IN THE HIGH COURT OF THE COOK ISLANDS
(LAND DIVISION)

APPLICATION NO: 691/14, 692/14, 693/14, 97/15, 98/15

IN THE MATTER	of Sections 446, 465, 465A of the Cook Islands Act 1915
AND	
IN THE MATTER:	of the Estate of Richard Pare Browne
BETWEEN	**RICHARD BROWNE AND TEPAREKURA BROWNE** First Applicants
AND	**NGAMAU MUNOKOA AND DIANE BROWNE HOLFORD** Second Applicants

Hearings: 30 June 2015

Counsel: Mrs T Carr for Applicants 97/15 & 98/15 and in opposition to 691/14, 692/14 & 693/14
Mr T Manarangi for the Applicant and objector to 97/15 & 98/15

Decision: 29 July 2016

JUDGMENT OF JUSTICE W W ISAAC

Introduction

[1] There are two competing applications to succeed to Richard Pare Browne (the deceased) who died on 21 November 2005 with no natural issue. The first applicants are Richard and Teparekura Browne. Richard is the deceased's adoptive child, not related in blood to the deceased. Teparekura is the deceased's feeding child, related in blood but never formally adopted. The second applicants, Ngamau Munokoa and Dianne Holford, are the deceased's nieces, being the children of the deceased Upokotokoa Wichman and Mani Browne, respectively.

Background

[2] The deceased and his wife, Kurai (also deceased) raised Richard from the age of three and formally adopted him when he was 16. Richard has no blood connection to his adoptive parents. The deceased and his wife raised Teparekura from birth as their feeding child, but never formally adopted her. She is the natural daughter of the deceased's brother, Eric.

[3] No land was set aside for Richard at the time of his adoption. When applying for the adoption order, Kurai told the court that, despite the adoption, "boy will not get our lands", and that he had already inherited "a number of his natural mother's lands".[1] When making the adoption order, the judge noted it was "[n]ot to affect succession to lands".[2]

[4] In 1973, an occupation order was made in Richard's favour over a section of the Turamatuti section. The order was granted after the deceased called a meeting to seek the family's agreement, which was forthcoming.[3] In 1981, Richard converted his occupation right to a lease, again with the support of the Browne family.[4] In 2007, a meeting of owners agreed to Richard's request for a five-year extension of the lease. They consented to his plan to sublease the section and agreed that after the lease's expiry, the section would vest in his children.[5] However, pursuant to a vesting order on 19 February 2007 the land was vested to Richard and his wife.[6]

[5] The parties agree that the deceased set aside land interests for Richard in his will. It appears that these interests were leaseholds, rather than shares in land.[7] In relation to one of these leaseholds, the deceased's orange plot, the second applicants note that the deceased and his brother had told the Court, four years after Richard's adoption, that:[8]

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[1] *Adoption of Richard Browne* (1964) 26 Minute Book 127.
[2] At 127.
[3] Affidavit of Richard Browne at [16]-[17].
[4] At [21].
[5] At [31].
[6] Evidence of Ngamau Munokoa and Dianne Holford at [15].
[7] Submissions of Counsel for First Applicants at [64]; Affidavit of Richard Browne at [33]; Evidence of Ngamau Munokoa and Dianne Holford at [6], [18] and [19]
[8] (1968) 28 Minute Book 226 at 227.

> ... if any question should arise as to who should succeed to his orange plot that it was his wish that it should go to his adopted daughter (not registered) Pare...

They say that the deceased later willed this leasehold land to Richard without any consultation with the blood family and the landowners.[9]

First applicants' submissions

Succession by Richard

[6] Counsel for the first applicants submits that Richard is entitled, under native custom, to succeed to the deceased and that the second applicants are not. Counsel relies on the precedent set down by the Land Court in *Succession to Tuokura Maeva deceased,*[10] which was upheld on appeal by the Land Appellate Court.[11] For the sake of brevity I will refer to these two decisions as the *Emma* decisions. These decisions held that an adopted child not of the blood can, under native custom, succeed to their adoptive parents' interests if their adoption has 'matured' through acceptance by the wider family.

[7] Counsel argues that Richard's adoption had so matured because the deceased, his siblings and their descendants accepted Richard as a member of the family during the deceased's life.[12] Land was "set aside" for Richard by the deceased and his near relatives.[13] Richard's closeness to the family is demonstrated by the contributions he and his wife have made to important family events, such as weddings and funerals.[14]

[8] Richard and Teparekura's succession to the deceased is supported by the "vast majority" of the deceased's family (other than the Upokotokoa and Mani lines, represented by the second applicants, and also one member of the Akaiti Napa line), who would be entitled to succeed were it not for the adoption.[15]

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[9] Evidence of Ngamau Munokoa and Dianne Holford at [6].
[10] *Succession to Tuokura Maeva deceased* (1968) 28 Minute Book 156.
[11] *Succession to Tuokura Maeva deceased* (1970) Land Appellate Court, Appeal No 215.
[12] Submissions of Counsel for First Applicants at [5].
[13] Affidavit of Richard Browne at [64].
[14] At [13], [32], [34]-[35].
[15] Submissions of Counsel for First Applicants at [64].

[9] The restrictions on succession on Richard's adoption order are not binding. Kurai's statement has no legal weight because she was not someone entitled to succeed to the deceased had the adoption order not been made.[16] The Court's notation on the order was without legal authority, as per the *Emma* decisions.[17] In any case, the deceased and his wider family did not observe these purported restrictions, given that land was set aside for Richard after the adoption.[18]

[10] Richard's prior succession to his natural mother is irrelevant to his entitlement to succeed to the deceased. The issue at hand is not about fairness or equity, but the correct application of custom.[19]

Succession by Teparekura

[11] Teparekura is entitled to succeed on both sets of applications. The difference is only whether she takes half a share (under the first application) or a smaller share (under the second application).[20] Indeed, the reason Teparekura was not formally adopted was because she was of the blood and therefore could already succeed.[21]

[12] Richard is entitled to succeed and he consents to Teparekura's inclusion in the succession order. The majority of the family also support Teparekura's succession to the deceased in terms of Richard's application.

Second applicants' submissions

Succession by Richard

[13] The second applicants submit their entitlement to succeed to the deceased rests on the fact that he died without natural issue and they are his next of kin by blood being his siblings and their descendants.[22]

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[16] At [52].
[17] At [37] and [55].
[18] At [54].
[19] At [57] – [60].
[20] At [67] – [68].
[21] Affidavit of Richard Browne at [12].
[22] Closing Submissions of the Objectors at [3].

[14] In contrast, Richard, as an adopted child not of the blood, cannot succeed. Section 465 of the Cook Islands Act 1915 stipulates that succession to lands by an adoptee is governed by native custom. Under custom a blood connection is the only basis upon which an individual can succeed to land. This custom was confirmed by the Court of Appeal in *Short v Whittaker*.[23] In that case, the Court of Appeal relied on papers as to the native custom relating to adoption prepared by the House of Ariki and the Koutu Nui in the 1970s.[24]

[15] The second applicants submit that the facts upon which the *Emma* decisions were based were materially different to this case:[25]

a) The deceased was the last of her blood line. She had no next of kin to support, or object to, the applicant's succession. This is clearly not the case here.

b) The deceased stated at the time of adoption that she wished for the applicant to succeed to her land interests. No objections were made before or after the adoption. Whereas here the family objected to Richard's succession at the time of adoption and the Court duly noted a restriction on the adoption order. Subsequently, the family's position remains unchanged.

[16] The argument that the Court's restriction lacks legal authority is incorrect. In the *Emma* decisions, the Court's restriction on succession in the adoption order had not been proposed by any blood relations or Emma's foster mother. Hence, the restriction was found to lack legal authority. In the present case, where the blood relatives objected to succession at the time of adoption, the Court's authority derives from those objectors and so its restriction is binding.[26]

[17] The second applicants referred to the "second" *Emma* decision,[27] in which Emma's entitlement to succeed to one particular section was reduced to a life interest because, subsequent to the earlier decision, next of kin, who objected to her absolute succession, were found to exist.[28]

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[23] *Short v Whittaker* [2003] CKCA 7; CA 3/2003.
[24] Closing Submissions of the Objectors at [95] and [98].
[25] At [21]-[25]
[26] At [74] – [81].
[27] (1968) 28 Minute Book 293, 304.
[28] Closing Submissions of the Objectors at [33] – [38].

[18] The second applicants also note that Richard has already succeeded to his natural mother and so already has large landholdings.[29]

Succession by Teparekura

[19] The second applicants say Teparekura is not entitled to succeed because s 465A of the Cook Islands Act 1915 precludes a child who is not legally adopted from succeeding to their adoptive parents. However, she is entitled to her shares as a niece of the deceased.[30]

The Law

[20] Sections 446, 465 and 465A of the Cook Islands Act 1915 provide the legislative framework for determining succession in relation to adoptees. They state:

> **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.
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> **465. Effect of adoption** - An order of adoption shall have in respect of succession to the estate of any Native the same operation and effect as that which is attributed by Native custom to adoption by native custom.
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> **465A. Effect of orders of adoption on interests in Native land** - No order of adoption, other than an order made under this Part of this Act or under section 9 of the Cook Island Amendment Act 1921 or under Part XXA of this Act shall have any force or effect in respect of succession to any interest in Native land.

Discussion

[21] In terms of s 465A, Teparekura is clearly not entitled to succeed to a one half share in the deceased's estate because she was not formally adopted. Her entitlement to succeed is as a niece of the deceased.

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[29] Evidence of Ngamau Munokoa and Dianne Holford at [9]-[11].
[30] At [7]; Closing Submissions of the Objectors at [55].

[22] In relation to Richard's application, the Act requires succession by adopted children to be determined in accordance with native custom. Thus, the key issues to be determined are:

a) Under what circumstances does native custom allow for an adopted child, not of the blood, to succeed?

b) Do these circumstances apply in this case?

Principles guiding judicial interpretation of custom

[23] To answer the first issue I firstly want to examine the principles that have guided the Court in its interpretation of custom when custom is referred to in Cook Islands legislation. In the case of *Hunt v De Miguel*, the Court of Appeal considered the application of custom in Cook Islands legislation and noted that:[31]

> Reading Article 66A as a whole, it is clear that the intention of Parliament in inserting Article 66A in 1995 was to provide for greater recognition and protection of custom and usage in the Cook Islands – or, as the Crown put it, "*to acknowledge the worth and dignity of traditional Cook Islands custom*".

[24] In my view, judicial statements on native custom do not define custom, but merely provide interpretation of custom. That is, the existence of native custom precedes Court pronouncements seeking to interpret it. As I stated in *Ian Karika*, "[i]t is not for the Court to determine the custom but the Court must follow custom."[32] Similarly, the Court of Appeal in *Re Vaine Nooroa o Taratangi Pauarii* stated that the Court's responsibility is to "follow the appropriate native custom, not to impose what we ourselves might think was a more fair result than the custom produces."[33]

[25] Simply put, accurate judicial interpretations take their cue from the evidence put before the Court. As noted by the Court of Appeal in *Hunt*:[34]

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[31] *Hunt v De Miguel* [2016] CKCA at [56].
[32] *Ian Karika* 324/14 per Isaac J.
[33] *Re Vaine Nooroa o Taratangi Pauarii (No 2)* [1985] CKCA 1; CA No. 3/85 at 7.
[34] *Hunt v De Miguel*, above n 31, at [55].

In every case the Court must, of course, determine custom on the basis of the evidence presented to it: the Court cannot simply make up custom out of thin air.

[26] I therefore consider that the interpretation of s 465 in this case requires a similar approach and the significance and importance of the applicable custom relating to adoption must underpin the interpretation of that section.

The custom relating to adoption

[27] In 1970, the House of Ariki prepared a paper entitled "Maori Customs approved by the Fifth House of Ariki 1970". The Paper was submitted to the Legislative Assembly with a recommendation that the Assembly request the Government to prepare legislation in accordance with the Paper's contents.[35]

[28] The Paper sets out various aspects of native custom. The section relating to "Adopted Children" states the following:

> (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.
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> (2) a. Any person who may be admitted to any land as owner, must have blood right to the ancestral owner of the land.
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> b. That if he is an adopted child, he must have blood connection with the ancestral owner of the land.
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> 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.

[35] Unfortunately, such legislation has not yet been prepared, so legislative authority is still lacking in this area.

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.

[29] In 1977 the House of Ariki produced a further Paper on custom which also addressed adopted children and included the following statement:

> ... 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.

[30] In 1977 the Koutu Nui of the Cook Islands made a Statement of Maori custom, in which it wrote:

> ... 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 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.
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> ...
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> (B) ADOPTION NOT ACCORDING TO INDIGENOUS CUSTOMS
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> 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.

[31] The statements of custom from the House of Ariki and the Koutu Nui highlight the importance of blood connection in emphatic terms. In relation to adoptions of children not of the blood, the Koutu Nui's paper supports the idea that, in exceptional cases, custom would allow such children to succeed, but subject to the "approval" and any "terms and conditions" of the descendants of the common ancestor to the land.

[32] Being mindful of these pronouncements on custom relating to adoption and being mindful of the Court's recognition of the importance of custom in statutory interpretation, I now turn to consider how the Court has applied custom in adoption cases.

Judicial determination of custom

[33] The *Emma* decisions featured the first significant judicial consideration of native custom regarding the right of an adopted child not of the blood to succeed. The case appeared at first instance before Chief Judge Morgan at the Land Court in 1968. It was appealed to the Land Appellate Court, which issued its decision in 1970. Given the timing of these decisions, the Courts formulated their interpretations

of the relevant custom without the benefit of the statements of custom discussed above.

[34] Both Courts acknowledged the difficulty in identifying the applicable custom because of variance across islands, villages and families.[36] The Chief Judge also noted divergent evidence: on the one hand, evidence showed that adopted children not of the blood could receive no more than a life interest, and on the other, landowner lists demonstrated that frequently such adopted children had been entered as owners without restriction.[37] Relevantly, the Land Appellate Court acknowledged that:[38]

> [n]o evidence has been produced in this appeal, or in the application for succession, from which the Court can adduce a relevant set of rules relating to adoption.

[35] Ultimately, Chief Judge Morgan felt compelled to reject "as a statement of the full custom, the bare claim that they [adopted children not of the blood] can receive no more than a life interest."[39] On appeal, the Appellate Court upheld this finding, agreeing that "neither the Cook Islands law nor Native custom precludes a legally adopted child from succeeding to an interest in Native freehold land owned by its adopting parent."[40] Many years later, in the case of *Strickland* (often referred to as the 'third' *Emma* decision), the High Court reiterated the view that:[41]

> … we cannot reach a conclusion that as a matter of custom, an adopted child, who is not of the blood, only ever takes a life interest. There will be circumstances when that is so but it is not an inevitable conclusion in all cases.

[36] Essentially the *Emma* decisions interpreted the relevant native custom to find that adoptions, for the purposes of succession, are not necessarily completed at the time the papers are signed. Rather, a child, once formally adopted, passes through

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[36] *Succession to Tuokura Maeva deceased* (1968), above n 10, at 156; *Succession to Tuokura Maeva deceased* (1970), above n 11, at 70-71.
[37] *Succession to Tuokura Maeva deceased* (1968), above n 10, at 161.
[38] *Succession to Tuokura Maeva deceased* (1970), above n 11, at 71.
[39] *Succession to Tuokura Maeva deceased* (1968), above n 10, at 162.
[40] *Succession to Tuokura Maeva deceased* (1970), above n 11, at 72.
[41] *Teariki v Strickland* [2007] CKHC 18; CA No. 7/06 at [43].

"degrees of recognition".[42] Accordingly, the Chief Judge was of the view that varied approaches between families in this matter exist not because different families apply different types of custom, but because the custom itself operates on a spectrum; whether an adopted child can succeed depends on the degree to which a family has recognised that child as part of the family.[43] The Appellate Court agreed with the lower court that "[t]here are also different kinds of adoption and adoptions pass through various degrees."[44] Ultimately it is for the Court to consider the surrounding factual context to determine whether a child's adoptive family fully recognises them. However, it should be noted that neither the House of Ariki nor the Koutu Nui refer to the idea that under custom an adoption passes through degrees of recognition.

[37] The case of *Re Vaine Nooroa o Taratangi Pauarii* followed the findings in *Emma* and noted that "the need for an adoption to develop... before giving right of succession to native land was widely, if not universally, accepted", although noted "it does appear that what was seen as sufficient to meet the test could vary somewhat from time to time and locality to locality. Custom was never immutable in all its aspects."[45] The Court rearticulated the notion stating "[t]he dominant issue was whether it was established that there was sufficient recognition by her family to enable the Court to say that the adoption had developed to the degree which satisfies the test set out in the decision of Chief Judge Morgan in the *Emma Moetaua* case."[46]

Are the Emma *decisions still good law?*

[38] Clearly, the custom surrounding succession by adopted children with no blood connection to their adoptive parents is contentious. Nevertheless, it is generally accepted that the *Emma* decisions set out the Land Court and Land Appellate Court interpretation of this custom. Indeed, the High Court in *Teariki v Strickland* recently affirmed that "the 1968 judgments remain good law" and that *Short v Whittaker* did not challenge these decisions.[47]

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[42] *Succession to Tuokura Maeva deceased* (1968), above n 10, at 156.
[43] Ibid.
[44] *Succession to Tuokura Maeva deceased* (1970), above n 11, at 71.
[45] *Re Vaine Nooroa o Taratangi Pauarii (No 2)*, above n 33, at 6.
[46] At 6-7.
[47] *Teariki v Strickland*, above n 41, at [44].

[39] The contention surrounding the *Emma* decisions, and this area of law generally, relates to the uncertain foundations upon which the decisions are based. As the Land Appellate Court stated:[48]

> The difficulty is to determine what is the Native custom applicable in any particular circumstances. No evidence has been produced in this appeal, or in the application for succession, from which the Court can adduce a relevant set of rules relating to adoption.

[40] I note that this paucity of evidence has been somewhat ameliorated by the two papers on native custom produced by the House of Ariki and the Koutu Nui (respectively) in the 1970s. These were cited by the Court in *Short v Whittaker*, which approved of the previous assessment in *Rake Aituoterangi* that, on aspects of native custom, the papers "convey strong evidentiary values".[49]

[41] I agree with the court in *Teariki v Strickland* that the *Short v Whittaker* decision does not unsettle the *Emma* decisions.[50] The issue of native custom in relation to adopted children not of the blood, i.e. the ratio of the *Emma* decisions, was not before the Court in *Short v Whittaker*.[51] Accordingly, I do not agree with the second applicants that *Short v Whittaker* alone can dispatch with the present case.

[42] However, I do think that the statements of custom in the 1970s papers carry significant weight, even though their recommendations have not been legislatively implemented. The Courts in the early *Emma* decisions did not benefit from the elucidation of custom presented by papers that had not yet been released. Now those papers are before us, I am of the view that the *Emma* decisions, and their scope, should be interpreted in light of the papers' expressions on native custom.

The scope of the Emma *decisions – a limited exception*

[43] The test in *Emma* is one of narrow applicability. I accept the relevance of the 1970 papers cited in *Short v Whittaker* insofar as they provide, quite emphatically, that the general rule of custom is that succession to land must derive from a blood

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[48] *Succession to Tuokura Maeva deceased* (1970), above n 11, at 2.
[49] *Short v Whittaker*, above n 23, at [25].
[50] *Teariki v Strickland*, above n 41, at [38]-[45].

connection.[52] Accordingly, the application of any exception to this rule demands a high threshold to be reached.

[44] In this context, the exception posited by the *Emma* decisions should be read as providing a 'never say never' approach to the ability of adopted children not of the blood to succeed. This appears to be the angle the Courts have taken when responding to arguments asserting that no circumstances could ever give rise to succession where no blood connection exists. As the Court stated in *Teariki v Strickland*:[53]

> We accept that identifying land interests through the relevant blood lines is of cardinal importance in Cook Islands custom. But, on the basis of the materials before us, we cannot reach a conclusion that as a matter of custom, an adopted child, who is not of the blood, only ever takes a life interest. There will be circumstances when that is so but it is not an inevitable conclusion in all cases.

[45] Chief Judge Morgan in the first *Emma* case framed his reasoning similarly, stating that "the Court cannot accept, as a statement of the full custom, the bare claim that [adopted children not of the blood] can receive no more than a life interest."[54] This was echoed by the Land Appellate Court, which was not convinced that "a legally adopted child has no right at all in any circumstances to unconditional succession".[55]

[46] Essentially, the Courts have adopted a position of openness to the possibility that an adopted child not of the blood could succeed. In my view, and having regard to custom, the opening provided is very narrow. While adopted children not of the blood will almost never be able to succeed, it is still conceivable that some exceptional circumstances may produce a different outcome.

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[51] At [38]-[39].
[52] *Short v Whittaker*, above n 23, at [19] and [20].
[53] *Teariki v Strickland*, above n 41, at [43].
[54] *Succession to Tuokura Maeva deceased* (1968), above n 10, at 162.
[55] *Succession to Tuokura Maeva deceased* (1970), above n 11, at 4.

Under what circumstances does native custom allow for an adopted child, not of the blood, to succeed?

[47] The Courts in the *Emma* decisions held that native custom allows an adopted child not of the blood to succeed if their adoption has fully matured. Maturation is demonstrated by the adoptee's full acceptance by their adoptive family.

[48] The concept of an adoption 'maturing' has caused considerable angst and, with respect, I am not convinced that it is the clearest expression of the law possible. It runs the risk of leading the court down paths of inquiry that are not necessarily helpful. As already noted, the House of Ariki and the Koutu Nui did not refer to adoption passing through degrees of recognition.

[49] For the purposes of clarification, in the context of a succession case, I understand the concept of an adoptive child's "acceptance" to be measured by whether or not their adoptive family supports, or objects to, their succession to land interests. If any objection exists, the family cannot be deemed to have fully recognised the adopted child.

[50] Accordingly, the central question for the court in these cases is whether any next of kin who would be entitled to succeed were it not for the adoption, object to the adoptee's succession. If they do, an application by an adoptee not of the blood to succeed absolutely, must fail.

[51] Framing the question in this way is not a change in the law. Indeed, the question of next of kin objections is the only tangible question that the Court considered in the *Emma* cases. It is also supported by the Court of Appeal in *Teariki v Sanderson* case, where it was observed, with reference to the "second" *Emma* decision, that if the family of Emma's foster parent had not fully died out[56]

> ... it might follow that Emma as an adopted child would be entitled under native custom only to a life interest. That is what occurred in relation to the Uritaua lands where Morgan CJ denied Emma absolute succession and granted her a life interest only at the requires of the next of kin to Tuokura in those lands.

[52] That this question was intended to be the crucial arbiter in these cases and was seen to reflect the native custom referred to in s 465 is demonstrated by the Chief Judge Morgan's statement in the first *Emma* case (when referring to earlier cases):[57]

> ... in some cases the Court has accepted an order of adoption as sufficient grounds for granting succession in favour of an adopted child notwithstanding strong objection from the next of kin of the deceased. Perhaps the Judge overlooked or was not aware of the provisions of Section 465.

Do these circumstances apply in this case?

[53] Overall, I agree with the submission of the second applicants that "the wishes of the foster parents and the next of kin are paramount".[58] I also agree that it was a material fact of the *Emma* decisions that the deceased had no surviving blood relatives and therefore no one with an entitlement to succeed (had there been no adoption) could object to the applicant's succession.

[54] Viewing the family's views as paramount also assists in understanding the statement in the first *Emma* decision that the Court's restriction on the adoption order "lacks legal authority".[59] This was not a general statement challenging whether Court-imposed restrictions on succession in an adoption order could ever be binding. Rather, it was tied to the specific facts in *Emma*. Specifically, at the time of the adoption order, Emma's foster mother made quite clear that she had no issue or next of kin and that she wished for Emma to succeed to her land. The Court recorded no objections from next of kin. As custom locates the authority to determine questions of succession to land in those entitled to succeed, the Court had no power to unilaterally declare a restriction. So the restriction it imposed lacked legal authority. As stated by the Land Appellate Court, "[h]ad there been competition for succession between close blood relations and the adopted child Emma, the words may have been given some weight but there was no such competition."[60]

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[56] *Teariki v Sanderson*, above n 41, at [22].
[57] *Succession to Tuokura Maeva deceased* (1968), above n 10, at 157.
[58] Closing submissions of objectors at [27].
[59] *Succession to Tuokura Maeva deceased* (1968), above n 10, at 158.
[60] *Succession to Tuokura Maeva deceased* (1970), above n 11, at 3.

[55] None of the foregoing means that an adopted child can never succeed when there are surviving family members. However, to succeed would require complete family recognition of the adoptee, i.e. total absence of family objection to their succession. Similarly, a restriction in an adoption order does not necessarily bar succession; positions may change and so allocation of land to an adopted child after the time of adoption can accord with custom. However, "[t]he persons who have the right to set aside such lands would be those entitled to succeed if no adoption had taken place."[61]

[56] Accordingly, the first applicants would have to show that all those entitled to succeed support his succession. This is not the case in this application, as shown by the competing applications for succession. The high threshold to meet the exception that an adopted child, not of the blood, can succeed to a deceased, has not been met.

[57] As a result, I do not consider that Richard Browne's applications are in accordance with the custom relating to adoption as articulated by the House of Ariki and the Koutu Nui, and must fail.

[58] I also find that the application of Ngamau Munokoa and Diane Holford should succeed.

[59] In making this finding, I now make the following orders:

a) The applications of Richard Browne are dismissed.

b) The persons entitled to succeed on the applications of Ngamau Munokoa and Diane Holford are the siblings of the deceased. In support of this application a genealogy was filed which was not in dispute. As a result and based on that genealogy the siblings of the deceased are as follows:

1.	Lilian Browne	fd	no issue
2.	Upokotokoa Browne	m.d	issue
3.	Te Kao Browne	m.d	issue
4.	Tamarua Joseph Browne	m.d	issue

[61] *Moeau deceased* (1957) 2 Appeals Minute Book 392 at 393.

5.	Akaiti Browne	f.d	issue
6.	Mani Browne	m.d	issue
7.	Willie @ Tamaru Browne	m.d	issue
8.	Eric @ Mann Browne	m.d	issue
9.	Poko Emily Browne	f.a	
10.	Walter Browne	m.a	
11.	Mary Browne	f.a	
12.	Tupou Browne	f.a	
13.	Yolande Browne	f.d	issue
14.	Tepaeru Browne	f.a	
15.	Munukoa Browne	fd	no issue

c) Should any party consider the siblings of the deceased are not correctly recorded they are to advise the Registrar of the High Court to ensure that the correct genealogy is on the court record.

Dated at Rarotonga this 29th day of July 2016.

W W Isaac

JUSTICE