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AN INHERITANCE CODE FOR NEW ZEALAND

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Abstract

In this thesis I review New Zealand's present inheritance laws which are characterised by:

- *20 disparate statutes stretching back 100 years;*
- *a lack of clear and consistent policies;*
- *a failure to adapt to fundamental changes in life expectancy, re-partnering and family groupings that have taken place over the last 40 years;*
- *inconsistent judicial decision-making;*
- *dual jurisdiction of the Family Court and High Court;*
- *mechanisms to avoid the consequences of the current legislation.*

Calls for urgent and fundamental reform have been met by piecemeal ad hoc changes. In contrast, reform in Australia has been systematic and carefully analysed.

After considering the two common inheritance regimes around the world (the fixed rule scheme and the court-based discretionary system), I reach two fundamental conclusions:

- *adoption of an inheritance code;*
- *recognition of the principle of testamentary freedom.*

In addition I recommend a number of changes to New Zealand's inheritance laws, and in particular:

- *acceptance of the primacy of the position of a surviving spouse or partner;*
- *replacement of the current family protection and testamentary promises claims with support and contribution claims;*
- *restriction of estate claims to spouses, partners and minor children;*
- *recognition of the rights of "accepted children" (stepchildren and whangai);*
- *clarification of the ability to compromise and contract out of claims;*
- *empowering one court to administer all inheritance laws;*
- *anti-avoidance measures;*
- *equating the rights of spouses, civil union partners and long term de facto partners on separation.*

I conclude this thesis with a skeleton of the proposed inheritance code including drafts of some of the key provisions.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises 49,345 words.

Subjects and Topics

Inheritance law

Chapter 1

HISTORY AND BACKGROUND

I *Origins*

Inheritance or succession laws in New Zealand have a long history. The Wills Act 1837 was effectively “imported” from England and remained in force (albeit with numerous amendments) for 170 years until the Wills Act 2007 was passed. New Zealand was the first of the Commonwealth jurisdictions to pass family protection legislation in the form of the Testator’s Family Maintenance Act 1900.¹ The initial proposal by Sir Robert Stout, the Limitation of Power of Disposition by Will Bill, was derived from Scots law and limited the will-maker’s testamentary power to one third of the estate; a surviving spouse was guaranteed one-third as were surviving children. If the will-maker was survived by either a spouse or children but not both, up to one-half of the estate was freely disposable.²

II *Initial Legislation*

The Bill was defeated because members were not happy with the mandatory division proposed. A further Bill, which was introduced in 1897 and made only slight changes, was also defeated. Despite this, Sir Robert Stout had clearly awakened a social conscience among members³ and in 1900 the Testator’s Family Maintenance Act 1900 was passed. After criticism by the Court of Appeal,⁴ the Testator’s Family Maintenance Act 1906 was passed and it in turn was consolidated as part of the Family Protection Act 1908.⁵ In essence, the legislation gave (and still gives today) to the Court a wide discretionary power to order provision from the estate of a deceased person in favour of a limited class of relatives. The Court must be satisfied that adequate provision is not available from the deceased’s estate for the proper maintenance and support of the applicant either under the deceased’s will or on intestacy.⁶ New Zealand pioneered family protection legislation but it was soon followed by the Australian states and Canada.⁷ The Australians refer to it as “family provision” legislation.

III *Legislative Developments*

Over the last 100 years there has been a plethora of statutes which affect in various ways the ability of New Zealanders to dispose of their estates by will or on intestacy and are still in force today. In historical order these include:

- **Life Insurance Act 1908** which limits the amounts of payments and to whom payments can be made under life policies where the deceased is a minor. There are also

¹ WM Patterson *Law of Family Protection and Testamentary Promises* (3rd ed, LexisNexis, Wellington, 2004) at [1.1].

² Richard Sutton and Nicola Peart “Testamentary Claims by Adult Children – The Agony of the Wise and Just Testator” (2003) 10 Otago LR 385 at 386.

³ Patterson, above n 1, at [1.3].

⁴ *Plimmer v Plimmer* (1906) 9 GLR 10.

⁵ Patterson, above n 1, at [1.6].

⁶ *Ibid*, at [1.1].

⁷ Northern Territory Law Reform Committee Report on Uniform Succession Laws (NTLRC R 31, September 2007) at 6.

provisions relating to the application and investment of funds by trustees where the funds are payable under a policy for the benefit of minors.⁸

- **Law Reform Act 1936** which provides that various causes of action subsist for the benefit of a person's estate, and can be continued against, and in some cases can be commenced against, his or her estate. There are also procedures for damages or compensation against a deceased's estate where there is no administrator.⁹
- **Law Reform (Testamentary Promises) Act 1949** which allows a claim on an estate where in exchange for services or work rendered or performed, the deceased promised provision. The Act provides remedies at the discretion of the presiding judge in situations which may not amount to binding and enforceable contracts.
- **Maori Trustee Act 1953** under which the Maori Trustee can apply for grants of administration of intestate estates and orders to administer with will annexed where a Maori dies leaving a will.¹⁰
- **Adoption Act 1955** under which the effect of an adoption order is to make the adopted child a child of the adoptive parents for all purposes including inheritance rights and duties, and similarly the adopted child ceases to be a child of his or her biological parents.¹¹
- **Family Protection Act 1955** allows certain relatives to claim on an estate if the deceased has breached moral duties to the claimant; and the court decides that further provision is needed for the applicant's proper maintenance and support. The Act applies both where the deceased left a will and on intestacy, and awards are made at the discretion of the presiding judge.
- **Trustee Act 1956** which empowers estate trustees to deal with chattels,¹² advance capital and income to beneficiaries¹³ and advertise and distribute the shares of missing beneficiaries.¹⁴ Once a personal representative has completed the duties of executor or administrator, he, she or it becomes a trustee and holds estate assets subject to the will and the Trustee Act 1956.
- **Simultaneous Deaths Act 1958** applies where two or more persons have died at the same time or in circumstances which give rise to reasonable doubt as to which has survived the other or others. The Act prescribes what happens to life insurance policies, jointly owned property, powers of appointment, wills and trusts.
- **Estate and Gift Duties Act 1968** which contains life expectancy tables and sets out the bases for valuations of annuities and life interests under wills.¹⁵

⁸ Sections 67B, 67C, 71 and 73.

⁹ Sections 3 and 9A.

¹⁰ Sections 12C and 12D.

¹¹ Section 16.

¹² Sections 39A and 39B.

¹³ Sections 40, 41 and 41A.

¹⁴ Section 76.

¹⁵ Section 68F.

- **Status of Children Act 1969** which largely did away with the former distinction between children born inside and those born outside a marriage. It is possible under s 3 of the Act to distinguish between “legitimate” and “illegitimate” relationships.
- **Administration Act 1969** regulates the administration of deceased estates in New Zealand and covers matters such as grants of administration, court procedures, rights and duties of administrators, and procedures for small estates. The Act sets out the regime and priorities of entitlements on intestacy;¹⁶ it also sets out the time limits that apply to notices of claim for further provision from an estate and the lapse of these notices,¹⁷ and interest on legacies.¹⁸
- **Property (Relationships) Act 1976**¹⁹ in Part 8 deals with the division of property where a spouse, civil union or de facto partner dies. It more or less equates the entitlements of spouses, civil union and de facto partners to relationship property on death with their entitlements on separation. The Act sets out the procedures and time limits for relationship property claims on death, and regulates the priorities of competing claims by other partners and children of the deceased.
- **Family Proceedings Act 1980** which provides for the recovery of child support and spousal maintenance from a deceased estate and the priority of such obligations.²⁰ The Act sets out the procedures for making applications and the Family Court is given wide powers to vary or fix the incidence of payments of maintenance as between the assets of the estate. The Act sets out the effect of a judicial separation order on intestacy.²¹
- **Protection of Personal and Property Rights Act 1988** which empowers property managers and attorneys to have new wills approved by the Family Court for persons who have lost mental capacity. The Family Court also has power to prohibit a person from completing a will.²²
- **Te Ture Whenua Maori Act 1993** which applies to estates comprising any beneficial interest in Maori freehold land and promotes the retention, use, development and control of Maori land. The Act provides that Maori customary land is inalienable and cannot be disposed of by will, and Maori freehold land can be left by will to restricted classes of relatives of the deceased. The Act is subject to the provisions of the Family Protection Act 1955.²³
- **Insolvency Act 2006** which in Part 6 deals with insolvent or bankrupt estates. A creditor or beneficiary can apply for an order that the estate be administered under Part

¹⁶ Where a person dies without a will or does have a will but it does not dispose of the whole estate; see ss 77-79.

¹⁷ Sections 47-50.

¹⁸ Section 39.

¹⁹ The 2001 Amendment Act including Part 8 came into effect on 1 February 2002.

²⁰ Sections 180 and 181 .

²¹ Section 26.

²² Protection of Personal and Property Rights Act 1988, s 54.

²³ *Riddell v Public Trust* [2004] NZFLR 33 (DC).

6 of the Act, and the Court can order administration by Public Trust or some other person.²⁴

- **Succession (Homicide) Act 2007** which codifies the law disqualifying a person who kills another from benefiting from the deceased person's estate or property. A "killer" is not entitled to any interest in property under the victim's will or on intestacy of the victim, cannot make a family protection claim, and has a restricted testamentary promises claim.
- **Property Law Act 2007** which contains provisions about the personal liabilities of estate administrators for obligations of the deceased person and provisions relating to instruments conferring an estate or interest in property on a person's heir or next of kin.²⁵
- **Wills Act 2007** which covers most aspects of New Zealand law in respect of wills including:
 - who may make a will;
 - requirements for the validity of wills;
 - rules for changing, revoking and reviving wills;
 - effect on wills of events such as marriage and dissolution;
 - disposition by will to children and issue;
 - mutual wills;
 - correction of wills;
 - admissibility of external evidence in the interpretation of wills;
 - special rules for the wills of military and seagoing persons.
- **Judicature (High Court Rules) Amendment Act 2008** which sets out in Part 27 the High Court Rules relating to grants of probate and letters of administration of deceased estates. The rules set out where applications must be filed, who is entitled to obtain a grant, priorities amongst competing claimants, and the forms required to be used by claimants.

While these statutes have been amended from time to time, all of them currently remain in force in New Zealand.

IV *Current Problems*

What are the current problems with New Zealand's inheritance and succession laws?

- The law is contained in at least 20 different statutes (set out above) which means that it is complicated for New Zealanders and their advisors to gain access to the relevant laws

²⁴ Section 385.

²⁵ Sections 7-10.

and clear statements of the law. A given situation may be governed by a number of these statutes, and there is no accessible guide as to which statutes apply.

- There are also common law rules not set out in statute. For example, rules and case law relating to testamentary capacity, undue influence and duress affect the validity of wills but are not set out in any of the 20 statutes discussed above. Again, this raises the problem of accessibility.
- The current statutes were passed at different times over the last 100 years. During that time, and particularly over the last 40 years, there have been huge changes in (a) the life expectancies of New Zealanders; (b) the numbers of dissolutions of marriage, remarriage and re-partnerings; (c) the bases of personal relationships (for example gay relationships) and societal attitudes towards the same; and (d) emergence of "blended families" (that is couples with children of previous relationships, living in new relationships). Few of the statutes reflect these changes.
- Most of the current laws do not contain clear statements of policy or principles; and to the limited extent they exist, they do not reflect contemporary attitudes of New Zealanders about obligations on death, even if there is consensus on these obligations.
- Older legislation such as the Law Reform Act 1936, the Law Reform (Testamentary Promises) Act 1949, and Family Protection Act 1955 feature long, convoluted sentences with minimal punctuation and use of undefined terms. For example, s 2(5) of the Family Protection Act 1955 is as follows:

For the purposes of this Act the estate of any deceased person shall be deemed to include all property which is the subject of any donatio mortis causa made by the deceased:

Provided that—

(a) No claim in respect of any property to which this subsection relates shall lie against the administrator by any person who (under any order of the Court under this Act) becomes entitled to the property or to any benefit therefrom; and

(b) In all other respects the provisions of this Act and of sections 46 to 51 of the Administration Act 1969 shall apply in respect of that property in the same manner as those provisions would apply to the property if it were part of the estate of the deceased which was properly distributed by the administrator immediately after the expiration of 6 months from the date of the grant in New Zealand of administration in the estate of the deceased without notice of any application or intended application under this Act in respect of the estate, whether the order of the Court is made before or after the expiration of the said 6 months.

- There is uncertainty and lack of consensus about the priorities of competing claims.²⁶ There can be competing claims on an estate by a surviving partner, children of different relationships, a person to whom a promise was made, and creditors. The rules on balancing these claims, particularly where the estate is small, are not clear.

²⁶ See for example *Hamilton v Hamilton* [2003] NZFLR 883 (HC).

- The courts struggle with nebulous expressions such as “moral duty”²⁷ “wise and just testator”²⁸ “maintenance and support”²⁹ and “serious injustice”,³⁰ and the consequence is inconsistent and unpredictable decisions. This was acknowledged by the Court of Appeal in *Williams v Aucutt*³¹ where Blanchard J stated that there was substance in criticisms of the way in which the courts have applied the present law.
- The use of Latin terms in legislation such as “donatio mortis causa”,³² “prima facie”,³³ and “administrator ad litem”³⁴ creates confusion and the impression that the law is out of touch with ordinary people. Few schools teach Latin today, and it can no longer be assumed that ordinary New Zealanders have a reasonable understanding of Latin terms.
- Will-makers’ clear intentions are defeated by judicial “re-writing” of wills.³⁵ In chapter 2 I illustrate that despite clear directions from the Court of Appeal, judges continue to “rewrite” wills. It should be noted in this context that ss 31 and 32 of the Wills Act 2007 do empower the High Court to correct wills and use external evidence to interpret wills.
- Litigation costs rather than merit are forcing settlement of claims against estates. There has long been an assumption that costs will be paid from the estate, and this is certainly true of the administrator’s costs of providing information to the court and the parties. This problem is not unique to New Zealand.
- Various New Zealand Law Commission (“the Law Commission”) reports have been produced but only random implementation or reform has resulted.³⁶ The Law Commission stated in 1996 that the law of testamentary claims is in urgent need of review and that the policies which now lie behind the law are unclear.³⁷ No fundamental reforms have occurred since then.
- Our intestacy regime has been in place for 40 years but does not reflect current social attitudes on a deceased person’s obligations and has failed to keep pace with inflationary changes, particularly property values. I will discuss in chapter 4 of this thesis the increasing acceptance both in New Zealand and overseas of the primacy of claims by surviving spouses or partners, particularly after a long relationship. Fundamental to this is the provision of adequate long-term accommodation, but this is complicated by the fact that increases in property values have outstripped inflation.

²⁷ Family Protection Act 1955, s 3(2).

²⁸ Patterson, above n 1, at [2.2].

²⁹ *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [52].

³⁰ *Re Williams (deceased): Kinniburgh v Williams* [2004] 2 NZLR 132, [2004] NZFLR 467 (HC); *Public Trust v Whyman* [2005] 2 NZLR 696.

³¹ *Williams v Aucutt*, above n 29, at [68].

³² Family Protection Act 1955, s 2(5) and Simultaneous Deaths Act 1958, s 3.

³³ Status of Children Act 1969, s 8(2) and (3).

³⁴ Law Reform Act 1936, s 9A(3).

³⁵ See *Strand v Strand* [2004] NZFLR 452 at 464 (FC); see also John Caldwell “Family Protection Claims” (2008) 6 NZFLJ 4.

³⁶ For example Law Commission *Succession Law: Testamentary Claims* (NZLC PP24, 1996); Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997); Law Commission *Succession Law: A Succession (Wills) Act* (NZLC R41, 1997).

³⁷ Law Commission *Succession Law: Testamentary Claims*, above n 36, at [7] and [8].

- Family trusts, transfers of assets to third parties and structures such as joint ownership have been used to defeat inheritance claims.³⁸ Over the last 15-20 years there has been a massive increase in the number of family trusts set up in New Zealand, and one of the main drivers of this is asset or inheritance planning.
- Some aspects of our inheritance laws such as family protection and testamentary promises claims are handled primarily in the Family Court but others such as will interpretation and estate/trust administration are handled exclusively in the High Court. If a particular case raises a number of issues, this may require separate proceedings to be filed in the High Court and the Family Court. Traditionally, all estate and trust matters were handled exclusively in the High Court but there have been significant inroads on this over recent times. This has resulted in uncertainty, and it is time to undertake a fundamental review.

V *Outline of Discussion*

It is apparent from this background that fundamental changes are required to New Zealand's succession and inheritance laws. Piecemeal changes will not work. In this thesis I discuss the following:

- (1) Should New Zealand adopt one comprehensive succession or inheritance code? What are the benefits and detriments of a code?
- (2) If a code is adopted what principles and policies should underpin that code? Is there sufficient consensus to formulate principles and policies?
- (3) Inheritance laws have been the subject of lengthy discussion papers by the Law Commissions in Australia and Scotland³⁹ over recent years. In Australia the "Uniform Succession Laws Project" has been implemented in part over the last 10-15 years. Those papers and that project raise the following important issues which I believe are common also to New Zealand:
 - Who is entitled to share in an estate on intestacy and what should those shares be?
 - Who is entitled to claim further provision from an estate? What are the philosophical bases for the various claims on an estate? Do claims by spouses and partners differ from adult spousal maintenance or economic disparity claims? Do claims by minor children differ from child support?
 - Should provision be linked to entitlements on intestacy or fixed shares prescribed in the code or should provision be determined by a court in its discretion? Should there be a mixture of fixed shares and discretionary awards?
 - What provision should be reserved for surviving spouses, civil union and de facto partners? Should this provision be linked to relationship property rights as is currently the case under Part 8 of the Property (Relationships) Act 1976? What

³⁸ See for example *Public Trust v Whyman*, above n 30; and Patterson, above n 1, at [4.20].

³⁹ For example New South Wales Law Reform Commission *Uniform Succession Laws: Family Provision* (NSWLRC R110, 2005); Queensland Law Reform Commission *Family Provision* (QLRC R58, 2004); Scottish Law Commission *Discussion Paper on Succession* (SLC DP136, 2007).

provision (if any) should be made for surviving spouses and partners in a short term relationship? Should such provision be limited to spouses and partners or should it extend to persons who live in a close personal relationship with the deceased?

- What provision should be reserved for children of the deceased? Should that provision be limited to dependent children or children under a certain age?⁴⁰ If the latter, what age should apply and should this increase for children undertaking fulltime study? Should provision be based upon obligations to maintain and support or should there be some “recognition factor” as currently exists in New Zealand?⁴¹
 - Should provision be required for step-children, children dependent upon the estate and whangai?⁴² Should dependent parents be able to make a claim for further provision? Should grandchildren, and especially adult grandchildren, be able to make a claim?
 - How have other countries dealt with these issues? In Australia and Scotland there has been significant research completed in this area. Australian family provision laws are based upon and are similar to New Zealand’s family protection laws, whereas Scottish succession law is much closer to the fixed inheritance regimes which are common in Europe. While the major problems are common to both countries, the outcomes of the reports differ.
- (4) Should there be anti-avoidance measures to overcome transfers of property and the use of family trusts and other structures to defeat entitlements? If so, how extensive should these measures be?
 - (5) Should interests in Maori land continue to be governed by a separate scheme? To what extent should Maori estates be subject to family provision and testamentary claims legislation?
 - (6) Should it be possible to contract out of a claim for further provision such as currently exists for relationship property?⁴³ If so, who should be able to enter into such contracts and what safeguards need to be put in place? Should court approval be a prerequisite?
 - (7) The Law Reform (Testamentary Promises) Act 1949 is unique to New Zealand. Is it necessary to maintain this statute or is this type of claim more conveniently covered by the law of fiduciaries, contract or constructive trust? How have other countries dealt with this issue?
 - (8) Is it desirable for inheritance issues to be heard in one court or is the current dual jurisdiction preferable? If one court is preferable which court should have jurisdiction?

⁴⁰ The age at which a child ceases to be dependent varies in different countries. As noted in the Scottish Law Commission’s Discussion Paper, above n 39, in France there is a lifelong reciprocal obligation to maintain between parents and children.

⁴¹ See for example *Williams v Aucutt*, above n 29, at [52].

⁴² A person adopted in accordance with Maori custom.

⁴³ Property (Relationships) Act 1976, s 21.

- (9) What about assets located overseas? Should the current distinction between movable and immovables be maintained? Can this be improved?
- (10) If a code is adopted what should be included? What is the outline of the proposed code? Should claims falling outside the code be without any remedy?

VI *Summary*

New Zealand's current inheritance laws are not working nearly as well as they ought to. There is urgent need for fundamental reform. The best outcome for New Zealand will be a comprehensive code expressed in plain English, covering all or almost all inheritance and succession issues, based upon carefully considered policies and containing clear, effective procedures. Piecemeal reform is no longer adequate.

In the following chapters I discuss the benefits and detriments of a code and the underlying policies for a code, and attempt to come up with answers to the questions posed in this chapter.

Chapter 2

BENEFITS AND DETRIMENTS OF CODIFYING INHERITANCE LAWS

I *Codification*

One approach is to address the problems set out in chapter 1 one by one. Is this the best way to resolve them? The argument in this thesis is that the best way to resolve the current problems with New Zealand's succession laws is to create a modern, comprehensive code along the lines of "codes" such as the Property (Relationships) Act 1976, the Crimes Act 1961 and the Succession (Homicide) Act 2007. Would the codification of inheritance laws solve or alleviate the problems identified in chapter 1 of this thesis?

It is important first to establish what is meant by a "code" or "codification" of laws. A code has been defined as "a system or collection of laws".⁴⁴ The word "code" signifies:⁴⁵

... a whole system of law, such as Code Napoleon of France, or the whole of the law on a particular subject such as the Bills of Exchange Act. A codifying statute is an Act which purports to be a complete statement of the law on the particular subject (both the statute law and the common law) at the time when it was passed. Examples of statutes which purport to be codifying Acts are the Minors' Contracts Act 1969 (see s 15) and the Contractual Mistakes Act 1977 (see s 5).

The Oxford Companion to Law states in respect of the word "code":⁴⁶

From the fifteenth century onward the term came to be applied to a more or less comprehensive systematic statement in written form of major bodies of law such as the civil law or the criminal law of a particular country, superseding the mixture of customs, decisions and bits of legislation which had previously applied.

Codification of New Zealand's inheritance laws therefore involves amalgamation of all existing statutes and the common law in one code or statute. The intention is to replace all existing statutory and common law rules in one omnibus code or statute.

Codification differs from consolidation of some existing statutes. Consolidation is not comprehensive and will not involve articulation of underlying principles and policies for all inheritance laws in New Zealand. Codification is far preferable.

II *Effects of Codification*

I now discuss whether codification will overcome or lessen the impact of the various problems listed in chapter 1.

⁴⁴ Peter Spiller (ed) *Butterworths New Zealand Law Dictionary* (6th ed, LexisNexis, Wellington, 2005) at 50.

⁴⁵ *Ibid.*

⁴⁶ DM Walker (ed) *The Oxford Companion to Law* (Oxford University Press, Oxford, 1980) at 234.

A *Scattered nature of the law*

The current law is contained in or scattered across at least 20 different statutes⁴⁷ which makes access to the relevant laws difficult.

The current statutes have been passed over a period of 100 years (1908-2008) and reflect a piecemeal approach to reform in this area.⁴⁸ The number of statutes has also resulted in some confusion or at least cross-over from inheritance law into relationship property rights⁴⁹ and contractual obligations.⁵⁰ It is difficult to understand, for example, why the provisions in the Wills Act 2007 setting out the requirements for a valid will, and the intestacy provisions in the Administration Act 1969 for those who die without a will, should be kept separate from the provisions in the Family Protection Act 1955 enabling wills and the intestacy rules to be challenged and changed. Even more confusing (to lawyers as much as anyone) is the fact that rules relating to notice of intention to make claims under the Family Protection Act 1955 and Property (Relationships) Act 1976 are contained in ss 45-51 of the Administration Act 1969. The reports completed by the Scottish and Australian Law Commissions propose comprehensive legislation covering as many inheritance and succession issues as possible. The New South Wales Law Reform Commission stated:⁵¹

Whether uniform or consistent, all the succession laws must be up to date. The law of wills, intestacy, family provision, administration and probate and administration of assets, must be brought together in one piece of legislation and must share, as far as possible, a common underlying principle. Unnecessary provisions and old language must be recognised and removed.

In the foreword to the Law Commission's Report "Presentation of New Zealand Statute Law"⁵² the President, Sir Geoffrey Palmer, stated that in New Zealand we need a systematic programme for weeding out statutes that are out of date and revising and rewriting old Acts to make them more readable. The President also noted the legislature's habit of passing big amending Acts that render incoherent the statute as a whole. He recommended that we "re-enact the whole thing rather than adopt a sort of cut and fill approach".

In addition to the multitude of statutes, inheritance law is also governed by a number of common law rules which have resulted from, and have been refined by, court decisions but are not set out in statute. Examples in relation to wills include the following:⁵³

- **Testamentary capacity:** A party seeking to prove a will must establish that it was signed by a will-maker of sound mind, memory and understanding, and who was a free agent.

⁴⁷ See chapter 1 of this thesis.

⁴⁸ The Law Commission recognised the need for fewer statutes in *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997).

⁴⁹ Property (Relationships) Act 1976, Part 8.

⁵⁰ Law Reform (Testamentary Promises) Act 1949.

⁵¹ New South Wales Law Reform Commission *Uniform Succession Laws: Family Provision* (NSWLRC IP11, 1996) at xiv.

⁵² Law Commission *Presentation of New Zealand Statute Law* (NZLC R104, 2008).

⁵³ These statements of the various common law rules are derived from John Earles (ed) *Dobbie's Probate and Administration Practice* (5th ed, LexisNexis, Wellington, 2008) at ch 50.

- **Undue influence:** Undue influence exists where the faculties of the will-maker have been so impaired that he or she ceases to be a free agent and has succumbed to the power or control of another; the effect of undue influence is to invalidate a will.
- **Duress:** Where a will-maker is compelled to make a will or is prevented from altering a will by force or threats by a person who stands to benefit, and testamentary intention is overborne.
- **Lack of knowledge or approval of will:** It is essential to the validity of a will that at the time of signing the will-maker knew and approved the contents of that will.

Over many years court decisions on will interpretation have been guided by various rules of construction that are not set out in statute but are nevertheless part of New Zealand's inheritance laws. Examples include the following.⁵⁴

- words used in a will should be construed in their ordinary or primary sense;
- legal and technical terms should be construed strictly;
- every word used in a will should be given effect;
- a will should be considered as a whole and the will-maker's intentions should not be deduced merely from particular parts;
- where there is doubt about the construction of a will provision, the court should favour a construction that avoids intestacy;
- if language used in a will can be construed in two different ways, the first of which will yield an absurd result and the second a fair and reasonable disposition, the second construction will be adopted by the court;
- a will-maker can create his or her own "dictionary" within a will which will guide the interpretation of the will.

Having succession laws in New Zealand contained in one code rather than spread across 20 different statutes, a number of common law rules and various rules of construction will make our laws easier for members of the public, their advisers and judges to access and understand. Inheritance laws directly affect all New Zealanders and it is therefore very important that they be accessible and easy to understand⁵⁵.

B Old and outdated laws

The current laws were passed at different times over the last 100 years.

Over the last 100 years there have been significant changes in:

⁵⁴ These rules of construction have been drawn from A Alston (ed) *Garrow and Alston Law of Wills and Administration* (5th ed, Butterworths, Wellington, 1984) at ch 49.

⁵⁵ Lord Bingham of Cornhill "What is the Law?" Robin Cooke Lecture 2008, Victoria University Faculty of Law, Wellington, 4 December 2008 stated that "the Law should be accessible and so far as possible intelligible, clear and predictable".

- life expectancies;
- the numbers of dissolutions of marriage, remarriages and re-partnerings;
- the numbers of blended families;
- societal attitudes towards personal and family relationships (and in particular, gay relationships).

According to Statistics New Zealand, since 1975-77 life expectancy has increased by 6.8 years for females and 9.2 years for males; life expectancy for women was 82.2 years and for men 78.2 years as at March 2009.⁵⁶ At the beginning of the 20th century, half the population of New Zealand was under 23 years of age;⁵⁷ as at 31 March 2010 half of New Zealand's population was aged over 36.6 years. The median age for males is now 35.5 years and 37.5 years for females. The percentage of New Zealand's population aged 90 years and over increased from 2.7% in 1996 to 3.9% in 2010.⁵⁸

The number of marriage dissolutions each year increased between 1971 and 1998 from 3347 to 10,037.⁵⁹ The Family Court made 9700 dissolution orders in 2008.⁶⁰ De facto unions are more common than marriage among younger New Zealanders; among women aged 20 to 24 years 62% of those in partnership at the 1996 census were in a de facto union; the corresponding figure for men was 73%.⁶¹ One textbook puts it this way:⁶²

However the 1970s and 1980s witnessed gradual changes in the composition of the traditional nuclear family unit. The paradigm unit of a married couple with one primary wage earner and children born in wedlock, although still the dominant configuration, began to be challenged by a variety of other domestic relationships. Divorce rates increased rapidly and single parents headed more families. More women were in paid employment. The number of couples in de facto relationships was also on the increase.

These trends are not unique to New Zealand. In Scotland there were 2656 divorces in 1965, 13,373 in 1985 and 10,940 in 2005.⁶³ Between 1980 and 2007 life expectancy for Scottish males rose from 68 to 75 years, and Scottish females from 75 to 80 years.⁶⁴ In Australia the number of divorces rose from 41,400 in 1981 to 55,308 in 2001, and in 2001 72% of couples indicated they had cohabited prior to marriage compared with 31% in 1981.⁶⁵ In Australia over the last 100 years male life expectancy at birth increased by 24 years from 55.2 years in

⁵⁶ "Births and Deaths: March 2009 quarter"(2009) Statistics New Zealand <www.stats.govt.nz>.

⁵⁷ "Population Ageing in New Zealand: Key Statistics January/February 2000" Statistics New Zealand <www.stats.govt.nz>.

⁵⁸ "National Population Estimates: March 2010 quarter" Statistics New Zealand <www.stats.govt.nz>.

⁵⁹ "Marriage and Divorce in New Zealand: Key Statistics" (March 2001) Statistics New Zealand <www.stats.govt.nz>.

⁶⁰ "Marriages, Civil Unions and Divorces: Year ended December 2008" (2009) Statistics New Zealand <www.stats.govt.nz>.

⁶¹ "Demographic Trends: 2001 - Reference Report"(2001) Statistics New Zealand <www.stats.govt.nz>.

⁶² N Peart, M Briggs and M Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004) at [1.7].

⁶³ Scottish Law Commission *Discussion Paper on Succession* (SLC DP136, 2007) at 1.

⁶⁴ "Life Expectancy and Healthy Life Expectancy" (2009) Scottish Government <www.scotland.gov.uk>.

⁶⁵ "Marriage and Divorce in Australia" (2002) Australian Bureau of Statistics <www.abs.gov.au>.

1901-1910 to 79.2 years in 2006-2008, and female life expectancy at birth increased over the same period by 25 years from 58.8 years to 83.7 years.⁶⁶

It is now very common at death for a person's children to be middle-aged and independent, and for a person to be in a second or third marriage or relationship and therefore to have competing obligations to a surviving spouse or partner, middle-aged children of a prior marriage or relationship, and grandchildren. It is common also for a person's second spouse or partner to have children and grandchildren of his or her own who are very much part of the "family" group. In the 1950s and 1960s when much of our current legislation was enacted the traditional nuclear family was predominant and legislation reflected this. Legislation from that era was not intended to cover the very different personal and family relationships that are common today. These issues are discussed further in chapter 4.

Professor Rosalind Croucher, an Australian Law Reform Commissioner, said this:⁶⁷

Dynastic expectations are one thing; increasing longevity is another. If we live into our 90s - and many of *us* will - then dynastic expectations are really those of another century. The inheritance of our children is their early childhood - their education (from long day care, through to private school, for many; and then to university) - they get 'their inheritance' as part of their 'maintenance, education and advancement in life'. Parents don't die now in a way that produces an orderly fulfilment of dynastic expectations of children.

... If we earn our way into a comfortable middle age, and then, do not quietly fade away within a decade or so of retiring, we will need our own savings to support our old age - and to enjoy it. John Langbein has spoken of the fact that children now 'get their inheritance early' - largely through an investment by parents in their education.

Why should we continue to travel, cramped and uncomfortable, at the back of the plane, just to facilitate dynastic expectations, when we have earned the right not to? The liberal philosophers lauded the self-reliant individual and the value in the sweat of the brow - the true justification of property. The expression of that in our law is the right to travel at the front of the plane (or nearer to it) in our dotage and to let, indeed encourage, our children along their own road in life. (It is the Reg Ansett philosophy.) It is, indeed, the age of the self-funded retiree.

Many of the current laws were enacted before these changes took place. If anything, the pace of change has increased, and yet New Zealand is still governed by laws that were enacted many years ago in a very different society.

Laws which

- take these changes into account;
- are accessible;
- are comprehensively set out in a code; and

⁶⁶ Australian Bureau of Statistics website < www.abs.gov.au >.

⁶⁷ Rosalind F Croucher "Towards Uniform Succession in Australia - a Progress Report" at 29 (paper presented at Law Society of South Australia Succession Law Conference, Adelaide, 7 May 2009).

- reflect New Zealand society in the 21st century

would receive wider acceptance by the community, would be easier to understand and would create greater consistency in court decisions.

C Statements of policies and principles

The current laws do not contain clear statements of policy or principles.

Modern legislation usually contains full statements of the underlying policy and principle but this is not the case with many older statutes. In the area of inheritance law, the Law Reform (Testamentary Promises) Act 1949 states at the outset that the Act is “to make better provision for the enforcement of promises to make testamentary provision for services rendered.” The policy behind the Act was explained in *McCormack v Foley* as follows:⁶⁸

The mischief which it was designed to remedy was largely the tendency of testators to persuade people to render services to them by promises later found to be too vague to establish at common law contracts enforceable against the estate. It also overcame evidential difficulties under the Statute of Frauds. It did not displace the common law as to testamentary contracts but created a new discretionary jurisdiction similar, in that the object was to enforce the deceased’s “promises” – an expression itself liberalised during the history of the statutory jurisdiction.

However, the policies behind the Act are not set out in the statute itself and short of studying the relevant decided authorities, or perhaps Hansard, it is difficult to know the rationale for this legislation.

The same comments apply equally to the Family Protection Act 1955. There is an initial statement to the effect that the Act is to consolidate and amend enactments relating to claims for maintenance and support out of the estates of deceased persons. Apart from that, there are no clear statements of policy or principle in relation to the Family Protection Act 1955 other than perhaps in some of the decided cases. One commentator says:⁶⁹

Although the original underlying social purpose of the Testator’s Family Maintenance Act 1900 aimed to ensure that poor dependants of the deceased did not become a burden on the state, the Courts quickly came to approach the legislation much more expansively and to extend their jurisdiction beyond cases of actual want.

One of the criticisms of the Family Protection Act 1955 is that over the years there have been conflicting and contradictory decisions particularly around the concepts of need, maintenance and support. Clear statements of policy would assist immeasurably.

The Administration Act 1969 is stated to be an Act “to consolidate and amend certain enactments relating to the administration of the estates of deceased persons”. However, the intestacy provisions in Part III go way beyond that; they deal with the distribution of the estates of deceased persons who die without wills. There are no statements of policy or principle underpinning the intestacy regime set out in Part III of the Act.

⁶⁸ *McCormack v Foley* [1983] NZLR 57 (CA) at 61; see also WM Patterson *Law of Family Protection and Testamentary Promises* (3rd ed, LexisNexis, Wellington, 2004) at [13.1].

⁶⁹ John Caldwell “Family Protection Claims by Adult Children: What is Going On?” (2008) 6 NZFLJ 4 at 4.

In contrast, modern legislation such as the Succession (Homicide) Act 2007 contains statements of its purpose, effect and application. The Succession (Homicide) Act 2007 sets out as its purpose the codification of the law that prevents a person who kills another person by committing homicide from benefitting as a result of the victim's death from the victim's estate or other property arrangements.⁷⁰ The Act also sets out its effect and application which are to replace the rules of equity, law and public policy that prevent a killer from receiving, becoming entitled to or claiming interests in property as a result of the death of the killer's victim.⁷¹

Clear statements of policy and principle provide assistance to judges when interpreting statutes, which in turn, enhance the quality of decision-making and aid counsel and legal advisers. Statements of policy and principle promote community understanding of the law. To some extent the absence of these statements of policy from many of our existing inheritance laws is due to the ages of the statutes; it is very rare for older legislation to be in the form of a code. Any inheritance code would need to be in line with current legislative practices of including statements of policy and principle and should ensure consistency in policy and principle across the whole area of inheritance or succession law.

D Drafting issues

Much of the legislation in this area contains long complicated sentences with minimal punctuation and the use of terms that are not defined in the particular statute but have been defined or given specific meanings in case law. By way of example, s 2(5) of the Family Protection Act 1955 was set out in chapter 1. Another example is s 3(1) of the Law Reform (Testamentary Promises) Act 1949 which is as follows:

Where in the administration of the estate of any deceased person a claim is made against the estate founded upon the rendering of services to or the performance of work for the deceased in his lifetime, and the claimant proves an express or implied promise by the deceased to reward him for the services or work by making some testamentary provision for the claimant, whether or not the provision was to be of a specified amount or was to relate to specified real or personal property, then, subject to the provisions of this Act, the claim shall, to the extent to which the deceased has failed to make that testamentary provision or otherwise remunerate the claimant (whether or not a claim for such remuneration could have been enforced in the lifetime of the deceased), be enforceable against the personal representatives of the deceased in the same manner and to the same extent as if the promise of the deceased were a promise for payment by the deceased in his lifetime of such amount as may be reasonable, having regard to all the circumstances of the case, including in particular the circumstances in which the promise was made and the services were rendered or the work was performed, the value of the services or work, the value of the testamentary provision promised, the amount of the estate, and the nature and amounts of the claims of other persons in respect of the estate, whether as creditors, beneficiaries, wife, husband, civil union partner, children, next-of-kin, or otherwise.

Older legislation seldom contains adequate definitions of terms or expressions used. For example, the Simultaneous Deaths Act 1958 contains words or expressions such as “devolve”, “issue”, “devise”, “donee” and “in default of appointment”. These words and expressions are not defined in the Act itself but all of them have specific meanings which

⁷⁰ Section 3.

⁷¹ Section 5.

have resulted from court decisions that in some instances may go back many years.⁷² To many people such expressions are incomprehensible or at least easily misunderstood without the benefit of the decided cases. There is also the frequent use of Latin terms in older legislation which I discuss later in this chapter.

If accessibility and clarity are seen as desirable objectives, then significant parts of our current inheritance laws need to be replaced. Some of New Zealand's current statutes are archaic and regarded as out of touch with ordinary New Zealanders.

E Competing claims

There is uncertainty and lack of consensus about the priorities of competing claims.

The Property (Relationships) Act 1976 provides that claims under Part 8 of that Act have priority over other claims such as those under the Family Protection Act 1955 and Law Reform (Testamentary Promises) Act 1949.⁷³ However, if a relationship property claim is made, there is uncertainty about the extent to which this claim can be “topped up” under the Family Protection Act 1955 and how such claims compete with other family protection claims.⁷⁴ The Court of Appeal pointed out in *McCormack v Foley*⁷⁵ that while family protection legislation and testamentary promises legislation operate in the same social area and both impose restraints on testamentary freedom, each statute is unique and the underlying concepts are different. Competing claims by a second spouse or partner and children of a first marriage are common but there is no guidance in the legislation on how to prioritise these claims. In *Hamilton v Hamilton*,⁷⁶ it was decided that if there are competing claims under the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949, neither has automatic preference over the other. Patterson notes⁷⁷ that a claim founded in contract takes priority over a family protection claim (which is made against the net estate) but not against a testamentary promises claim (which is made against the gross estate). The legislation, apart from the Property (Relationships) Act 1976,⁷⁸ contains no guidance on the priorities of competing claims.

It is in the interests of clarity and certainty to have transparent rules governing the priorities of competing claims. Clear rules will facilitate settlement of claims and avoidance of litigation costs. A single code, with statements of principle and policy, subjective expressions replaced by objective tests and, as far as possible, rules regulating the priorities of competing claims, will promote greater certainty and consistency in judicial decisions.

F Undefined and uncertain terms

The courts struggle to grapple with nebulous expressions such as “moral duty”, “wise and just testator”, “maintenance and support” and “serious injustice” and this results in inconsistent and unpredictable decisions.

⁷² See for example the definitions of “devise” and “issue” in N Kelly, C Kelly and G Kelly *Garrow and Kelly's Law of Trusts and Trustees* (6th ed, LexisNexis, Wellington, 2005) at cxi and cxvi.

⁷³ Section 78(1)(c).

⁷⁴ Patterson, above n 68, at [8.11].

⁷⁵ *McCormack v Foley* [1983] NZLR 57 (CA).

⁷⁶ *Hamilton v Hamilton* [2003] NZFLR 883 (HC).

⁷⁷ Patterson, above n 68, at [13.7]; *Breuer v Wright* [1982] 2 NZLR 77 (CA); *Hamilton v Hamilton*, above n 76.

⁷⁸ Section 78(1)(c).

Caldwell describes the position in the following terms:⁷⁹

The oft-stated protestation that the Courts will refuse to modify the will in the interests of fairness, but rather will only interfere with the testamentary disposition to the extent necessary to remedy the perceived breach of moral duty has always audaciously begged the fundamental question of exactly what constitutes a “moral” (or to put it another way “fair”) testamentary provision.

As well it might be beneficial if it could come to be more openly acknowledged that the outcome of any family protection claim is ultimately determined more by the exercise of subjective judicial value judgements than the application of any normative principles.

The meaning of “moral duty” under the Family Protection Act 1955 was discussed in a research paper in 1997.⁸⁰ The paper concludes at page 47:

The concept of moral duty under the Family Protection Act 1955 is an outdated and unsound addition. It was first developed at a time when values and ideals were very different to those held by a large percentage of New Zealanders today ... in our modern multi-cultural society it is impossible to agree on exactly what should constitute a moral duty.

To similar effect Virginia Grainer comments:⁸¹

Whereas the inter vivos duties have been responsive to societal change, the family protection moral duties have not evolved to the same extent. The family protection moral duties need to be brought in line with current inter vivos duties. They need to be aligned to the changes that have taken place so that they are appropriate for today’s environment.

She also says:⁸²

Given the problems inherent in the use of the moral duty test, New Zealand would be well advised to follow England’s example and devise a new family protection regime not reliant on the questionable moral duty concept.

The expression “serious injustice”⁸³ has created particular uncertainty in terms of the threshold for granting leave under section 88(2) Property (Relationships) Act 1976. Another question is whether the same term should be interpreted in identical fashion under ss 88(2) and 21J Property (Relationships) Act 1976. The decisions in *Re Williams: Kinniburgh v Williams*,⁸⁴ *Public Trust v Whyman*,⁸⁵ *Morgan v Public Trust*⁸⁶ and *Harrison v Harrison*⁸⁷ illustrate the difficulties the Court has had.⁸⁸ In *Whyman* the Court of Appeal held that the

⁷⁹ Caldwell, above n 69, at 4.

⁸⁰ RJ Scott “Moral Duty Under the Family Protection Act 1955: Necessary Element or Outdated and Unsound Addition” (LLB (Hons) Research paper, Victoria University of Wellington, 1997).

⁸¹ Virginia Grainer “The Family Protection Act 1955 Time for Reform?” (LLM Thesis, Victoria University of Wellington, 1997) at 94.

⁸² *Ibid*, at 120.

⁸³ Property (Relationships) Act 1976, ss 21J and 88(2).

⁸⁴ *Re Williams (deceased): Kinniburgh v Williams* [2004] 2 NZLR 132; [2004] NZFLR 467.

⁸⁵ *Public Trust v Whyman* [2005] 2 NZLR 696 (CA).

⁸⁶ *Morgan v Public Trust* HC Auckland CIV-2006-404-003636, 20 November 2006.

⁸⁷ *Harrison v Harrison* [2005] NZFLR 252 (CA).

⁸⁸ See also Nicola Peart “Scared to Death” (paper presented to New Zealand Law Society Trust Conference, Wellington, June 2007).

High Court in *Re Williams* went too far in suggesting that the level of justice required to warrant leave is "intolerable". The Court of Appeal went on to say that s 88(2) was intended primarily to address situations of the type presented in that case.⁸⁹ In *Morgan*⁹⁰ Venning J compared ss 21J and 88(2) and noted the sections appeared in different parts of the Act, they dealt with different issues and a number of the indicia in s 21J would not be relevant to consideration of "serious injustice" under s 88(2). The Judge distinguished *Harrison v Harrison*⁹¹ which dealt with "serious injustice" under s 21J.

It is unfair to ask judges to make decisions affecting the lives of people based on such uncertain expressions. It is also very unfair on the public and their advisers. The results are uncertainty and inconsistency.

The use of Latin terms such as "donatio mortis causa",⁹² "prima facie"⁹³ and "administrator ad litem"⁹⁴ is not desirable in an age where such terms are no longer in common use and Latin is taught in very few schools. To many New Zealanders these terms are incomprehensible and reinforce the impression that the law is out of touch with ordinary people.

A code which eliminates such expressions or, to the extent they are used, contains clear practical definitions, will reduce this uncertainty.

G Re-writing wills

Will-makers' clear intentions are being defeated by judicial "re-writing" of wills.

Despite statements that the Family Protection Act 1955 does not authorise judges to "re-write" wills,⁹⁵ the reality is the judges continue to do just that.⁹⁶ Caldwell argues that the purpose of the Family Protection Act 1955 is to authorise judges to undertake testamentary re-writing and this means that a "will can never be regarded as anything more than a tentative disposition of property pending the ultimate decision by the Court".⁹⁷ In *Williams v Aucutt*,⁹⁸ the Court of Appeal stated "... there are pointers to concerns that some orders in recent years may have been out of line with current social attitudes to testamentary freedom relative to claims by adult children." In the same case Blanchard J stated:⁹⁹

Nonetheless there is substance in the criticisms of the way in which courts sometimes apply the present law. It is to be remembered that the court is not authorised to re-write a will merely because it may be perceived as being unfair to a family member and it is not for a beneficiary to have to justify the share which has been given.

⁸⁹ *Re Williams (deceased): Kinniburgh v Williams*, above n 84, at [47] and [48].

⁹⁰ *Morgan v Public Trust*, above n 86, at [27].

⁹¹ *Harrison v Harrison*, above n 87.

⁹² Simultaneous Deaths Act 1958, s 3 and Family Protection Act 1955, s 2(5).

⁹³ Status of Children Act 1969, ss 8(2) and (3).

⁹⁴ Law Reform Act 1936, s 9A(3).

⁹⁵ *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at 497.

⁹⁶ See for example *Strand v Strand* [2004] NZFLR 452 (FC) at 464, where Judge McCormick explicitly does this; see also *Haines v Chelley and Haines* HC Auckland CIV 2004-404-004556, 21 October 2008 where the High Court overturned a Family Court decision which rewrote the deceased's will.

⁹⁷ Caldwell, above n 69, at 4; *Welsh v Mulcock* [1924] NZLR 673 at 682.

⁹⁸ *Williams v Aucutt*, above n 95, at [45].

⁹⁹ *Ibid*, at [68].

In that case, the Court of Appeal¹⁰⁰ articulated the difficulties of assessing current social attitudes in a complex and ever-changing environment. This goes to the heart of the problem. There are no objective or clear guidelines against which judges can assess current social attitudes and of course, the social environment is always changing. It is not surprising that inconsistent decisions result. A code based upon updated and agreed principles and policies and which enshrines testamentary freedom as a fundamental objective, will help ordinary New Zealanders and their advisers in their asset planning arrangements.

One problem with a code is that over time it too will become outdated and out of step with the changing social environment. However, if properly chosen, many of the principles and policies will endure and remain relevant at least for a considerable time. Those policies that become outdated (indeed all policies) should be reviewed as time passes. A single code would be far easier to review and update than the present multitude of statutes and rules of common law.

H Litigation costs

Litigation costs rather than merit are forcing settlement of estate claims and have become a major issue in recent years.¹⁰¹ The uncertainty of current laws in this area, discussed above, compounds the problem. A single code based upon agreed and clearly enunciated principles will assist will-makers and their advisers and minimise litigation costs.

This is a particular problem for modest estates. The current practice of requiring all affected parties to be served and the general practice of ordering that the costs of the parties be borne by the estate¹⁰² often mean that it is not economic to defend family protection claims even though they may have little merit. For example, a wealthy 60 year old son has been left out of his mother's will and modest estate but agrees to accept a small legacy in settlement of his claim; most if not all of his legacy could be swallowed up in legal expenses.

Estate litigation costs are also a major concern in Australia. The New South Wales Attorney-General John Hatzistergos stated in September 2008:¹⁰³

The bill addresses widely held concerns about the increasing and disproportionate costs of family provision proceedings. The bill seeks to prevent people from making unmeritorious claims and accessing money from the deceased's estate to fund their legal costs without any restriction. There are numerous instances of cost blowouts in family provision proceedings in New South Wales. For instance, a case in which the legal costs reached \$605,000 for a relatively modest estate. The judge commented that the legal costs were far greater than the amount that any of the claimants could have hoped to receive in a family provision order and called the case "a dark stain on the administration of justice". Another was a case in which costs approached \$100,000 for an estate valued at less than \$400,000. In that case, the applicant tried to appeal after failure in the first instance. The applicant's appeal was dismissed both because it was without merit and because further litigation might have left a beneficiary of the estate without her home.

¹⁰⁰ Ibid, at [44].

¹⁰¹ Law Commission *Succession Law: Testamentary Claims* (NZLC PP24, 1996) at [40].

¹⁰² Patterson, above n 68, at [17.40].

¹⁰³ Leonie Englefield "Family Provisions, Particularly in Respect of the Uniform Succession Laws" (paper presented to Law Society of South Australia, Adelaide, 7 May 2009).

Another was a case regarding an estate of \$412,000, which occupied a half-day hearing, where the costs were \$90,000. The judge quite rightly described the costs as "excessive".

I Law Commission reports ignored

Various Law Commission reports have been produced but only random implementation or reform has resulted.

Radical changes were enacted in 2001 (to have effect in 2002) which meant:

- de facto partners (including same sex partners) could make family protection claims; and
- de facto partners (including same sex partners) could make claims under Part 8, Property (Relationships) Act 1976;¹⁰⁴ and
- these same partners have entitlements on intestacy under the Administration Act 1969.

These rights were extended to civil union partners in 2005.¹⁰⁵

In 2007, the Wills Act was passed with the intention of consolidating the numerous amendments to the original Wills Act 1837. Although some changes were introduced, the law was not fundamentally changed. The same is true of the Succession (Homicide) Act 2007 discussed above. Although these changes resulted from Law Commission recommendations, they were effected in isolation. They continue the piecemeal approach to reform of the law in this area. Indeed, at the time of writing, further amendments to the Wills Act 2007 are proposed.

Nevertheless, the fundamental problems raised in various Law Commission Reports remain¹⁰⁶ and there is no immediate prospect of reform. A new code which takes into account the changes recommended by the Law Commission and where appropriate, implements those changes, would be a major step in the right direction. In Australia there has been an ongoing process of reform under their Uniform Succession Laws Project.¹⁰⁷

J Intestacy rules

New Zealand's intestacy regime has been in place for more than 40 years but does not reflect current social attitudes towards a deceased person's obligations; it has also failed to keep pace with inflationary changes and particularly property values.

As from 1 June 2009 a surviving spouse or partner receives the first \$155,000 of the deceased's estate, the personal chattels and one third of the residue; where there are surviving children they take the other two thirds of the residue.¹⁰⁸ The trend of legislation over recent years (and this is based upon Law Commission recommendations) is to increase the entitlements of surviving spouses and partners.¹⁰⁹ This is mirrored in the recommendation of

¹⁰⁴ Claims by the survivor on death to relationship property.

¹⁰⁵ Property (Relationship) Amendment Act 2005, s 3(4); Relationships (Statutory References) Act 2005, s 7.

¹⁰⁶ For example, Law Commission, above n 101; also Law Commission *Presentation of New Zealand Statute Law* (NZLC R104, 2008).

¹⁰⁷ Rosalind Croucher, above n 67.

¹⁰⁸ Administration Act 1969, s 77.

¹⁰⁹ For example Part 8 of the Property (Relationships) Act 1976 which came into effect in 2002.

the Scottish Law Commission's Discussion Paper on Succession.¹¹⁰ Similarly the trend in Australia has been to limit claims by non-adult children and shift the balance in favour of the spouse or de facto partner.¹¹¹ The New South Wales Succession Amendment (Intestacy) Act 2009 provides that a surviving spouse receives the whole estate if the deceased is not survived by issue and where there are surviving issue the statutory legacy available to the surviving spouse is \$350,000.¹¹² Our current intestacy laws, although updated from time to time, do not reflect these trends.

The statutory legacy of \$155,000 applies where death occurred after 1 June 2009¹¹³. The previous statutory legacy was \$121,500 which was set on 3 June 1998; it did not change for 11 years. From June 1998 to June 2008 the median sale price of a residential property in New Zealand rose from \$163,000 to \$340,000; it more than doubled¹¹⁴. According to the Reserve Bank of New Zealand CPI Inflation Calculator, between 1998 and 2008 the total change in inflation in New Zealand was 25.6%. The cost of \$121,500 in 1998 increased to \$152,607.70 in 2008¹¹⁵. The statutory legacy would have been sufficient to purchase a residential home in 1998 albeit for less than the median sale price; that is unlikely to be the case at the time of writing.

For example, take a case where the main asset of an estate is a home worth in the region of \$500,000. As the intestacy laws currently stand, and assuming no application is made under the Property (Relationships) Act 1976, if the deceased is survived by a second spouse or partner and children of a previous relationship, the second spouse/partner would have to pay approximately \$230,000 to acquire the share of the children in the home. The same rules apply where there has been only one marriage or relationship. Many New Zealanders would consider this unfair, particularly if the second relationship lasted for 20 years or more. New Zealand's present intestacy laws are discussed in more detail in chapter 5.

A single code which takes into account current community attitudes and overseas trends, and which recognises the primacy of the surviving spouse or partner's position on intestacy, would prevent the unfairness that can result in the situation described above. The code could also recognise the importance of keeping the family home and chattels for a surviving spouse or partner and create a different regime to allow for this.

K Anti-avoidance provisions

The transfer of assets to third parties and use of discretionary family trusts and structures such as joint ownership to defeat inheritance claims are common asset planning measures in New Zealand.

It is a common asset planning tool to set up a family trust to avoid or defeat inheritance claims. The law in this area is not certain.¹¹⁶ The Scottish Law Commission discussed anti-avoidance provisions in its Discussion Paper on Succession¹¹⁷ and the New South Wales Law

¹¹⁰ Scottish Law Commission *Discussion Paper on Succession* (SLC DP136, 2007) at [2.57].

¹¹¹ New South Wales Law Reform Commission *Uniform Succession Laws: Family Provision* (NSWLRC IP11, 2006) at [1.37].

¹¹² Schedule 1, Chapter 4, Parts 4.1 and 4.2.

¹¹³ Administration (Prescribed Amounts) Regulations 2009.

¹¹⁴ "Market Trends" Real Estate Institute of New Zealand, www.reinz.org.nz.

¹¹⁵ New Zealand Inflation Calculator <www.rbnz.govt.nz>.

¹¹⁶ Patterson, above n 68, at [4.20].

¹¹⁷ Scottish Law Commission, above n 110, at Part 4.

Reform Commission recommended notional estate orders.¹¹⁸ Prior to the removal of estate duty in New Zealand in 1991 duty was assessed on the deceased's notional estate¹¹⁹ and the concept of a notional estate is still in use under the Protection of Personal and Property Rights Act 1988.¹²⁰ A single code could include anti-avoidance provisions such as severance of joint ownership and notional estate awards which the courts could apply in inheritance cases. Anti-avoidance provisions are in place in other areas of the law such as bankruptcy and relationship property disputes, and while they are not always simple in their application, they can be effective in preventing evasion.

In *Public Trust v Whyman*¹²¹ the Court of Appeal strained to allow infant children of the deceased to make a claim on property jointly owned by the deceased and his new partner. As the cases on section 88(2) Property (Relationships) Act 1976 show, the law is far from clear; in particular, the term “serious injustice” has caused difficulty.¹²² A single code setting out clearly the basis and the circumstances when joint ownership can be severed will create greater certainty and consistency of decision-making.

L Jurisdiction - which court?

Should one court have jurisdiction in inheritance law; if so, which court?

A code would normally prescribe which court is to have primary jurisdiction for all disputes and applications. It would be unusual for a code to require different courts to have jurisdiction on different issues within the same code.

A single inheritance code is likely to result in the identification of one court to have primary jurisdiction in the handling of disputes under the code and also administrative matters such as grants of administration. A code will also set out the process for all appeals.

The jurisdiction of the Family Court has expanded since its creation in 1981 but there are still significant areas that are the sole preserve of the High Court. The codification process will force a re-think of the jurisdictional issues in this area and will result in a more streamlined process for dispute resolution. The High Court’s traditional jurisdiction in all inheritance law issues has been diminished over recent years. For example, most family protection and testamentary promises claims are commenced in the Family Court, but undue influence and lack of testamentary capacity cases must be filed in the High Court. However the Family Court has jurisdiction to determine whether a person has mental capacity to sign an enduring power of attorney.¹²³ This has created confusion and unnecessary complexity which will be discussed in chapter 6 of this thesis. The emergence of the Family Court as a specialist court over the last 30 years points the way towards one specialist court handling all inheritance cases.

¹¹⁸ New South Wales Law Reform Commission *Uniform Succession Laws: Family Provision* (NSWLRC R110, 2006) at [3.20].

¹¹⁹ For example s 8 Estate and Gift Duties Act 1968 which included powers of appointment in the dutiable estate.

¹²⁰ Section 62.

¹²¹ *Public Trust v Whyman*, above n 85.

¹²² *Re Williams: Kinniburgh v Williams*, above n 84; *Public Trust v Whyman* above n 85; *Morgan v Public Trust*, above n 86.

¹²³ *Waldron v Public Trust* HC Auckland CIV 2009-404-00485, 19 January 2010.

III *Benefits v Detriments*

As stated at the commencement of this chapter, a code or codifying statute involves amalgamating all statutes and common law rules.

In light of the problems outlined earlier in this chapter, a comprehensive updated and well-drafted inheritance code will result in:

- accessibility for all;
- debate and following debate, clarification of the relevant policies;
- better understanding of the law and relevant principles by professionals and the general public;
- reduced likelihood of disputes;
- consistency of judicial decision-making;
- greater likelihood of settlement of disputes;
- less delay and reduced legal costs in litigation;
- clearer advice to will-makers and consequent reductions in disputes.

One detriment of a code is that it can be or become rigid and inflexible. Because of its all-encompassing nature, injustice can result in individual cases. However this needs to be weighed up against the current uncertainty, inconsistency and unfairness of our succession laws. It needs to be remembered that a hotchpotch of narrow statutes can also become rigid and hard to amend. The significant benefits of a code which are set out above also need to be taken into account. One way to deal with inflexibility and rigidity is to ensure that the code:

- is based on accepted policies which are clearly analysed and enunciated;
- sets out clearly the entitlements of specified parties, who can claim further provision and the rationale for such rights;
- allows some judicial discretion or flexibility in certain areas and within the accepted categories of beneficiaries and claimants.

Another potential detriment is that the code needs to be comprehensive; other causes of action are excluded. What should be included in the code and what should be excluded? For example, should claims to relationship property on death come within the proposed inheritance code or remain within Part 8 of the Property (Relationships) Act 1976 alongside provisions relating to division of property on separation? Should existing common law rules such as those relating to testamentary capacity and undue influence be defined and specifically included within the proposed code? Or should they be preserved as causes of action outside the proposed code? Do the rules for construction of wills fit within a code and rules of interpretation? The answer must be to include all causes of action specifically within the proposed code in order to ensure its integrity and to overcome the difficulties and

criticisms of the current laws discussed in this chapter. If that is correct, it is essential that all existing causes of action are carefully analysed and those that are to be retained need to be included and clearly articulated¹²⁴ within the proposed code.

Having said that, there can be limits to a code. For example the Property (Relationships) Act 1976 is a code¹²⁵ but in *Kerridge v Kerridge and Others* the Court of Appeal decided that:¹²⁶

while the PRA is a code in respect of transactions between spouses in respect of property, it is not a code in respect of all available remedies between spouses for all possible legal disputes that may arise between them.

In that case Mrs Kerridge claimed that Mr Kerridge deceitfully led her to believe in 2000 that he would transfer a property from a trust to their joint names when he never intended to do so. The Court of Appeal upheld the High Court's refusal to strike out the claim in deceit. The strike out application was argued on the basis that s 4 of the Property (Relationships) Act 1976 which says that the Act is a code was intended to cover any and all claims that arose between spouses in respect of property and the section should not be read down. It was contended that it is not sufficient reason to circumvent the Act on an ad hoc basis whenever an aggrieved party finds him or herself without a remedy. The Court of Appeal held that the claim in deceit was not in the category of property transactions caught by s 4 and therefore was not barred. Similarly in *Mosaed v Mosaed*¹²⁷ the Court of Appeal distinguished an enquiry into accounting for a profit from the division of matrimonial property. Therefore, while it is important for an inheritance code to include accepted inheritance claims, it will not necessarily close the door on all potential claims between partners.

Another benefit of the codification exercise is that it shows up inconsistencies. There will be an interpretation section, so that words will be defined the same way rather than different ways in different statutes as at present. By way of examples, the terms "final distribution" and "movable property situated in New Zealand" have different meanings under the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949.¹²⁸ There will be a jurisdiction section, specifying which court deals with cases in the first instance, and also addressing private international law issues. Existing processes and practices will be critically analysed in light of modern conditions.

IV Summary

In 2001 radical changes were made to relationship property in New Zealand.¹²⁹ This was in response to significant social changes that had occurred¹³⁰ and in particular the increasing numbers of de facto and same sex relationships and the uncertainty of the law. The Property (Relationships) Act 1976 is a code.¹³¹ The same social changes and increases in life expectancy affect inheritance laws which are also unclear, outdated and inadequate. A similar legislative response (codification) is overdue.

¹²⁴ For example, s 30 of the Wills Act 2007 is arguably a codification of the previous case law relating to mutual wills.

¹²⁵ Section 4.

¹²⁶ *Kerridge v Kerridge and Others* [2009] 2 NZLR 763, [2009] NZFLR 705 (CA) at [52].

¹²⁷ *Mosaed v Mosaed* (1996) 15 FRNZ 15 (CA), [1999] 3 NZLR 634.

¹²⁸ Patterson, above n 68, at [13.26] and [16.3].

¹²⁹ Property (Relationships) Act 1976.

¹³⁰ N Peart, M Briggs and M Henaghan (eds), above n 62 at [1.7].

¹³¹ Section 4.

The history of inheritance laws in New Zealand over the last 100 years has been a tale of fragmented reactions to specific problems having currency at particular times. The outcome in 2010 is a patchwork of archaic and poorly drafted statutes lacking any underlying, let alone modern, statements of policy. Suggestions for reform by the Law Commission have been actioned on a random basis, or ignored.

This area of the law affects all New Zealanders. It is unsatisfactory from the point of view of good legal policy and public accessibility to continue piecemeal reform. While significant work and resources are needed, the time has come for an inheritance code to replace the mishmash of our current inheritance laws. In 1997 the New Zealand Law Commission pointed out that 27,000 people die in New Zealand each year and many leave assets.¹³² It concluded that the need for review is urgent.¹³³

¹³² Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [12].

¹³³ *Ibid*, at [5].

Chapter 3

COMPETING REGIMES

I *History*

The common law has recognised and protected private property rights in New Zealand (and in overseas countries) for many years.¹³⁴ At a very fundamental level, the question that inevitably arises is the extent to which restrictions should be imposed on the ability of the owner of private property to deal with his or her property on death. At one extreme the USSR decreed in 1918 that on death the property of a deceased person became the property of the State; however, in 1964, a new system of inheritance was brought in that was similar to that existing in western countries.¹³⁵ At the other extreme, prior to 1900 in New Zealand,¹³⁶ a will-maker had unrestricted power to dispose of assets by will.

There are two main competing principles. On the one hand, the argument that a person has the right while alive and within the law to deal with personal property as he or she chooses; this should continue on death. On the other hand, the argument that on death all property should pass to the State so that the State can use that property for the benefit of all citizens. Most states choose a middle course. In Australia, for example, the position has been described as follows:¹³⁷

For many years the State chose a middle course - allowing the testator freedom of distribution but abstracting a substantial slab of the proposed distribution by way of death or inheritance taxes. This happy compromise was thwarted by a controversial Queensland Premier who abolished such impositions in his State. This was, at first, considered by other State governments as a local and hazardous eccentricity, until an alarming number of their own citizens (with their assets), started to decamp for the pleasures of the Queensland Gold and Sunshine Coasts, now further enhanced by the prospect of unencumbered testamentary disposition. Rather hastily, the other State and Territory governments fell into line, as did, eventually, the Federal Government. State rivalry may be one of the unexpected advantages of the Federal system.

But to allow unfettered freedom of testamentary distribution conflicts with the second principle of fairness and justice. Testators can be forgetful, capricious or malicious. Should they thereby be permitted to ignore persons towards whom they had a clear moral obligation by reason of dependency, obligation or relationship? The classic case is the dutiful daughter giving up youth, marriage and career to look after the aged parents who leave her destitute; but that is just one example of many. Should the law step in to convert the moral obligation to a legal one? ...

It was left to the more enlightened Dominions to redress the balance. Pioneered by New Zealand in 1900 and followed by the Australian States and Canada, measures were enacted that allowed the Courts, within certain defined limits, to make provision or

¹³⁴ However, no such protection is contained in the New Zealand Bill of Rights Act 1990.

¹³⁵ Ken Mackie *Principles of Australian Succession Law* (LexisNexis, Chatswood (NSW), 2007) at [1.10].

¹³⁶ The position in England, USA, Canada and Australia was similar, see WM Patterson *Law of Family Protection and Testamentary Promises* (3rd ed, LexisNexis, Wellington, 2004) at [1.2].

¹³⁷ Northern Territory Law Reform Committee *Report on Uniform Succession Laws* (NTLRC R31, September 2007) at 5.

further provision out of the estate of a testator for persons whose claims should in fairness or justice be recognised.

As noted by Patterson¹³⁸, the ability of a will-maker to exclude his spouse or children from provision in his will¹³⁹ and the injustice resulting from this was the major impetus for the Testator's Family Maintenance Act 1900.

II Options

Most countries have therefore attempted to compromise between total testamentary freedom on one hand and the interests of the deceased's family (and the consequent obligations placed upon the State) on the other. Two trends have emerged.¹⁴⁰ In some European countries, including Scotland, the immediate relatives have fixed shares of which they cannot normally be deprived. In contrast, in countries like New Zealand, Australia and England, while testamentary freedom is recognised, the courts have discretionary powers to order adequate provision for the proper maintenance of certain dependents of the will-maker if the will fails to do this.¹⁴¹ These different approaches have been described as the "fixed rule scheme" and the "court-based discretionary system".¹⁴² The first policy issue that arises is whether New Zealand should change its current court-based discretionary system for a fixed rule scheme.

Each of these systems is advocated in strongly contrasting LLM theses by Andreas Bauer¹⁴³ and Virginia Grainer.¹⁴⁴ Bauer advocates legal enforcement of a moral duty to recognise "deserving" family members by wills because the benefits achievable for children, family and society as a whole patently outweigh the loss of personal liberty. Under his model 50% of an estate would pass in fixed shares to statutory heirs, and the deceased would be able to deal with the remaining 50% by will. The benefits of his model are:

- Family harmony and smooth functioning of families resulting from explicit recognition of the need to recognise family members.
- It is open and not subject to undue influence.
- It is more democratic and results in sharing fortunes on death.
- There is more certainty and less litigation.
- Fixed share systems work in many countries.

In his view the disadvantages of the testamentary freedom/discretionary approach practised in New Zealand are:

- There is more litigation and consequent costs.

¹³⁸ Patterson, above n 136, at [1.2].

¹³⁹ At that time, most property was owned by males.

¹⁴⁰ Mackie above n 135, at [1.11].

¹⁴¹ Ibid.

¹⁴² Scottish Law Commission *Discussion Paper on Succession* (SLC DP136, 2007).

¹⁴³ A Bauer "The Law Commission Succession Project: A Critical Analysis and Alternative Model" (LLM Thesis Victoria University of Wellington, 2004).

¹⁴⁴ Virginia Grainer "The Family Protection Act 1955: Time for Reform?" (LLM Thesis Victoria University of Wellington, 1997).

- Significant information is needed to support or refute claims.
- The result depends upon individual judges and their personal views.
- Will-makers' discretions are open to abuse.
- Court decisions are not democratically legitimate because judges are not elected.
- Estate planning is difficult because precise criteria cannot be prescribed for every case.
- Unlike the fixed share system, the focus is on money, not moral duty.
- Family relationships are poisoned by claims.
- Administration of estates is delayed and more expensive.
- Testamentary freedom is very much an English or common law approach which is not practised world-wide and is inconsistent with Maori concepts of land ownership which recognises a strong, spiritual attachment to land (as discussed in chapter 5 of this thesis).

Bauer does acknowledge the following issues with his model:

- To back up the model it is necessary to have a tracing system and powers to set aside lifetime transfers of property and transactions; he suggests that gifts over a certain level and within 10 years of death be caught.
- Reconciling the interests of second spouses/partners and children of the deceased; he proposes lifetime agreements for the surviving spouse under which children will forfeit their right to claim when the first spouse dies. He does not suggest reserved shares for de facto partners.
- There are problems with defining "deserving" heirs and he suggests there should be "flexibility" where some children have greater educational or other needs and also where a child has looked after the deceased for many years.
- He suggests that relationship property and testamentary promises claims should have priority over other claims.
- He acknowledges the problem of farms or large areas of land being split under a fixed share regime and suggests discretion and power to maintain farms after death.
- He supports the New Zealand Law Commission's proposals on memento claims.

The problems with this model are:

- It requires a complicated, expensive and time consuming system of setting aside lifetime transactions over a lengthy period of time.
- It is not clear who will administer and pay for this system and the tracing required to support it.

- Investigations of lifetime transactions, tracing and applications to set aside such transactions will result in more litigation, expense and delay.
- The lack of flexibility in cases where some children have greater needs or deserve greater recognition for help provided to the deceased will result in unfairness and will increase not decrease family disharmony.
- Fragmentation of farms and large areas of land remains a very real issue.
- The New Zealand experience with estate duty was that many people went to great lengths to set up schemes to get around obligations which they did not accept; a forced share regime is likely to be regarded in the same way with the consequent emergence of an avoidance industry.
- There is uncertainty about the respective priorities of fixed shares and other claims.

III *Testamentary Freedom*

Virginia Grainer put the case for unlimited testamentary freedom as follows:

- It is consistent with a person's rights; that is, a person has a right to deal with assets while alive as he or she chooses and this should not change on death.
- It facilitates altruism. The family protection regime expedites one possible prioritisation; that is, family members have priority over charities which may have greater needs. Charities rely on donations, and the family protection regime reduces the ability to give to charity by will.
- It facilitates wealth distribution. The Family Protection Act 1955 perpetuates the status quo and entrenches financial inequality.
- It facilitates social control. It can serve to support family and social order by providing the will-maker with an opportunity to maintain, reward or punish selected individuals. Automatic entitlements can have the opposite effect.
- It creates flexibility. The understanding of "family" today is very individual, and people should have the flexibility to deal with assets in accordance with their individual view of "family".

The proposals for reform set out in chapter 13 of the Grainer thesis are:

- New Zealand law should be changed so that it corresponds as nearly as possible to complete testamentary freedom. The only justifiable limitations are those consistent with the limitations on the will-maker's freedom of discretion while alive.
- The Family Protection Act 1955 should be repealed and statutes enforcing duties relating to matrimonial property, spousal support and child support should be amended to provide for enforcement of testamentary duties that correspond to those inter vivos requirements.

- Spousal maintenance applications should be made during the first two years after the death of the deceased person on the same basis as awards are made after separation. After two years, awards would be made on the same basis as awards are made now after dissolution of marriage.
- The Child Support Act 1991 should be amended so that a child support claim can be made against a deceased estate on the same basis as it would be made against property during the will-maker's life. Adult children would have no entitlement to make claims against an estate apart from assistance for training and education up until the age of 25 years. This would be consistent with inter vivos duties.
- With regard to the Law Commission's 1996 proposal¹⁴⁵ that it should be possible to prevent a will-maker from disinheriting a child in a way that is capricious or vindictive or vitiated by mistake of fact, Grainer comments that this is premised on the questionable assumption that adult children have a right to inherit from their parents.¹⁴⁶ Judgement on these issues is very subjective.
- In summary, Grainer recommends that the Family Protection Act 1955 should be repealed and maintenance obligations of a will-maker should be extended to the situation where one party has died.

The problems with this proposal are:

- Spousal maintenance and child support obligations are calculated on a person's income, not assets. When a person dies, in most cases their income is reduced or completely cut off; however, assets are likely to become available. Calculations based on income which is no longer available have to be changed. In most cases the extent of assets available for a claim is important not past income. As pointed out by Garnett Crowhen¹⁴⁷ maintenance is based largely on income whereas family protection claims are usually paid out of capital.
- The proposal to pay spousal maintenance in stages, that is, at death (as if separated), and again two years later (as if marriage dissolved) will drag out estate administration; this is not desirable. It is not a practical proposal.
- Maintenance and child support are assessed on the basis that a partner or former spouse will be alive and can contribute in non-financial ways. On death this is obviously not the case. Some compensation needs to be made for lack of non-financial contributions.
- Grainer's views on the "individual" nature of family are at odds with the Maori view on whanau, hapu and iwi. The classic Maori view is that membership of the groups provides meaning and purpose.

¹⁴⁵ Law Commission *Succession Law: Testamentary Claims* (NZLC PP24, 1996) at 67.

¹⁴⁶ *Ibid*, at 147.

¹⁴⁷ Garnett Crowhen "Maintenance and the Personal Representative" (LLM Thesis Victoria University of Wellington, 1979).

IV *Fixed Rule Scheme or Court-Based Discretionary System?*

The relative merits and deficiencies of both systems have been discussed in recent reports by the Scottish Law Commission¹⁴⁸ and by the New South Wales Law Reform Commission.¹⁴⁹ The English Law Commission also considered that it would be undesirable to change laws of estate distribution in such a way as to cause more applications to Court for greater provision.¹⁵⁰ The comparative merits and defects of the two contrasting systems are:

- The advantages of a fixed rule scheme are certainty and convenience. People can prepare wills with knowledge of the likely outcome. The delays, costs and inconvenience of litigation are minimised as are the costs and time involved in estate administration.¹⁵¹
- The major disadvantage of a fixed rule scheme is rigidity. Unlike the court-based discretionary system, factors such as the conduct of the parties and the competing needs of claimants and beneficiaries are usually irrelevant in fixed rule schemes.
- Another disadvantage of a fixed share system is that it is usually limited to a small number of classes of claimants. Unlike a court-based discretionary system, a fixed share system usually provides for only a small list of parties.
- A further disadvantage of a fixed rule scheme is that an owner of property is deprived of the ability to decide what is to happen on death to property that in many cases he or she has acquired and developed. An unwanted and possibly undesirable regime is imposed on the property owner. This has meant, in the case of farms or large blocks of land, fragmentation of ownership amongst a person's heirs rather than retention by an heir of choice; this has led in turn to inefficient and problematic use of the land.
- The advantages of a court-based discretionary system are flexibility and the ability to take into account many factors in different situations. Also, awards can take various forms such as lump sum payments, transfers of property or periodical payments.
- The disadvantages of a court-based discretionary system are uncertainty and inconvenience.¹⁵² While previous decisions provide some guidance, the outcome depends very heavily on the particular circumstances.¹⁵³ A discretionary system also provokes litigation and the consequent cost, delay and upheaval at a time when the family are still adjusting to bereavement.¹⁵⁴
- Experience with court based discretionary systems has shown that the class of those who can claim widens according to changing social mores. As one report notes:¹⁵⁵

¹⁴⁸ Scottish Law Commission, above n 142.

¹⁴⁹ New South Wales Law Reform Commission *Uniform Succession Laws: Intestacy* (NSWLRC R116, 2007).

¹⁵⁰ England and Wales Law Commission *Distribution on Intestacy* (Working Paper 108, 1988) at 37.

¹⁵¹ Scottish Law Commission, above n 142, at [3.33].

¹⁵² *Ibid*, at [3.34].

¹⁵³ See *Re Z* [1979] 2 NZLR 495 at 508 where Cooke J stated "it may not be profitable to try to lay down rules of practice purporting to crystallise some aspect of the standard testator's moral duty".

¹⁵⁴ Scottish Law Commission, above n 142, at [3.34].

¹⁵⁵ Northern Territory Law Reform Committee, above n 137, at 7.

Once a Court is given power to override the testator's discretion and impose its own discretion in accordance with broad principles of equity, it becomes difficult to argue that such principles should be restricted only to some specific cases and not to others. Non-relatives for instance may be more deserving of and dependent on the testator's bounty than relatives.

The Scottish Law Commission favoured retention of a fixed rule scheme for surviving spouses and civil partners but recommended a discretionary court-based system for dependent children and cohabitants. In contrast, the New South Wales Law Reform Commission favoured retention of a court-based discretionary system; however, it also recommended reduction of the classes of potential claimants under this system.

V *New Zealand Perspective*

The reports of both the Scottish and New South Wales Law Reform Commissions illustrate that neither system is perfect and there are advantages and disadvantages to both.¹⁵⁶ It is, however, important that as far as possible, our laws reflect the views of our society. In its 1997 Report the Law Commission comments:¹⁵⁷

Although most people want to pass on their assets to members of their family, a research study undertaken in New Zealand suggests that older people value their freedom of disposition and right to decide who their beneficiaries will be: Thorns (1995) *A Social Policy Journal of New Zealand*, 30, 38. A British study drew similar conclusions, see Finch and Masson – *Negotiating Family Responsibilities* (Tavistock/Routledge, London 1993).

In a 2006 survey conducted in New Zealand, 60% of 2274 respondents believed that a parent did not have a duty to pass on wealth to his or her children and only 21% of respondents thought children had any right to expect an inheritance from their parents.¹⁵⁸ It is difficult to accurately assess the views of our society, if indeed, a clear predominant view exists. Caldwell points out that the views expressed in this 2006 survey were consistent with the 1997 recommendations of the Law Commission (set out above) and he commented that: “There can now really be little doubt that contemporary thinking currently leans heavily in favour of testamentary freedom.”¹⁵⁹

However, as the Law Commission also pointed out,¹⁶⁰ there is no social inquiry that supports the assumption that there is general acceptance of the exact content of a will-maker's moral duty. The Law Commission proceeds to say that New Zealand society is not culturally and ethnically homogenous which can make it difficult for will-makers to have their different ethnic and cultural values recognised, respected and protected.¹⁶¹ Further evidence of this are the provisions relating to succession to Maori land contained in *Te Ture Whenua Maori Act 1993*, discussed later in this chapter and the discussion on Maori land and property interests in chapter 5 of this thesis.

However, it is very unlikely that New Zealand will change to a fixed rule scheme in view of:

¹⁵⁶ See for example, Scottish Law Commission, above n 142, at Part 3.

¹⁵⁷ Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [14], footnote 28.

¹⁵⁸ John Caldwell “Family Protection Claims by Adult Children: What is Going On?” (2008) 6 NZFLJ 4.

¹⁵⁹ *Ibid.*

¹⁶⁰ Law Commission, above n 157, at [33].

¹⁶¹ *Ibid.* at [33].

- the long history (over 100 years) of our current court-based discretionary system and complete absence of the fixed rule scheme in our history;¹⁶² and
- the importance of the principle of testamentary freedom (which is implicit in the court-based discretionary system) to New Zealanders;¹⁶³ and
- the fact that none of the Law Commission Reports on succession or inheritance law has advocated a fixed rule scheme and recent reports in both England and Australia (whose histories in this area are similar to ours) advocated retention of a court-based discretionary system.

Can we use a mixture of the fixed rule scheme and the court-based discretionary system? As stated above, the Scottish Law Commission favoured retention of a fixed-rule scheme for surviving spouses and civil union partners, but recommended a discretionary court-based system for dependent children and cohabitants. This approach has been criticised because no overarching rationale is given for applying different regimes to different classes of claimants, and no specific justifications are given for preferring certainty and convenience in one case, and individual desert in another.¹⁶⁴ One commentator has stated that the English (court-based discretionary) system will probably get the morally right and fair answer in more cases than others because the court is given discretion to take account of all the morally relevant factors with special weightings for some of them.¹⁶⁵

However, despite retention of a court-based discretionary system, many of the problems identified in chapter 1 of this thesis can be avoided, or at least minimised, by making the following changes (some of which were recommended by the New South Wales Law Reform Commission):¹⁶⁶

- greater limitations on who can apply for further provision;
- clarification of the grounds upon which awards can be made involving perhaps establishment of the need for proper maintenance and support rather than “recognition”;
- a clearer and perhaps more restrictive definition of “need”;
- financial limits (to be imposed by statute) on the courts’ discretionary powers.

¹⁶² As stated early in chapter 1 of this thesis, initial proposals in the 1890s to introduce a fixed rule scheme based on Scots Law were defeated and to the writer’s knowledge, there have been no proposals since then to reintroduce it. Although arguably, the fixed entitlements on intestacy under the Administration Act 1969 and rights to relationship property on death under Part 8 of the Property (Relationships) Act 1976, are forms of fixed shares.

¹⁶³ See John Caldwell, above n 158.

¹⁶⁴ Hilary Hiram “Reforming Succession Law: Legal Rights” (2008) 12 *Edinburgh Law Review* 77 at 81-86.

¹⁶⁵ N MacCormick “Discretion and Rights” (1989) 8 *Law and Philosophy* 23 at 33-34.

¹⁶⁶ New South Wales Law Reform Commission *Uniform Succession Laws: Family Provision* (NSWLRC R110, 2005) Draft Family Provision Bill 2004 clauses 6 and 10, which limit who can apply and when Orders can be made.

Arguably the individualism of testamentary freedom clashes with the Maori communal view of property; whanau members working together for the care and management of land and taonga.¹⁶⁷

However, the principles of testamentary freedom relate to personal assets; it has never been possible for an individual to dispose of communal property. The proposal in chapter 5 of this thesis is that the current regime in relation to Maori land, as prescribed in Te Ture Whenua Maori Act 1993, is retained and specifically recognises the communal nature of Maori land and taonga.

The special historical link between Maori and land will be maintained; as will recognition of an individual's place in whanau, hapu and iwi. Testamentary freedom will still apply to assets other than land.

This issue is further discussed in chapter 5 of this thesis.

In conclusion, one of the guiding principles of an Inheritance Code is the importance of freedom of testation: the properly expressed wishes of the will-maker should be given primacy. Judicial intervention should be limited to situations where it is essential. Therefore retention of the longstanding court-based discretionary regime as opposed to the fixed rule regime is proposed.

¹⁶⁷ M Henaghan and B Atkin (eds) *Family Policy in New Zealand* (3rd ed, LexisNexis, Wellington, 2007) at 49.

Chapter 4

POLICIES ON CLAIMS AGAINST AN ESTATE

I *Who Should be Able to Seek Provision?*

To avoid any uncertainty, this chapter deals with claims for further provision from an estate which are akin to current family protection claims. I am not dealing with challenges to a will on the bases of lack of testamentary capacity, undue influence or an alleged testamentary promise; those claims are conceptually different.

From the outset our family protection legislation and its Australian equivalents set out a list of eligible claimants; the list was largely restricted to spouses, children and grandchildren. However, in July 1998 Victoria, uniquely among the Australian states, dispensed with the list of eligible applicants and made it possible for any person to make a claim so long as the deceased had a responsibility to make provision for the proper maintenance and support of that person.¹⁶⁸ In determining whether an applicant qualified, the Victorian Court has to consider 12 factors such as the nature and length of the relationship between the applicant and the deceased, the deceased's obligations to the applicant, the size of the estate, the financial resources and needs of the applicant, the age and any disabilities of the applicant, benefits previously given to the applicant, and the conduct of the applicant.

The intention was to avoid the harsh consequences that may occur where a meritorious person is prevented from bringing a claim because of the legal status of his or her relationship with the deceased; and to change the focus instead on the nature of the relationship with and the moral responsibility of the deceased.¹⁶⁹ It is the nature of the relationship between the applicant and the deceased that is crucial to the existence of responsibility to provide from the estate.

A recent case under the Victorian legislation *Sinclair v Forsyth*¹⁷⁰ involved a couple who enjoyed a lengthy social and personal relationship (which included sexual intimacy and a deep abiding friendship) but where financial independence was largely preserved and separate homes were maintained. The applicant resided with her former husband and their children throughout the 12 year relationship with the deceased. The Judge found that this relationship was the "shaping force" in their lives and awarded the applicant 50% of the \$800,000 estate. While this approach does have some obvious attractions, it is notable that none of the other Australian states have followed this track and the following disadvantages are inherent:

- This approach increases rather than decreases the number of potential claimants which goes against the trend towards testamentary freedom.
- The decision in *Sinclair v Forsyth*¹⁷¹ indicates that an award is made on the nature of the relationship rather than need or dependency.

¹⁶⁸ Administration and Probate Act 1958 (Vic), s 91.

¹⁶⁹ Leonie Englefield "Family provisions, particularly in respect of the uniform succession laws" (paper presented to Law Society of South Australia, Adelaide, 7 May 2009).

¹⁷⁰ *Sinclair v Forsyth* [2008] VSC 250.

¹⁷¹ *Ibid.*

- In such cases the Court is heavily reliant on the (often uncontradicted) evidence of the survivor which is not always the safest course to the truth.
- This approach is likely to lead to greater rather than less uncertainty which, as mentioned in chapter 2 of this thesis, is one of the problems with our present laws.

While this approach is of interest, it is highly unlikely after 100 years of family protection legislation that New Zealand will follow Victoria and abandon its list of eligible claimants.

A *Spouse/partner*

Since 2002 a spouse or partner has been entitled on death to 50% of relationship property under Part 8 of the Property (Relationships) Act 1976. Should a spouse, civil union partner or long term de facto partner of a deceased person retain a right to make a claim for further provision from the estate of a deceased spouse or partner? The right to make a claim was recognised more than 100 years ago in the Testator's Family Maintenance Act 1900 which gave the Court discretion to make adequate provision for the proper maintenance and support of the deceased's wife, husband or children if the deceased failed to do so in his or her will.¹⁷² The reports of the Law Commissions of New Zealand, Scotland, England and New South Wales support this. Indeed, as noted by the New South Wales Law Reform Commission:¹⁷³

... there is no doubt that needs of the surviving spouse or partner have become more and more important over time. ... this reflects a trend in most comparable jurisdictions towards giving more recognition to the needs of the surviving spouse or partner.

As noted in the report of the New South Wales Law Reform Commission,¹⁷⁴ when the Statute of Distributions was passed in England in 1670, the average life expectancy at birth was approximately 38 years for men and 36 years for women; although those who made it to 25 years could expect to live on average until 55 years. In Australia in 2001-2003, the average life expectancy at birth was 77.8 years for men and 82.8 years for women.¹⁷⁵ As noted in chapter 2 of this thesis, life expectancy in New Zealand since 1975 has increased by 6.8 years for females and 9.2 years for males; life expectancy for women was 82.2 years and for men 78.2 years as at March 2009.¹⁷⁶ The consequences of this are first, that the children of a deceased person are now, at the deceased's death, often in their forties and fifties and therefore in most cases, not financially reliant upon their parents; and secondly, the surviving spouse or partner (in their seventies or eighties) is often more reliant upon the deceased, (particularly if the spouse has been retired for 15-20 years) and may live another 10-15 years.

When the Property (Relationships) Act 1976 was enacted, the right to make a separate application for further provision on death was specifically preserved.¹⁷⁷ The entitlement to half of the relationship property was consistent with the other provisions of the Act for equal division and was separate from obligations arising on death which had long been recognised

¹⁷² See s 2; see also N Peart, M Briggs and M Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004) at [1.4].

¹⁷³ New South Wales Law Reform Commission, *Uniform Succession Laws: Family Provision* (NSWLRC R110, 2005) at [1.37].

¹⁷⁴ *Ibid*, at [1.15] and [1.37].

¹⁷⁵ *Ibid*, at [1.15].

¹⁷⁶ "Births and Deaths: March 2009 quarter" (2009) Statistics New Zealand <www.stats.govt.nz>.

¹⁷⁷ See s 57.

in the Family Protection Act 1955. As noted by the New South Wales Law Reform Commission¹⁷⁸ recognition of the needs and primary position of a surviving spouse or partner has, if anything, increased and therefore the right to make application for further provision should be retained.

I discuss the claims of surviving spouses, civil union and de facto partners (“partners”)¹⁷⁹ in more detail later in this chapter because they raise a number of important issues in respect of:

- the difference between relationship property and inheritance rights;
- whether de facto partners in a relationship of short duration should have the same rights as other de facto partners;
- whether separation affects the right to make a claim; and
- competing claims between a spouse/partner and children of the deceased.

It is sufficient for present purposes to say that as a class, spouses and partners should be included as potential claimants on the estate of a deceased person both in relationship property and family protection-type claims.

B Close personal association

What of a person who lives in a close personal association or relationship with the deceased but does not qualify as a de facto partner? While they have rights in contract and tort which are enforceable against an estate, they do not have inheritance or succession rights as such. The New South Wales Succession Act 2006¹⁸⁰ includes amongst eligible claimants "a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death". This was intended to cover non-sexual relationships such as an adult daughter caring for an elderly parent; in contrast the South Australian definition of this term was expressly intended to include de facto and same sex unions.¹⁸¹ In New Zealand the Domestic Violence Act 1995 includes within the meaning of domestic relationship a person who has a "close personal relationship" with another person and the Court may have regard to a number of factors in deciding whether a close personal relationship exists.¹⁸² It is not necessary for there to be a sexual relationship or cohabitation.

This mirrors to some extent the approach taken in Victoria which is discussed above in that it focuses on the nature rather than the category of the relationship with the deceased. It is therefore subject to the same criticism, namely:

- It increases rather than decreases the number of potential claimants and thereby goes against the principle of testamentary freedom.

¹⁷⁸ New South Wales Law Reform Commission, above n 173, at [1.37].

¹⁷⁹ The report of the Scottish Law Commission describes them as “Civil partners” in its *Discussion Paper on Succession* (SLC DP136, 2007).

¹⁸⁰ Section 57.

¹⁸¹ Leonie Englefield, above n 169, at [5].

¹⁸² See Domestic Violence Act 1995, s 4.

- Courts will tend to make awards based on the nature of the relationship rather than need or dependency.
- The court is heavily reliant upon the uncorroborated evidence of the survivor.
- Greater rather than less uncertainty is likely to result.

On scrutiny it seems unlikely that valid inheritance claims by a person in a close personal relationship with the deceased will arise very often. If assets are held jointly they will pass automatically to the survivor. For many years Public Trust have done free wills, as do many solicitors, so there is no financial impediment to signing a will. De facto relationships under the Property (Relationships) Act 1976 require neither cohabitation nor a sexual relationship,¹⁸³ so many in a close personal relationship will qualify as de facto partners. Therefore it is only if the deceased holds property in his or her sole name or as a tenant in common, the relationship does not qualify as a de facto relationship and the deceased dies intestate (or even less likely, with a will that does not provide for the other person in the close personal relationship) that a potential claim will arise. If this is the situation, it must be very doubtful that a claim should be available; particularly if the deceased has gone to some lengths to leave out the claimant.

It is unlikely that New Zealand will follow this approach in light of the legislative history in this area and the principle of testamentary freedom discussed in chapter 3 of this thesis.

C Minor children

There can be little argument that minor children of a deceased person should be able to claim further provision from the estate of the deceased. If the will-maker had survived, there would normally have been obligations to provide for minor children and this obligation transfers to the estate on death. This was recognised in the Testator's Family Maintenance Act 1900. The report of the New South Wales Law Reform Commission¹⁸⁴ includes non-adult children as one of three categories of persons who can make application for further provision from an estate and the Queensland Law Reform Commission had similar proposals.¹⁸⁵ The reports of the Law Commission¹⁸⁶ agree. This raises issues about the basis for such provision and also competing claims with a surviving spouse or partner which are discussed later in this chapter.

For the sake of clarity, I propose that the current right of minor biological or adopted children of a deceased person to make a claim for further provision from the deceased's estate be retained; this right would subsist irrespective of whether the child was being maintained or eligible to be maintained by the deceased. There are situations where a parent has no obligation to maintain his or her minor child. For example, if a child or parent is overseas, relief may be available, and there are other exemptions in the Child Support Act 1991.¹⁸⁷

¹⁸³ Section 2D(2) Property (Relationships) Act 1976 lists nine factors to be taken into account when determining whether a de facto relationship exists and "common residence" and the existence of a sexual relationship are only two of these factors.

¹⁸⁴ New South Wales Law Reform Commission, above n 166, Draft Family Provision Bill 2004 cl 6.

¹⁸⁵ Queensland Law Reform Commission *Family Provision* (QLRC R58, 2004) Family Provision Bill 2004 cl 6.

¹⁸⁶ Law Commission, above n 157, at [70].

¹⁸⁷ Section 25.

However, in principle a minor child should be eligible to claim against the estate of a natural or adopting parent.

When does a person cease to be a minor? Under the Age of Majority Act 1970 a person ceases to be a minor at 20 years of age. However, the Minors' Contracts Act 1969 provides that a minor is a person aged under 18 years¹⁸⁸ and 18 is the age in the United Nations Convention on Rights of the Child. The Scottish Law Commission proposed that a new "alimentary obligation" should be available to a child of the deceased, and it further proposed that "child" should mean a person under the age of 18 years, or if undergoing appropriate education or training, a person under the age of 25 years.¹⁸⁹ Under the Child Support Act 1991, liability for child support terminates when the child turns 19 years.¹⁹⁰ Many New Zealanders are still in tertiary education at 19 or 20 years of age and are therefore dependent or semi-dependent. I propose therefore for the purposes of succession law, that a minor be a person aged under 21 years.

A number of New Zealanders aged 18 years are still at secondary school so 18 years is too young. The problem with extending claims to children aged up to 25 years if undergoing "appropriate" education or training, as proposed by the Scottish Law Commission, is that it begs the question what is "appropriate" education or training? Does it have to be fulltime, or will part time do? Does the training need to be job or career specific, or will any study or training do? By the age of 21 years most New Zealanders have had the opportunity to complete tertiary qualifications, or be three years into tertiary education. While the age of 21 years differs from the ages specified in the Child Support Act 1991 and the Age of Majority Act 1970, and may add further confusion in the minds of many as to when a minor legally becomes an adult, most New Zealanders would regard a 21-year-old as an adult; sufficient time has been allowed to commence and advance tertiary study or qualifications. It is common will drafting practice in New Zealand to specify that the entitlements of children vest on attaining 21 years of age.

D Adult children

Adult children of a deceased create greater problems. With increased life expectancies it is now very common for the children of a deceased person to be in their 40s and 50s and completely financially independent from their parents. Why should the deceased have obligations to provide for those children on death? As noted in the report of the Scottish Law Commission:¹⁹¹

Compulsory shares for children reflect a static society where inherited wealth was very important: nowadays there are many more opportunities for people to amass their own wealth and indeed are expected to do so. Inheritance from a parent should no longer be viewed as a right.

The New South Wales Law Reform Commission¹⁹² recommended that the rights of non-adult children to seek further provision be limited to those to whom the deceased owed a

¹⁸⁸ Section 2.

¹⁸⁹ Scottish Law Commission *Discussion Paper on Succession* (SLC DP136, 2007) at [3.80].

¹⁹⁰ Section 5.

¹⁹¹ Scottish Law Commission, above n 189, at [3.96].

¹⁹² New South Wales Law Reform Commission, above n 166, cls 7 and 11.

responsibility to provide maintenance, education or advancement in life. The Commission also set out a list of relevant factors to be taken into account by the Court and the list includes any physical, intellectual or mental disability of the proposed applicant. The financial resources and needs of the applicant were also seen as a relevant factor.

In the context of claims by adult children, the most understandable cause of complaint in New Zealand is the increasingly common situation where the surviving parent of adult children gives his or her estate to a new spouse or partner (who is not a parent of the deceased's adult children) and thereby effectively disinherits them. The complaint is that assets built up by both parents of the adult children pass to a third party rather than to the children; that is, the adult children miss out on the assets built up by both of their parents and a third party receives them. While these situations undoubtedly create disappointment for the surviving children, does this justify imposing a legal obligation on the parents to provide on death for independent adult children? As noted earlier in this chapter, many New Zealanders do not accept that it does.

The other side of the coin is the increasingly common scenario where a middle-aged child has neglected his or her parent for many years thereby placing a physical and financial burden on other children during the parent's later years. When left out of the will the neglectful middle-aged child, who may be well off financially, makes a family protection claim against what may be a modest estate. The other children feel duty bound to defend the claim and their parent's expressed wishes. The result is significant legal costs, delay in administration and a fragmented family. There is no question of financial need or desert. While these cases are often settled financially, personal relationships can be destroyed by the process. The decisions in this area refer to "recognition"¹⁹³ but it is difficult to see how an award of money by the Court replaces recognition by the deceased. It is difficult to believe that this all too common scenario was envisaged by the framers of the original legislation or that the Family Protection Act 1955 was intended for this type of application.

E Law Commission

In 1997 the Law Commission recommended in respect of adult children that they should have only the following claims:¹⁹⁴

- in respect of valuable benefits they have conferred on a parent during the parent's lifetime; or
- where they are genuinely in need and it is possible without unfairness to those otherwise entitled to the estate of the deceased to provide periodical payments sufficient to alleviate that need; or
- where what is sought by the child is no more than a memento or keepsake of modest value; and these memento claims would be disposed of swiftly and simply by a disputes tribunal.

In essence, the Law Commission proposed that very limited claims be available to adult children. Indeed, if the three suggested claims are analysed, there are doubts that even they

¹⁹³ See *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [166].

¹⁹⁴ Law Commission, above n 157, at [72]-[77].

should be retained. In relation to the first, if a child confers a benefit on a parent there is no presumption under New Zealand law that this was a gift; the presumption of advancement does not apply in relation to benefits conferred by a child to a parent.¹⁹⁵ The benefit will therefore be treated as a loan which can be recovered from the parent's estate; unless a gift was intended by the child, in which case it should not be recoverable anyway.

The second category is genuine "need" where it is possible without "unfairness" to others to provide periodical payments. I will discuss the meaning of "need" very shortly in this thesis, but in short, "need" has been one of the criteria under the Family Protection Act 1955 for many years, and different interpretations of that word have led to some of the current problems. The word "unfairness" similarly creates uncertainty and introduces further subjectivity to this area. The difficulty with this second category is that it leaves the way open to different judges to give inconsistent meanings to terms such as "need" and "unfairness", and thereby cause more uncertainty.

With respect to the third category, mementos or keepsakes, despite what the Law Commission says, decisions about which family member should get a ring or other personal item often create huge arguments between family members. Sometimes the item in question can be valuable and it is unrealistic to suggest that these disputes can be resolved swiftly and simply by a disputes tribunal. The claims are often based upon alleged promises by the deceased, sometimes going back many years. This type of dispute is sometimes resolved by putting the item in question up for auction at which the competing claimants can bid. This category can become very emotive and divisive, and is best left out altogether.

F Options

The options based on our current laws and the New Zealand, Scottish and Australian reports are:

- adult children are eligible to claim if in "need"; or
- adult children can claim if "dependent" upon the deceased; or
- adult children cannot make any claim at all.

The problem with "need," is that this is the ground for claims at present and as just discussed, this has led to major problems. Claims by adult children on the ground of need are one of the biggest problem areas at present. As pointed out by Sutton and Peart,¹⁹⁶ one obvious objection to "need" and "dependency" is that if there is no obligation on a parent to provide for adult children while alive, it is not logical for this to be imposed on death. Need and dependency as grounds for a claim will penalise children who, in most cases, through hard work, have become independent and will reward those who have not. As one commentator has pointed out, self-reliance is a laudable principle which is often forgotten in family provision cases.¹⁹⁷

¹⁹⁵ N Kelly, C Kelly and G Kelly *Garrow and Kelly's Law of Trusts and Trustees* (6th ed, LexisNexis, Wellington 2005) at [14.4.4].

¹⁹⁶ Richard Sutton and Nicola Peart "Testamentary Claims by Adult Children – The Agony of the Wise and Just Testator" (2003) 10 Otago LR 385.

¹⁹⁷ Rosalind F Croucher "Towards uniform succession in Australia" (2009) 83 ALJ 728 at 751.

Another problem with “dependency” is that it is very difficult to define precisely. Does it need to be financial? Does it include gifts or loans from a parent from time to time? Is partial dependency sufficient? If so, how does one define or calculate partial dependency? What if a child is dependent on a parent through choice but not necessity? Should it be linked to tertiary education? That would be unfair on those who do not have the good fortune to receive tertiary education or are simply not academic. One option is to define dependency in narrow terms such as limited to full time tertiary study or being in receipt of a sickness or similar benefit. The problem with linking entitlements to tertiary study is whether the study needs to be job or career specific and fulltime, or whether any part time study will do. In terms of eligibility for a State benefit, does this need to be on a long term basis or will short term eligibility suffice? Does eligibility need to exist at the time of death or will previous eligibility suffice? Will a person who qualifies for accident compensation or cover under a disability policy qualify? This leaves the way open to abuse as there may be those who will change their circumstances in order to qualify for further provision.

If the intention is to create certainty and clarity, the simplest course is to exclude claims by adult children completely. Once a child has reached a certain age, regardless of family practices, needs or other problems, there is no entitlement to make a claim on a parent’s estate. This accords with our current child support laws while a parent is alive and it is difficult to justify a departure from this when a parent has died. One argument against this is that it increases the burden on the State but again, this occurs while the parent is alive or at present if a parent transfers assets while alive to a discretionary family trust.

The Law Commission has pointed out that there is no specific evidence to support the view that there is general acceptance of the exact content of a will-maker’s moral duty to adult children. The Commission also pointed out that it cannot be assumed in this context that New Zealand society is culturally and ethnically homogenous and the assumption of homogeneity may make it difficult for will-makers and their families to have their different ethnic and cultural values recognised, respected and protected.¹⁹⁸ As the Law Commission stated:¹⁹⁹

The consequences of the absence of any norm of this kind are that a deceased’s perception of his or her moral duty is overruled by a particular judge’s assessment of current social norms. This assessment is necessarily based on the judge’s personal sense of the fitness of things shaped by such factors as religious and cultural background, family history and attitudes and personal experiences.

The law has become unclear in its purposes. Failure by the Courts to articulate (beyond the obscure concept of moral duty) why precisely they are altering a will-maker’s arrangement results in a situation where wills are varied according to the subjective values of the particular judge who chances to deal with the matter. This makes it difficult to assess whether the Court’s distribution is more commendable than the will-maker’s. There are appreciable differences in the awards made to adult children. These differences mean that conscientious will-makers find it hard to know and comply with the requirements of the law and bring it into disrepute.

¹⁹⁸ Law Commission, above n 157, at [33].

¹⁹⁹ Ibid, at [33]-[34].

In the same 1997 Report, the Law Commission noted²⁰⁰ that almost 90% of those who commented on claims by adult children, accepted the commission's analysis that the present law is seriously deficient.

Views on the extent of a will-maker's responsibility to provide for adult children vary widely depending upon factors such as:

- the personal circumstances of the will-maker and children;
- the differing relationships between will-makers and their children;
- cultural and ethnic background;
- personal views;
- specific assets.

For example in relation to cultural and ethnic background and specific assets as discussed in chapter 5 of this thesis, the Te Ture Whenua Maori Act 1993 recognises that for Maori land and taonga²⁰¹ have a deep spiritual meaning.

As Sutton and Peart point out,²⁰² even if it is accepted as conventional morality that a will-maker should provide for adult children, it does not follow that this should become law. It should only become law if capable of being focussed in a satisfactory way; the law should meet certain quality standards. Sutton and Peart argue²⁰³ that there are problems with both "distributive" and "corrective" types of justice. What are the criteria for redistributing an estate? Equality? Fairness? Economic need or dependency? Amount of contact with the will-maker? The problems with "corrective" justice are quantifying "needs", balancing the competing claims of other children and spouses and then dividing up what may be only a modest estate.

G Summary

1. There is no evidence of consensus in New Zealand that a will-maker owes duties to provide for adult children.
2. If there is a general consensus on this point, there is likely to be very significant variation in views on the scope of that consensus based on personal circumstances, cultural values and age.
3. There is no clear conceptual basis upon which to base laws requiring provision for adult children.

²⁰⁰ Ibid, at [35].

²⁰¹ "Taonga" has been defined as a valued possession or anything highly prized and may include any material or non-material thing having cultural or spiritual significance for a given tribal group. See N Peart, M Briggs and M Henaghan (eds), above n 172 at [17.3.1]; also Waitangi Tribunal Ngawha Geothermal Resource Report (Wai 304,1993) at 20.

²⁰² R Sutton and N Peart, above n 196, at 394-395.

²⁰³ Ibid, at 399.

As explained in chapter 1, the policy behind the original family protection legislation was to ensure that the needs of spouses and dependent children were met as far as possible from the estate of a deceased person. There was no intention to impose mandatory provision for independent middle aged children in competition with a surviving spouse or partner. However, that has now become common as people are living longer and marrying or re-partnering later in life. The Court of Appeal decisions discussed in chapters 1 and 2 of this thesis²⁰⁴ establish that there is no obligation to establish “necessitous circumstances” in many cases, but impose an obligation on the ground of “recognition”. However, the statute itself does not refer to “recognition”. The 10% recognition awards discussed and made in a number of these cases are arbitrary and not articulated in the statute.²⁰⁵ Experience in this area has shown that problems arise if a duty is imposed without a clear underlying conceptual basis and community acceptance of that conceptual basis. Handing the problem over to judges and giving them a wide discretion but minimal criteria (which is the current position) is demonstrably unsatisfactory.

This view has been mirrored in Australia where, as noted by the Northern Territory Law Reform Committee,²⁰⁶ once a court is given power to override a testator's discretion and impose its own discretion in accordance with broad principles of equity it is difficult to restrict such principles only to some specified cases and not to others. It is essential that reform in this area be clear and capable of consistent application.²⁰⁷ At present in the area of inheritance claims by adult children, that is not possible. It is concluded, therefore, that there should be no entitlement for adult children to make testamentary claims as currently exist in the Family Protection Act.

H Accepted children

So far, I have discussed only biological or adopted²⁰⁸ children of a deceased person. What of minor dependent children who have been accepted and/or brought up by the deceased as part of the family (“accepted children”)?²⁰⁹ In New Zealand, such children have traditionally been called “stepchildren” or “foster” children. For some years now in New Zealand, liability for child support has arisen where a step-parent declaration has been made by the Court; the Court looks at the following factors:²¹⁰

- the responsibility which the putative step-parent has exercised in relation to the child;
- knowledge of the parentage of the child;

²⁰⁴ *Williams v Aucutt*, above n 193 at [50]; *Henry v Henry* [2007] NZFLR 640 at [45].

²⁰⁵ *Williams v Aucutt*, above n 193 at [76]; *Henry v Henry*, above n 204 at [46].

²⁰⁶ Northern Territory Law Reform Committee *Report on Uniform Succession Laws* (NTLRC R31, September 2007) at 7.

²⁰⁷ Lord Bingham of Cornhill “What is the Law?” (Robin Cooke Lecture 2008, Victoria Faculty of Law, Wellington, 4 December 2008) stated that the “core of the rule of law principle” is that all persons should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the Courts. He went on to say that observance of this principle requires that the law should be accessible and so far as possible intelligible, clear and predictable.

²⁰⁸ I am assuming that adopted children will continue to have the same inheritance rights in New Zealand as biological children of a deceased person.

²⁰⁹ The Scottish Law Commission uses the term “accepted children” - see above n 179 at [2.71].

²¹⁰ Child Support Act 1991, s 99; see also Webb and others *Family Law in New Zealand* (14th ed, LexisNexis, Wellington, 2009) at [5.204]-[5.205].

- liability of any other person to maintain the child;
- appointment as guardian;
- the marital status of the parties;
- overall assessment and other factors.

The Property (Relationships) Act 1976 in s 2 defines “child of the de facto relationship” and “child of the marriage.” One text²¹¹ notes that a child living with the partners or spouses all the time and who is treated by them as part of the family would be a child of the relationship. The child should not be a mere visitor and should live in the partners’ residence for a significant part of time. The child should be treated as a member of the family as shown through inclusion in family life and activities. I refer to this as a “child of the family”.

One of the purposes of the Testator’s Family Maintenance Act 1906 was to provide for dependent minor children. Due to the significant increases in marriage dissolutions, remarriage and re-partnering discussed earlier in this thesis, accepted children are now very common in New Zealand. If minor dependent children of a will-maker can claim further provision, it is difficult to argue that accepted children or a child of the family who are also minor and dependent should be excluded from the right to make a claim. Logically, minor accepted children or a child of the family who were being maintained by the deceased should be able to make application for further provision from a deceased’s estate. This right should also be extended to “whangai” (persons adopted in accordance with Maori custom) who were being maintained by the deceased or were accepted as part of the family unit. “Whangai” do not currently come within the class of persons entitled to claim under the Family Protection Act 1955.²¹²

It is difficult to see how the positions of minor dependent whangai and minor dependent stepchildren differ. A stepchild of the deceased can currently make a claim under the Family Protection Act 1955 if being maintained wholly or partly or if legally entitled to be maintained wholly or partly by the deceased immediately before death.²¹³ This should extend to minor accepted children and whangai. For the reasons set out earlier in this chapter this should not extend to adult stepchildren, accepted children and whangai. Later in this chapter the conceptual basis for claims by accepted children and whangai is discussed.

I Parents

The current position in New Zealand is that parents of a deceased person who were being maintained wholly or partly by the deceased immediately before the deceased’s death are entitled to make a claim.²¹⁴ Parents who were not being maintained by the deceased can also make a claim for further provision where there are no competing claims by a spouse, partner, or child of a marriage, civil union or de facto relationship of the deceased.²¹⁵ Again, as with adult children, there is no legal obligation to maintain a parent while the will-maker is alive. The State provides a safety net in the form of New Zealand Superannuation for those over 65

²¹¹ N Peart, M Briggs and M Henaghan (eds), above n 172, at [2.6.2(1)].

²¹² *Re Walker (deceased)* [2002] NZFLR 481; *Keelan v Peach* [2003] 1 NZLR 589 (CA).

²¹³ See s 3(1)(d).

²¹⁴ See s Family Protection Act 1955, s 3(1)(e)(i).

²¹⁵ See Family Protection Act 1955, s 3(1)(e)(ii).

years and those who have need of greater care are eligible for rest home accommodation. If adult children who are dependent upon the deceased are not entitled to make a claim, it follows that the deceased's dependent parents should not be able to make a claim. Indeed people over 65 years have greater eligibility for assistance from the State. Many people will provide for parents in their wills, but that does not justify imposing a legal obligation to do so. Again, without a clear consensus about the content and extent of a will-maker's obligations to provide for particular parties (such as adult children or parents), it is very difficult to legislate clearly for this; attempts to do so are likely to be unsuccessful.

J Grandchildren

Currently in New Zealand grandchildren of whatever age can make claims on the estate of a deceased person.²¹⁶ Consideration of claims by grandchildren is affected by provision made by the deceased for the parents of the grandchild or grandchildren.²¹⁷ However, adult grandchildren do not "step into the shoes" of a parent who dies before the will-maker.²¹⁸ If the claims of children, stepchildren and accepted children are limited to minor children who were being maintained by the deceased, it follows that the claims of grandchildren must be similarly limited. It would be very difficult to justify a duty to maintain and provide for adult grandchildren but not adult children. Similarly, if grandchildren have been "*accepted*" by the deceased or were members of the family because, for example, the parent of the grandchildren (being a child of the deceased) has died prematurely or simply cannot look after the grandchildren adequately, they would qualify as accepted children or whangai and it follows that such minor dependent grandchildren should be able to make a claim on the same basis as accepted children.²¹⁹ The basis for and extent of such a claim is discussed later in this chapter.

Indeed, taking into account the trend towards longer life expectancies discussed earlier in this thesis,²²⁰ the needs of minor grandchildren may be greater than those of their adult parents. For example, if a will-maker has accepted responsibility to bring up a grandchild because the grandchild's parent (being a child of the will-maker) cannot do so adequately, it may be that the will-maker's primary obligations are to the minor dependent grandchild and not the grandchild's adult parent. Even if the adult child of a will-maker is responsible for bringing up his or her minor children, the will-maker's obligations to minor grandchildren in "necessitous circumstances" may be greater than those owed to an adult child, particularly one who is well off. The conceptual basis for claims by minor children and grandchildren is discussed later in this chapter.

K Great-grandchildren

It is now common for New Zealanders to have great-grandchildren when they die. At present, great-grandchildren have no rights to claim further provision under the Family Protection Act 1955. They do, however, have potential entitlements on intestacy because they are "issue"²²¹ and there are also potential entitlements under the Wills Act 2007 if a will disposes of

²¹⁶ Family Protection Act 1955, s 3(1)(c).

²¹⁷ Family Protection Act 1955, s 3(2).

²¹⁸ *Re Broderick: Chalk and Others v Hoare and Stout* HC Palmerston North CIV 2008-454-736, 18 March 2009.

²¹⁹ See Part I, H of this chapter.

²²⁰ See chapter 2 of this thesis.

²²¹ Administration Act 1969, s 78.

property to “issue”.²²² However, it is unnecessary to extend claims for further provision from an estate to great-grandchildren because the likelihood of a great-grandchild being maintained by a great-grandparent or in need of support from a great-grandparent is very remote. Claims by grandchildren for further provision are currently seen as considerably weaker than those of children,²²³ and claims by great-grandchildren must be even weaker to the point where in most, if not all, cases it is very difficult to accept there is any duty at all. If, however, a great-grandchild has become dependent upon or is “accepted” by a will-maker or is a member of the family, that great-grandchild would qualify as an “accepted child” and, on that basis, would potentially be able to claim further provision. The basis for a claim would therefore be acceptance by the deceased or being a member of the family.

II *Claims by Spouses and Partners*

It is important to state the current pre-requisites to a claim by spouses and partners. At present in New Zealand a spouse or civil union partner (no matter the length of the marriage or civil union) can make a family protection claim. Under s 3(1)(aa) of the Family Protection Act 1955, a de facto partner²²⁴ can also make a claim if living in a de facto relationship with the deceased at the date of death and provided that the relationship is not one of short duration (generally under 3 years' duration).²²⁵ Even where the relationship is one of short duration, the Court can make an award if satisfied:²²⁶

- “(i) That there is a child of the de facto relationship; or
- (ii) That the de facto partner has made a substantial contribution to the de facto relationship; and
- (b) The Court is satisfied that failure to make the Order would result in serious injustice to the de facto partner.”

This is in keeping with provisions in the Property (Relationships) Act 1976 in respect of property claims. This also has close similarities to the proposals of the New South Wales Law Reform Commission.²²⁷ The apparent reason for the difference between spouses and civil union partners on one hand and de facto partners on the other is that a marriage or civil union is seen as a public and binding commitment by both parties whereas this does not necessarily exist in a de facto relationship. If there is such a public binding commitment, death within the early stages of a marriage or civil union should be treated similarly to death at later stages of the marriage or civil union. Arguably, there may not be the same commitment where death occurs in the early stages of a de facto relationship.²²⁸ At present, a surviving spouse, civil union or de facto partner (other than de facto partners of short duration) has significant relationship property rights. These will normally amount to half of the relationship property.²²⁹ These rights have priority at present over family protection,

²²² Wills Act 2007, s 24.

²²³ *Re Broderick*, above n 218.

²²⁴ As defined in Property (Relationships) Act 1976, s 2.

²²⁵ See Property (Relationships) Act 1976, s 2E for a definition. In general terms this applies where the de facto partners have lived together as de facto partners for less than 3 years.

²²⁶ See Family Protection Act 1955, s 4A(2).

²²⁷ New South Wales Law Reform Commission, above n 166, at [1.4].

²²⁸ A recent Court of Appeal decision *Bourneville v Bourneville* [2009] NZFLR 69 at [21] contains a comment about the nature of marriage as opposed to de facto relationships.

²²⁹ This mirrors the entitlements of the parties on separation.

testamentary promises and claims under the will of the deceased or on intestacy.²³⁰ While some have argued that separation and death are quite different events and should have different consequences,²³¹ in many situations in New Zealand, relationship property is owned by both parties to the relationship and very often they have equal entitlements. It is therefore simple and logical for those relationship property rights or entitlements to continue after one of the partners dies. It would be unfair for relationship property rights to continue after separation but disappear in the event of death. In 1997, the Law Commission recommended that widows and widowers have rights to apply for a property division and also make a “support claim” to permit the claimant to enjoy a reasonable, independent standard of living²³². There is no need to change the current criteria for relationship property claims on death by spouses, civil union and de facto partners; there is merit in keeping them the same as relationship property rights on separation.

What about family protection-type claims for further provision by a spouse, civil union or de facto partner? It has been recognised for some years in New Zealand that property rights under the Property (Relationships) Act 1976 (formerly the Matrimonial Property Act) are different from family protection claims. For example, in *Re Churchill*,²³³ it was pointed out that the purpose of the Matrimonial Property Act 1976 is to enable each spouse to obtain proper recognition of what is truly his or hers; whereas the Family Protection Act is intended to enforce a duty which is owed to the other to make provision for proper maintenance and support out of what is truly his or hers. This is recognised in the Property (Relationships) Act 1976.²³⁴ One right is based on property entitlements and the other on succession or inheritance entitlements; they are distinct rights and different considerations apply to each. Nevertheless, the rights of a surviving spouse, civil union or de facto partner on death to half of the relationship property are a very relevant factor when assessing a claim under the Family Protection Act 1955.²³⁵

A *Separation*

What should happen when spouses, civil union partners and de facto partners separate prior to death? In the case of spouses and civil union partners, at present separation does not of itself bar provision under the Family Protection Act 1955; although as Patterson points out,²³⁶ separation may be a relevant factor in terms of moral duty. In contrast, a condition of a de facto partner’s right to bring a family protection claim is that the de facto partner and deceased were living in a de facto relationship at the date of death.²³⁷ Why is there a difference? The position in respect of spouses and civil union partners is consistent with the provisions in the Wills Act 2007²³⁸ that (in the case of spouses and civil union partners) a will is not affected by separation unless a dissolution or separation order has been made before death. The difference is that, legally, a marriage or civil union subsists until a

²³⁰ See Property (Relationships) Act 1976, s 78.

²³¹ N Peart, M Briggs and M Henaghan (eds), above n 172, at [2.2].

²³² Law Commission, above n 157, at [53].

²³³ *Re Churchill* [1978] 1 NZLR 755; see also *Re Hilton* [1997] 2 NZLR 734.

²³⁴ Sections 78 and 57.

²³⁵ This was accepted in *Wylie v Wylie* (2003) 23 FRNZ 156 (CA).

²³⁶ WM Patterson *Law of Family Protection and Testamentary Promises* (3rd ed, LexisNexis, Wellington, 2004) at [8.8].

²³⁷ Family Protection Act 1955, s 3(1)(aa).

²³⁸ Wills Act 2007, s 19.

dissolution order is made or one or both of the parties dies.²³⁹ However, it is anomalous that despite a lengthy and perhaps even acrimonious separation and division of relationship property, the survivor can make a family protection claim if the marriage or civil union has not been dissolved.²⁴⁰ Few people are aware of this.

The termination of a de facto relationship is much harder to define because no dissolution order can be obtained by de facto partners. The clearest ways to define termination of a de facto relationship are physical separation and death. Unlike marriage and civil unions, there is no formal register of de facto relationships. It is strongly arguable that the rights of spouses and civil union partners to claim further provision should also terminate on separation even if this conflicts with the legal position that marriage and civil unions subsist until death or the making of a dissolution order. If a couple have legally separated and resolved property matters they should not be required to dissolve their marriage or civil union to prevent a family protection claim. Legal separation involves both physical and mental elements.²⁴¹ “Legal separation” will need to be defined in the Code and this term is used subsequently in this thesis. It is anomalous also that the survivor of a long-term but terminated de facto relationship should be worse off than the survivor of a short-term marriage where the couple have separated. It is not a satisfactory answer that proof of physical separation is difficult to establish (as opposed to a dissolution order): that question frequently arises in relationship property disputes while couples are alive and on death. Therefore, the current legal position should change: family protection (or as I subsequently call them “support”) claims by spouses or civil union partners should not be available if the parties have been legally separated. Like de facto partners, they should only be able to make a support claim if living with the deceased at the time of death.

B De facto relationships of short duration

Should a surviving de facto partner in a relationship of short duration be able to make a family protection-type claim for further provision? At present they cannot, but the court can make an award if satisfied:

- that there is a child of the de facto relationship; or
- that the de facto partner has made a substantial contribution to the de facto relationship; and
- that failure to make the order would result in serious injustice to the de facto partner.

It is important to remember the difference between relationship property and family protection claims. If there is a child of the de facto relationship, that child has a right to seek further provision; if a minor, a claim can be made on behalf of the child. If the surviving de facto party in a relationship of short duration has made a substantial contribution to the de facto relationship, then it is logical for a claim to be available in respect of relationship property, but it does not follow that a family protection claim should be available; the claims are conceptually different.

²³⁹ *Bourneville v Bourneville*, above n 228, at [21] for comments on the difference between a marriage and a de facto relationship.

²⁴⁰ This happened in *Re Hilton*, above n 233.

²⁴¹ See N Peart, M Briggs and M Henaghan (eds) above n 172 at [2.6].

If the relationship is less than three years in duration, the couple have not married or entered a civil union and the deceased has not made a will in favour of the surviving de facto partner, it is unfair to impose family protection obligations in favour of the surviving de facto partner. If the couple have not married or entered into a civil union and if the relationship is of short duration, it is doubtful that the survivor has achieved the paramount or primary position in the deceased's life that is an important part of family protection claims by spouses and partners. Any child of the relationship would have a separate claim. As pointed out in chapter 1 of this thesis, the term "serious injustice" has created problems previously under the Property (Relationships) Act 1976. The clearest and simplest course is to exclude altogether a family protection claim by a surviving de facto partner where the relationship is of short duration.

This raises the question whether the provision in Part 8 of the Property (Relationships) Act 1976 relating to relationship property on death should be incorporated in any inheritance or succession code, or should stay in the Property (Relationships) Act 1976. I discuss this point in chapter 9 of this thesis but in short, a code is by nature intended to be comprehensive and should include all relevant laws.

C Appropriate conceptual basis for claims

Bearing in mind the difference between relationship property rights and family protection claims, what is the appropriate conceptual basis for claims by surviving spouses, civil union or de facto partners for further provision from an estate? Should it be based just on need or should there be additional recognition of the importance of the relationship? The New South Wales Law Reform Commission noted²⁴² a trend towards giving more recognition to the needs of the surviving spouse or partner and this is reflected in the 2009 amendments to the New South Wales Succession Act. For many years, the courts in New Zealand have regarded the widow of a deceased as having a paramount claim²⁴³ and in the first reported case in New Zealand in this area,²⁴⁴ Edwards J pointed out that the position of the widow differed from that of the will-maker's adult children both in needs and in law. While need is a relevant factor, the importance of marriage, a civil union or a de facto relationship, particularly where it has existed for many years must give rise to greater obligations and expectations. In most cases there exists an additional element which elevates the importance of the relationship beyond mere need or dependency. The Law Commission recommended²⁴⁵ that surviving spouses and de facto partners have the right to apply for property division (now under the Property (Relationships) Act 1976) and also for a "support" claim to permit the claimant to enjoy a reasonable, independent, standard of living until the claimant can reasonably be expected to achieve an independent standard of living. The trend overseas also is to give greater recognition to the rights of surviving spouses and de facto partners and clearly this extends beyond mere financial need.²⁴⁶ The Law Commission's recommendation that surviving spouses or de facto partners should be able to make "support" claims enabling them to enjoy a reasonable, independent standard of living until reasonably able to achieve an independent standard of living should be extended also to civil union partners.

²⁴² New South Wales Law Reform Commission *Uniform Succession Laws: Intestacy* (NSWLRC R116, 2007) at [1.37]; NSW Succession Amendment (Intestacy) Act 2009, Schedule 1, Chapter 4.

²⁴³ Patterson, above n 236, at [8.1]

²⁴⁴ *Re Rush* (1901) 20 NZLR 249.

²⁴⁵ *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [53] and [57].

²⁴⁶ New South Wales Law Reform Commission, above n 166 at [2.7].

One of the significant changes made by the Property (Relationships) Act 1976 was to empower the court under ss 15 and 15A to redress future economic disparity between the parties resulting from the division of functions during the marriage, civil union or de facto relationship. However, the focus on future economic disparity precludes the application of these sections on death.²⁴⁷ Any disadvantage resulting from this is at present overcome by an award under the Family Protection Act 1955 and this should continue by way of a “support” award. While this may appear to create some uncertainty and may appear contrary to the arguments advanced earlier in this thesis, for clarity and consistency “support” claims should be made available for a surviving spouse, civil union or de facto partner because of his or her special place in the life of the deceased. Uncertainty and inconsistency can be minimised for the following reasons:

- The whole of the deceased’s and the survivor’s property (including relationship and separate property) would be taken into account in a “support” award.
- The purpose of the award would be to assist the survivor to attain a reasonable independent standard of living until reasonably able to achieve that position personally.
- The criteria for such an award would have some similarities to the criteria for assessment of spousal maintenance under the Family Proceedings Act 1980: matters such as the assets of the estate and survivor, the needs of the survivor and his or her obligations, would be taken into account.²⁴⁸
- Support claims would not be based upon “moral duty” or the likely views of the “wise and just testator”.

Arguably such an award would be similar to adult maintenance as currently allowed under the Family Proceedings Act 1980²⁴⁹. It could be contended that, rather than allow specifically for an award, why not simply continue existing adult support orders or obligations or make an assessment of adult maintenance on death. Virginia Grainer puts forward this argument: family protection awards should be replaced by continuation of adult maintenance - to be assessed at death (on a basis similar to separation) and two years after death (on the same basis as dissolution).²⁵⁰

However, the conceptual bases for adult maintenance and a support award are very different. Adult maintenance is usually paid or awarded where a couple are alive and separate; payment is made for a limited time and one of the relevant factors in assessing it is the likely earning capacity of each party²⁵¹. Another factor is ongoing care of minor children. Based on these factors, death is very different from separation. Awards also need to be reviewed and reassessed in light of changed circumstances at death and the possible existence of competing claims. Death is very different from separation and obligations to a spouse or partner and the ability to finance these obligations will change significantly on death. While it would be possible for support payments to be made on a periodic basis as well as in one lump sum, in practical terms the better course in most cases would be a lump sum payment so that the

²⁴⁷ N Peart, M Briggs & M Henaghan (eds), above n 172, at [2.1.5].

²⁴⁸ Webb and Others, above n 210, at [5.12].

²⁴⁹ Section 67.

²⁵⁰ Virginia Grainer “The Family Protection Act 1955: Time for Reform?” (LLM Thesis, Victoria University of Wellington, 1997) at ch 13.

²⁵¹ Family Proceedings Act 1980, s 63(1).

estate in question can be wound up and paid out. Payments on a periodic basis will prolong estate administration. A further difference is that on separation, non-financial assistance will continue to be available. After death, non-financial assistance will be lost and compensation for this loss is appropriate.

D Statutory legacy

The Scottish Law Commission²⁵² undertook a world-wide review of legislation and inheritance provision in this area. The Commission discussed the position in German law where a spouse or civil partner is entitled to a *Pflichtteil*²⁵³ amounting to one half of the amount which the applicant would have received if the deceased had died intestate. The Scottish Law Commission recommended²⁵⁴ that a surviving spouse or civil partner's legal share be calculated on 25% of what he or she would have received if the deceased had died intestate. Earlier in that report the Scottish Law Commission had recommended that where an intestate is survived by a spouse or civil partner and issue, the spouse or civil partner should receive a fixed sum of £300,000 (or the whole estate if under this amount) and any excess over £300,000 is to be divided equally: half to the spouse/partner and half to the issue.²⁵⁵

For many years in New Zealand, surviving spouses (and since 2002 de facto partners) have been entitled on intestacy to a "*prescribed amount*" or statutory legacy²⁵⁶ under the Administration Act 1969²⁵⁷ where the deceased was survived by a spouse/partner and issue. The statutory legacy is increased by Order in Council. I discuss entitlements on intestacy in chapter 5 of this thesis and will set out proposals for the entitlements of surviving spouses and partners. For the present, I suggest in line with the proposals in Germany and Scotland (discussed above) that a surviving spouse, civil union or de facto partner be entitled to make a "support" claim up to a maximum of the statutory legacy. This would of course, be over and above any entitlements under the Property (Relationships) Act 1976 or any entitlements under the deceased's will or on intestacy; although those entitlements would be relevant to the assessment of any support claim.

The benefits of this are:

- To create greater certainty by imposing a financial limit on awards;
- To minimise the likelihood of disparate and inconsistent awards; and
- To link awards to minimum entitlements applicable on intestacy.

E Accommodation

One further aspect needs to be mentioned and that is the provision of housing or accommodation to a surviving spouse or partner. As Patterson points out:²⁵⁸

²⁵² Scottish Law Commission *Discussion Paper on Succession* (SLC DP136, 2007).

²⁵³ Compulsory portion of the estate.

²⁵⁴ Scottish Law Commission, above n 252, at [3.46].

²⁵⁵ *Ibid*, at [2.57].

²⁵⁶ Currently \$155,000.00 from 1 June 2009.

²⁵⁷ Section 77.

²⁵⁸ Patterson, above n 236, at [4.3].

In particular, if a home has not been provided for the widow by the terms of the deceased's will, the court will usually be prepared to make an award to enable the widow, with appropriate contributions from her own resources if necessary, to acquire a home.

I propose, therefore, that the absence or availability of adequate housing accommodation be relevant and taken into account in assessment of support awards to surviving spouses or partners within the statutory legacy. At present under s 27(3) of the Property (Relationships) Act 1976 occupation orders are enforceable against the personal representative of the person against whom it is made. This should continue but be extended so that an occupation order is specifically available to a surviving spouse, partner or minor children.

F Criteria

I propose further, however, that unless settled between the claimant and the estate, a support claim be determined by the court in its discretion and that the maximum amount of any award be the statutory legacy on intestacy.²⁵⁹ In exercising its discretion, the court should, as recommended by the New South Wales Law Reform Commission²⁶⁰ consider relevant factors such as:

- the relationship between the applicant and the deceased including the nature and duration of the relationship;
- the nature and extent of the deceased's obligations and responsibilities to the applicant and to any other family members;
- the nature and extent of the deceased's estate;
- the financial resources and needs of the applicant and any other person applying for further provision or named as a beneficiary in the deceased's will;
- any physical, intellectual or mental disability of the applicant or any other person applying for future provision or named as a beneficiary in the deceased's will;
- the age of the applicant;
- provision made by the deceased while alive to the applicant or under the deceased's will or on intestacy;
- the date of the will and circumstances in which it was made;
- whether the applicant was being maintained wholly or partly by the deceased at the time of death;
- whether any other person is liable to support the applicant;
- the standard of living of the deceased and the applicant while both were alive;

²⁵⁹ See chapter 5 for details of the statutory legacy.

²⁶⁰ New South Wales Law Reform Commission *Uniform Succession Laws: Family Provision* (NSWLRC R110, 2005) at [2.41].

- whether adequate housing or accommodation will be available for a surviving spouse or partner;
- any other matter considered relevant by the court.

These factors, while different, do have some similarities to the factors currently considered by the courts in assessing adult maintenance under the Family Proceedings Act 1980. The relevant factors for adult maintenance currently are the means of both parties, their needs, whether the payer is supporting any other person, the responsibilities of the parties, the standard of living of the parties while they were living together, and any other circumstances that make one party liable to maintain the other.²⁶¹ The factors relevant to a support award are more extensive because, as discussed earlier, death is different from separation. Additional and different factors need to be taken into account and there are obvious changes to the assets and income available to meet a claim.

What is proposed is that after taking these factors (so far as they are relevant) into account, the court can award a surviving partner or spouse up to the amount of the statutory legacy which would have been available on intestacy. If the deceased did die intestate any award would be over and above entitlements on intestacy. The statutory legacy will need to be increased on a regular basis as I will discuss in chapter 5 of this thesis. As recommended by the Law Commission, the award would be by way of support to permit the surviving spouse or partner to enjoy a reasonable, independent standard of living until reasonably able to achieve an independent standard of living. Any award by the court to the surviving spouse, civil union partner or de facto partner would have priority over entitlements under the will or on intestacy and would also have priority over any awards to any other applicant for further provision; but would not exclude claims by minor children, grandchildren or accepted children of the deceased. Where there are competing claims the court would determine the amounts of such claims in its discretion.

G Priorities

However, “support” claims by spouses, partners (and for that matter, minor children, minor accepted children, minor grandchildren and minor accepted grandchildren) should not have priority over claims on an estate under contract or in equity (which I will discuss later in this chapter). Section 78(1) of the Property (Relationships) Act 1976 currently provides that entitlements to relationship property have priority over:

- entitlements under a will;
- entitlements on intestacy;
- orders made under the Family Protection Act 1955 and Law Reform (Testamentary Promises) Act 1949; and
- duties and fees payable in respect of the estate.

However, s 78(2) provides that entitlements under the Property (Relationships) Act 1976 do not have priority over debts properly incurred by the personal representative in the ordinary

²⁶¹ Family Proceedings Act 1980, ss 65(2) and (5).

course of administration and reasonable funeral expenses. These rules should continue to apply and provisions similar to those in s 78(2) should apply to support claims for further provisions from an estate; that is, they do not have priority over properly incurred estate debts. Similarly, debts incurred by the deceased in contract and successful equitable claims against the deceased's estate should have priority over support claims for further provision. Support claims for further provision should be calculated on the "nett" estate after property relationship entitlements, contractual and equitable debts have been deducted. This is consistent with the long-standing principle (noted by Patterson²⁶²) that a claim founded in contract takes priority over a family protection claim which is made against the nett estate.

Arguably, the exercise of judicial discretion on competing claims by spouses and partners on one hand and minor children or grandchildren on the other could lead to some uncertainty and inconsistency. Both groups can be vulnerable depending upon the particular circumstances and therefore, it is not possible to exclude either group. Uncertainty and inconsistency will be minimised because:

- the starting point would be the priority of the surviving spouse or partner;
- the only competing claimants will be surviving spouses/partners and minor children/grandchildren;
- the criteria for awards will be very specific (as set out above) and not based on loose notions such as “moral duty” and the “wise and just testator”;
- there will be clear financial parameters around the amounts that can be awarded (again as set out above).²⁶³

Therefore based on this discussion the following priorities should apply to claims on estates in this order:

- estate administration costs and reasonable funeral expenses should have priority as they do at present;²⁶⁴
- valid estate debts and proven civil and equitable claims rank next;
- relationship property claims follow in priority; and
- support claims follow, with priority being given to claims by spouses, civil union and de facto partners but with power for the court to decide in its discretion the amounts awarded where there are competing support claims.

To recap, a surviving spouse, civil union partner or de facto partner would first be able to make a relationship property claim. Once that is resolved, and provided the survivor was not legally separated from the deceased at the time of death, he or she could make a support claim on the balance of the estate. Although the support claim of a surviving spouse, civil union partner or de facto partner would have priority over support claims by minor children,

²⁶² Patterson, above n 236, at [13.7] .

²⁶³ See the discussion on limiting claims to the amount of the statutory legacy earlier in this chapter and in chapter 5.

²⁶⁴ Insolvency Act 2006, s 393.

grandchildren and accepted children/grandchildren, these claims would not be precluded, and in a small estate the presiding judge would exercise a discretion in resolving competing claims. In most cases all claims would be heard at the same time. The objective when making an award to a surviving spouse, civil union or de facto partner would be to permit him or her to achieve a reasonable independent standard of living based on the couple's prior standard of living. In the case of de facto relationships of short duration there will be no eligibility to make a support claim but a relationship property claim could still be made on death if:

- there is a child of the de facto relationship; or
- the de facto partner has made a substantial contribution to the de facto relationship; and

the court is satisfied that failure to make an order would result in serious injustice to the de facto partner.

III *The Conceptual Basis for Claims by Minor Children or Grandchildren*

In 1997, the Law Commission noted that overseas jurisdictions have restricted claims by children to younger and disabled children both for clarity and to accord better with community expectations about the limits of parental responsibility. The Commission referred in this regard to changes in the United States of America and Canada. The Commission went on to highlight the significant inconsistencies between the laws that apply before and after the death of the will-maker:²⁶⁵

There is now a significant inconsistency between the laws that apply before and after the death of a will-maker. By contrast to the law that applies after death (the Family Protection Act 1955) will-makers' duties during lifetime to support children financially, are confined to children under 19 years of age. The law that applies to will-makers before death now also makes provision for support claims by a stepchild if a step-parent has assumed in an enduring way the responsibilities of a parent of that stepchild. But on death, stepchildren's claims are limited. Similarly while will-makers are not required by law during their lifetime to support parents or grandchildren, on death those more distant relatives may (few actually do), claim financial support. A significant proportion (60%) of those who commented on the financial support claim for minor and disabled children proposed in the discussion paper supported the basis and priority suggested for those claims.

In the same 1997 report, the Law Commission stated²⁶⁶ that parents' duties during their lifetimes to provide financial support to minor and disabled children and former spouses are widely accepted and clearly defined. It noted, however, that by contrast, claims by adult children under the Family Protection Act 1955 were in urgent need of review. Thirteen years later the problems remain.

A *Support*

The Law Commission recommended a "support" claim by children only if the children are:²⁶⁷

- minors; or

²⁶⁵ Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [29].

²⁶⁶ *Ibid*, at [32].

²⁶⁷ *Ibid*, at [70].

- under 25 years and undertaking educational or vocational training; or
- unable to earn a reasonable independent livelihood because of a physical, intellectual or mental disability which occurred before the child reached 25 years.

With respect to adult independent children, the Law Commission recommended²⁶⁸ that they should have only limited claims. I concluded earlier in this chapter that adult children should have no claims.

In relation to other relatives such as grandchildren, stepchildren and parents of the deceased, the Law Commission recommended that support claims could only be made on establishing a direct responsibility between the will-maker and the claimant such as where the will-maker has assumed in an enduring way the responsibilities of a parent. These recommendations are in keeping with the views expressed by the New South Wales Law Reform Commission²⁶⁹ and the Scottish Law Commission.²⁷⁰ As discussed earlier, parents of a deceased person should not have rights to claim further provision from the estate.

The Commission also recommends that stepchildren or grandchildren for whom the will-maker has assumed in an enduring way, the responsibilities of a parent, be able to make support claims. In 1997 the Law Commission prepared a Draft Succession (Adjustment) Act and in clause 28 of that draft Act,²⁷¹ a support award for a child is defined as being of such a kind as to ensure that while the child is entitled to support, the child is maintained in a reasonable way and to a reasonable standard and so far as practical, educated and assisted towards the attainment of economic independence. The draft clause also sets out factors to be taken into account by the court in assessing a support award²⁷² including age and stage of development of the child, other actual or potential sources of support, the amount of support provided by the deceased and the actual and potential ability of the child to meet his or her reasonable needs.

The Commission commented²⁷³ that separating out the claims of dependent children and limiting such claims to “*support*” has these advantages:

- it is clear and specific;
- it eliminates the confusion which exists in the present law;
- it complies with community expectations and principles of support law;
- it complies with international obligations;
- it limits children’s claims so that more significant claims (such as those of spouses, civil union and de facto partners) can be given full effect.

The Commission could also have added that this would remove the current inconsistency between laws that apply before death and those applying after death. I agree that claims by (a) minor children of the deceased or (b) minor stepchildren, accepted children, whangai and grandchildren of a deceased person who *were* members of the family (as discussed earlier in

²⁶⁸ Ibid, at [72]-[77].

²⁶⁹ New South Wales Law Reform Commission, above n 260, at [2.13].

²⁷⁰ Scottish Law Commission, above n 252, at [3.95] and [3.96].

²⁷¹ New Zealand Law Commission, above n 265, at page 86.

²⁷² Clause 28(3).

²⁷³ New Zealand Law Commission, above n 265, at [71].

this chapter) should be limited to “support” claims along the lines set out in the commission’s report and clause 28 of the draft Succession (Adjustment) Act. I will now discuss support claims by eligible minors.

B Support claims by children and accepted children

"Support" claims have similarities to child support obligations while a person is alive. Under the Child Support Act 1991 there are obligations to provide for the maintenance and support of qualifying children until aged 19 years (or until the child becomes financially independent).²⁷⁴ Money due can be recovered from a deceased person's estate.²⁷⁵ This begs the question whether child support obligations should continue after death instead of or in addition to support claims. Virginia Grainer suggests that child support claims could be made against an estate on the same basis that they would be made against the will-maker if he or she had survived.²⁷⁶ In general, however, child support obligations are assessed on the income of the liable parent²⁷⁷ and in most cases this will be significantly reduced or at least significantly affected on the death of the parent. It is appropriate therefore for the obligations to come to an end on death²⁷⁸ and for the situation to be reviewed. It is also important to recall that on death other obligations or competing claims may arise which did not exist while the person was alive; therefore existing obligations need to be reviewed in light of the changed circumstances. Also, if the will-maker had survived, certain non-financial assistance would have been provided to children but this will cease on death; some allowance needs to be made for this.

As recommended by the Law Commission, such support awards should be limited to ensuring that, while the child is entitled to support, the child is maintained in a reasonable way and to a reasonable standard and so far as practical, educated and assisted towards the attainment of economic independence. In addition to the criteria suggested by the Law Commission for such awards (being age and stage of development of the child, other actual or potential sources of support, the amount of support provided by the deceased and the actual or potential ability of the child to meet his or her reasonable needs), another important factor is competing claims by a spouse, partner, children or other minor children or grandchildren. However, I have concluded that no claims should be available to adult children and parents of a deceased person. In this, I have departed completely from the proposals of the Law Commission.²⁷⁹

With regard to the Law Commission’s proposal that support claims be available to children under 25 years of age and undertaking educational or vocational training, the issues raised earlier in this chapter come up again. Exactly what sort of training qualifies? Does training need to be career specific or will most courses suffice? Does the training need to be fulltime or will part time do? My proposal is that claims be available to children, grandchildren or accepted children under 21 years on the basis that by that age, most have at least started tertiary education and many will have completed it.

²⁷⁴ Child Support Act 1991, s 5.

²⁷⁵ Family Proceedings Act 1980, ss 180 and 181.

²⁷⁶ Virginia Grainer, above n 250, at 143.

²⁷⁷ Child Support Act 1991, s 29.

²⁷⁸ Child Support Act 1991, s 25.

²⁷⁹ Law Commission, above n 265, at [72]-[77].

With respect to claims by children unable to earn a reasonable, independent livelihood because of a physical, intellectual or mental disability which occurred before the child attained 25 years, the age limit is arbitrary and will create unfairness for those suffering such a disability after the age of 25 years. Most responsible parents (and sometimes other relations) will provide by will specifically for a child with these disabilities. If not, there are charitable organisations which support people with various disabilities and of course the State ultimately provides benefits and care for people who cannot support themselves. As Virginia Grainer points out, there are difficulties defining what is caught by a physical, intellectual or mental disability, and what is outside this term.²⁸⁰

Another problem with linking claims to a reasonable independent livelihood or need is that experience both here and overseas with family provision legislation shows that what was intended as a very limited claim can develop into a significant industry. This has been the experience here with adult claims under the Family Protection Act 1955 and in Australia.²⁸¹

One further point needs to be made. There have been rare cases where an applicant's behaviour towards the deceased has been so bad that he or she should be unable to make a successful claim. The term used is "disentitling conduct", and it can be a complete or partial bar to a claim for further provision.²⁸² It is harsh to impose a ban on a person who otherwise would have a valid claim, particularly a 19 or 20 year old, because of disentitling conduct. A "killer" is prevented from benefitting from a victim's estate, but otherwise I propose that a claimant's conduct be one of a number of factors to be taken into account in assessing a claim, it should not be a complete bar.

C Proposal

A deceased person's children, grandchildren, step-children, accepted children and whangai aged under 21 years should be entitled to make a support claim. The basis for such claims is that the deceased assumed in an enduring way the responsibilities of a parent towards the claimant or that the child was a member of the family. This removes the current discrimination against a child who may not be the biological child but in all other respects is a member of the deceased's family.

As recommended by the Law Commission, the purpose of a support award should be to ensure that the child is maintained in a reasonable way and to a reasonable standard and so far as practical, educated and assisted towards the attainment of economic independence. Awards will only be available to persons under 21 years at the will-maker's date of death. In assessing the award the court will take into account the age and state of development of the child, other actual or potential sources of support, the amount of support provided by the deceased (for example private schooling), the actual or potential ability of the child to meet his or her reasonable needs, and competing claims by other claimants or beneficiaries named in the will or entitled on intestacy.

IV Summary of Key Principles

- Relationship property claims should remain as at present.

²⁸⁰ Virginia Grainer, above n 250, at 143.

²⁸¹ See Rosalind F Croucher "Towards Uniform Succession in Australia" (2009) 83 ALJ 728 at 739.

²⁸² Patterson, above n 236, at [4.17].

- Claims under the Family Protection Act 1955 should be replaced by “support” claims limited to:
 - a surviving spouse or civil union partner who was not legally separated from the deceased at the date of death;
 - a surviving de facto partner who was living with the deceased in a de facto relationship and not legally separated from the deceased at the time of death and where it was not a relationship of short duration;
 - any child, grandchild, step-child, accepted child or whangai aged under 21 years at the date of the deceased’s death and who was a member of the deceased’s family.
- Support awards should be defined:
 - In the case of a surviving spouse, civil union or de facto partner as an award enabling the claimant to enjoy a reasonable, independent standard of living until reasonably able to achieve an independent standard of living. Support claims for spouses or partners should not exceed the “statutory legacy” on intestacy which would be set initially at \$350,000.
 - In the case of a minor child, stepchild, accepted child, stepchildren or grandchildren, as an award of such a kind as to maintain the child in a reasonable way and to a reasonable standard and so far as practical, educated and assisted towards attainment of economic independence.
- In respect of competing support claims, a surviving spouse or partner should have priority but not to the complete exclusion of minor children, accepted children, stepchildren or grandchildren. Other family or whanau would have no claims but would retain entitlements on intestacy or based upon contract or “contributions”.

Chapter 5

FURTHER POLICIES

I *Principles and Policies on Intestacy*

In 2008 and 2009 there were respectively 769 and 755 grants of letters of administration on intestacy in New Zealand.²⁸³ A significant number of estates are involved. It is useful to set out some of the relevant principles when drafting an intestacy regime. The Scottish Law Commission summarises these principles:²⁸⁴

- The rules of intestate succession are default rules; they apply only in the absence of a valid testamentary disposition.
- The rules of intestate succession are shaped by principles to which each jurisdiction gives different weight and by its own legal tradition.
- To keep the property in the deceased's family or kinship group; accordingly intestate heirs are generally limited to those related by blood to the deceased.
- The presumed wishes of the deceased. The rules of intestacy should by and large mirror the provisions for family that people usually make in their wills rather than the provisions which the particular deceased might have made if he or she had made a will. A written statement or informal will can now be validated by the High Court;²⁸⁵ these principles assume that no such document exists. The principle of testamentary freedom favours construction of a will that the deceased would have made rather than what most will-makers would have done. However, thousands of intestacies occur in New Zealand each year and therefore it is only possible in practice to frame default rules according to what the majority will do.
- The rules of intestacy should be acceptable to a broad spectrum of public opinion; that is they should constitute, as far as rules of general application can, a fair and natural system that adequately reflects majority views.
- The rules should be clear, consistent, free from anomalies, relatively easy to understand and also as simple as possible in order that people are aware what will happen to their property if they die intestate. If they are unhappy with the result, there is an incentive to make a will.

The Scottish Law Commission also noted the trend towards giving the surviving spouse a greater share of the estate.²⁸⁶ It favoured equating the positions of surviving spouses and "civil partners" (couples who register their relationships).²⁸⁷

²⁸³ Email from John Earles, Registrar High Court of New Zealand, regarding grants of letters of administration on intestacy (27 May 2010). The estimated level of intestacy in Australia is between 6-14% of all estates, see New South Wales Law Reform Commission *Uniform Succession Laws: Intestacy* (NSWLRC R116, 2007) at [1.12].

²⁸⁴ Scottish Law Commission *Discussion Paper on Succession* (SLC DP 136 2007) at [2.2].

²⁸⁵ Wills Act 2007, s 14.

²⁸⁶ Scottish Law Commission, above n 284, at [2.21].

The New South Wales Law Reform Commission discussed similar principles when setting out the aims of intestacy rules:²⁸⁸

- Carrying out the presumed intentions of the intestate. Any system that has to cover all situations will not cover individual cases perfectly. People may fail to produce a valid will through no fault of their own and the intestacy rules should be standardised to produce a result that will be fair in most cases.
- Establishing the presumed intentions of an intestate is difficult. Wills that have been written are one of the few reliable sources of information about how people actually intend to distribute their property on death. This conclusion was derived from an empirical study of proceedings filed in the Probate Registry of the NSW Supreme Court in 2004.
- It was noted that a number of law reform agencies stated that one of the principal aims is to make the rules of distribution simple, clear and certain.
- The rules of distribution should acknowledge the needs of family members and in particular, should balance the competing needs of the surviving spouse/partner and issue of the intestate. The surviving spouse or partner should be given primacy on intestate distribution.
- While provision for deserving family members is desirable, it is very difficult to prescribe this in intestacy rules.
- The inter-relationship between intestacy regimes and family provision regimes is important. Family provision regimes are important in dealing with individual cases involving issues such as need and desert.

The Northern Territory Law Reform Committee said this:²⁸⁹

Generally the rules of distribution on intestacy attempt to apply the community's views on what should be done with the estate of a person who has died intestate. One objective is to produce the same results as would have been achieved if the intestate had the foresight, the opportunity, the inclination or the ability to produce a will ... the Rules of intestate succession acknowledge the needs of family members only at the most general level. ... an important issue to be considered in intestate succession is the need to balance the competing requirements of the surviving spouse or partner and the issue of the intestate. However, the rules of distribution cannot always treat the needs of family members on the individual level.

The principles set out in the reports from the Scottish and New South Wales Law Reform Commissions, which will be discussed shortly, particularly where they coincide, are likely to be relevant to New Zealand. In this regard, the following points are noteworthy:

- provisions should mirror those usually made by people in their wills;

²⁸⁷ Ibid, at [2.22].

²⁸⁸ New South Wales Law Reform Commission *Uniform Succession Laws: Intestacy* (NSWLRC R116, 2007) at [1.23] to [1.45].

²⁸⁹ Northern Territory Law Reform Committee *Report on Uniform Succession Laws* (NTLRC R31, September 2007) at 12.

- the rules should be simple, clear and certain;
- the surviving spouse or partner should be given primacy;
- the word “issue” (all descendants) rather than “children” is used and no distinction is made between minor and adult issue.

I suggest that these principles are also applicable to New Zealand. One further point is that in New Zealand the Public Trust Office (now called Public Trust) was established in 1873 to provide free wills and encourage ordinary people to make wills and thereby avoid intestacy. Some solicitors do this also. In New Zealand, there is no financial barrier to making a will.

A *Current intestacy regime*

The intestacy regime currently in place in New Zealand can be summarised as follows:²⁹⁰

- If the person dying intestate is survived by a spouse, civil union or de facto partner ("partner") but no issue or parents, everything passes to the spouse or partner;
- If the deceased is survived by a spouse/partner and issue, the spouse/partner receives all personal chattels, “the prescribed amount” or "statutory legacy" (currently \$155,000) and one third of the residue; the remaining two thirds of the residue passes to the deceased’s issue;
- If the deceased is survived by a spouse/partner, no issue but a parent, the spouse/partner takes the personal chattels, the statutory legacy and two thirds of the residue; the remaining one third of residue passes to the surviving parent or parents;
- If the deceased is survived by issue but no spouse or partner, everything passes to the issue;
- If the deceased is survived by a parent or parents but no spouse/partner or issue, everything passes to the surviving parent(s).

The Administration Act also provides for brothers and sisters, nephews and nieces and grandparents if no spouse/partner, issue or parents survive. These provisions do not warrant detailed comment because they are a default regime to cover relatively uncommon situations. Ultimately, if no relatives survive the intestate deceased, the estate passes to the Crown “bona vacantia”;²⁹¹ that is a rare occurrence but I will discuss and recommend a change to what should occur in that event.

This regime applies to both total and partial intestacies and it has been in place for more than 40 years. Over that time, there have been very significant changes in life expectancies, rates of divorce, the number of second marriages or relationships and the standard of living. It is timely to review the principles underpinning our intestacy laws. There have been law commission reports in both Scotland and Australia over recent years which review their laws on intestacy and I now discuss the findings and recommendations of those reports.

²⁹⁰ Full details are set out in the Administration Act 1969, ss 77-79.

²⁹¹ Literally “abandoned goods”; see Administration Act 1969, s 77(1)(c).

B Scottish proposals for intestacy

The Scottish Law Commission made the following findings:²⁹²

- Where a person dies intestate leaving a spouse or civil partner but no issue, the surviving spouse/civil partner should receive the whole estate. Over the last 100 years or so, a major trend has been towards the deceased's surviving spouse becoming entitled to an ever-increasing share of the estate: "A spouse or civil partner is now seen as a living member of the family, not an interloper."²⁹³ "Civil partners" are couples who register their relationship,²⁹⁴ de facto couples do not.
- Where the intestate is survived by issue and by a spouse or civil partner, the spouse/civil partner should be entitled to a "fixed sum" (£300,000) or the whole estate if under this amount. Any excess over the fixed sum should be divided equally; half to the spouse/civil partner and half to issue.
- The fixed sum should up-rate annually in line with the change in the Retail Price Index.
- The spouse/civil partner so entitled to a share of the intestate's estate should have an option to acquire the deceased's interests in any dwelling-house, furniture and furnishings.
- Nothing short of divorce, dissolution or annulment of a marriage should affect the surviving spouse or civil partner's rights; separation in itself should not affect their rights.
- There should be no distinction between the various classes of surviving spouse or civil partner.
- The commission posed, and left open, the question whether a child accepted by an adult as a child of his or her family should be treated as the adult's own child for the purposes of intestate succession.

C Australian proposals for intestacy

The New South Wales Law Reform Commission²⁹⁵ made the following recommendations which have largely been enacted:²⁹⁶

- The surviving spouse or partner (including de facto partners) should be entitled to the whole of the intestate estate where there are no surviving issue of the intestate. Again, the commission noted increasing public acceptance of the importance of the position of a surviving spouse or partner.
- Where the intestate is survived by a spouse/partner and issue, the spouse/partner should be entitled to the whole estate except where some of the issue are from another

²⁹² Scottish Law Commission, above n 284, at Part 2.

²⁹³ Ibid, at [2.21].

²⁹⁴ Registration is effected under the Civil Partnership Act 2004.

²⁹⁵ Above n 288 at xiii-xx.

²⁹⁶ Succession Amendment (Intestacy) Act 2009.

relationship. If issue of another relationship of the deceased survive as well as the spouse/partner, the intestate estate should be shared between the surviving spouse/partner and the surviving issue.

- Where the intestate is survived by a spouse/partner and issue of another relationship, the spouse/partner should receive:
 - all tangible personal property (personal effects);
 - a statutory legacy of \$350,000 (as adjusted from time to time) and interest on it;
 - one half of the residue of the estate;

the remaining one half share of the residue should pass to the deceased's issue "per stirpes".²⁹⁷

- Where there is more than one spouse or partner (and no issue), each spouse/partner should share in the estate. If there are multiple partners (or a spouse and a partner) and issue of the intestate, the partners/spouse would share the entitlements available to a spouse/partner as set out above.
- Stepchildren should not be recognised for the purposes of intestacy and where a person has been adopted, previous family relationships should have no recognition for the purposes of intestacy.
- Distributions to relatives of the intestate (including issue) should be "per stirpes"²⁹⁸ in all cases.

The Report of the New South Wales Law Reform Commission contains numerous other recommendations which have marginal relevance to the policies or principles I am exploring and therefore, I do not propose to discuss them any further. The 2009 amendments to the New South Wales Succession Act 2006 largely follow these recommendations.

Both of these reports highlight the acceptance in these countries of the primacy of the position of the surviving spouse and equivalent of our civil union partner. The report of the New South Wales Law Reform Commission puts de facto partners where the relationship is more than two years in duration, or a child has been born to the relationship, in the same category.²⁹⁹ Both reports also accept that it is important that our laws reflect community values and views and the recommendations in both reports do this. Both Scotland and Australia have similarities to New Zealand. Scotland has an important difference from New Zealand which is the view of Maori and Pacific Island people to succession rules, particularly in respect of land. That view is reflected in the Te Ture Whenua Maori Act 1993 which I will discuss shortly and the position of "whangai". While the proposed intestacy regimes in Australia and Scotland attempt to be fair and representative, certainly in Australia there is the ability for certain relatives to apply to the court for further provision from an intestate estate. This is necessary in order to deal with individual cases involving need and desert and has

²⁹⁷ Literally, "by stock"; the entitlement of descendants is determined by the entitlement of those who have predeceased them and would otherwise have been entitled to take.

²⁹⁸ Ibid, footnote for a definition of this term.

²⁹⁹ New South Wales Law Reform Commission, above n 288, at [2.17] and [2.18].

been the case in New Zealand also for many years. The following discussion assumes also that relationship property rights of surviving spouses and partners will continue as they are at present.

D Proposed intestacy regime for New Zealand

What therefore is an appropriate intestacy regime in principle for New Zealand in 2010? I recommend as follows.

- The surviving spouse or partner should be entitled to the whole of the intestate estate where there are no surviving issue.
- Where the intestate is survived by a spouse/partner and children (whether of a previous relationship or not), the surviving spouse or partner will be entitled to:
 - the deceased's personal chattels and effects;
 - a statutory legacy which I would set at \$350,000 (in line with the recommendations of the New South Wales Law Reform Commission) and the discussion earlier in this chapter on greater recognition of the right of a surviving spouse, civil union or de facto partner;
 - the statutory legacy would be increased annually to avoid the erosion in value that occurred in respect of the statutory legacy between 1998 and 2009³⁰⁰ and as recommended by the Scottish Law Commission; in view of the importance of adequate housing and the fact that house prices can outstrip inflation rates the statutory legacy should also be reviewed from time to time against property values. Patterson cites several cases where adequate housing was considered important in claims by surviving spouses.³⁰¹
 - one half of any residue of the estate over and above the personal chattels and statutory legacy; the other half one half of the residue would be shared by the surviving children of the deceased in equal shares per stirpes.³⁰²
- If there are multiple partners (or a spouse and a partner) they would share equally the entitlements of a surviving spouse or partner.

E Separation

What should happen where spouses, civil union and de facto partners separate prior to death? In the case of spouses and civil union partners, at present separation does not of itself bar entitlement on intestacy unless a separation order was in place at the time of death.³⁰³ In contrast, a condition of a de facto partner's entitlement on intestacy is that the de facto

³⁰⁰ I highlighted this issue in chapter 2, and the even more dramatic change in the median house sale figures between 1998 and 2008.

³⁰¹ WM Patterson *Law of Family Protection and Testamentary Promises* (3rd ed, LexisNexis, Wellington, 2004), at [4.3].

³⁰² Above n 297 for a definition of this term.

³⁰³ Family Proceedings Act 1980, s 26(1); see also Administration Act 1969, s 77A.

partner and deceased were living together as a couple when one of them died.³⁰⁴ Why is there a difference? The position in respect of spouses and civil union partners is consistent with the provisions in the Wills Act 2007³⁰⁵ that (in the case of spouses and civil union partners) a will is not affected by separation unless a dissolution or separation order has been made before death. It is also consistent with the present entitlement of a de facto partner to make a family protection claim only if living in a de facto relationship with the deceased at the date of death.³⁰⁶ The difference is that legally, a marriage or civil union subsists until a dissolution order is made or one or both of the parties dies³⁰⁷. The termination of a de facto relationship is much harder to define because no dissolution order can be obtained. The clearest ways to define termination of a de facto relationship are legally separated³⁰⁸ and death. However, it is strongly arguable that the rights of spouses and civil union partners on intestacy should also terminate on legal separation even if this conflicts with the long standing position that marriage and civil unions subsist until death or the making of a dissolution order.

The arguments advanced earlier in chapter 4 of this thesis in relation to family protection or support claims by separated spouses or partners apply equally on intestacy. If spouses or partners have been separated and have resolved relationship property, it is anomalous that intestacy rights should be available to the survivor. There is no reason in principle why de facto partners should be treated differently; there should be consistency. Therefore, the current legal position should change: entitlements of spouses and civil union partners on intestacy should not be available if the parties were legally separated at the date of death and like de facto partners they should be entitled on intestacy only if living with the deceased at the time of death.

F Short duration

Should a surviving de facto partner in a relationship of short duration have entitlements on intestacy? This raises similar issues to those discussed earlier in relation to rights of de facto partners in short duration relationships to make family protection claims. The current legal position is the same on intestacy: a de facto partner in a short duration relationship has no claim unless the court is satisfied that there is a child of the de facto relationship or that the de facto partner has made a substantial contribution to the de facto relationship, *and* the court is satisfied that serious injustice would result if the de facto partner who survives does not succeed on intestacy. There is, however, one important difference which is that unlike family protection claims, where the court has a discretion, on intestacy a person either qualifies for the full entitlement or not; it is all or nothing.

As discussed in chapter 4 under support awards, if there is a minor child of the relationship, that child should have a support claim. If there have been contributions to the relationship

³⁰⁴ N Peart, M Briggs and M Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004) at [2.1.5].

³⁰⁵ Wills Act 2007, s 19.

³⁰⁶ Family Protection Act 1955, s 3(1)(aa).

³⁰⁷ See also *Bourneville v Bourneville* [2009] NZFLR 69 at [21] for comments on the difference between a marriage and a de facto relationship.

³⁰⁸ The decided cases and commentators indicate that termination of a relationship has both a mental and a physical component. See *O v K* [2004] NZFLR 507; *Julian v McWatt* [1998] NZFLR 257; also N Peart, M Briggs and M Henaghan (eds), above n 304, at [2.6].

then, a relationship property claim can be made. However, just as relationship property and family protection claims are conceptually different, so are relationship property claims and entitlements on intestacy. It is increasingly acknowledged both in New Zealand and overseas that a spouse, civil union partner or long term de facto partner has a special or primary role in the life of a person and significant provision should be made for the survivor on death. It is doubtful that a short duration de facto partner will have achieved this status. In light of the proposed increase in entitlements of spouses, civil union partners and de facto partners on intestacy, and the “all or nothing” nature of these entitlements, significant injustice could result if a short duration de facto partner could make a claim on relationship property and then be entitled to a large entitlement on intestacy. The safest and clearest course is to exclude short duration de facto partners from entitlements on intestacy.

G Issue, children and accepted children

If the intestate is survived by issue but no surviving spouse or partner, those issue would share the estate equally and “per stirpes”.³⁰⁹

Adoption should have the same legal effect on succession law as is currently the case.³¹⁰ To ensure consistency with the proposals earlier in this chapter in respect of support claims, I propose that accepted children or children of the family (who can include step-children, whangai, grandchildren and even great-grandchildren) have the same rights on intestacy as a child of the deceased. As members of the family, accepted children should have the same rights as biological children of the deceased and this would extend to the issue of accepted children who die before the deceased. It would also extend through to adulthood because, unlike support claims, the purpose of intestacy rules is to provide a default regime for distribution, not to maintain or assist those who have not been adequately provided for. As stated under support claims in chapter 4 this would remove the current discrimination against a child who may not be the biological child of the deceased but in all other respects is a member of the deceased’s family.

H Bona vacantia

From time to time there are estates which pass “bona vacantia” to the state. In practice the relevant Treasury officials are often happy to give favourable consideration to “claims” for further provision from relatives or friends who were closely associated with the deceased. There is no statutory basis for this approach but it happens in practice. In Australia the National Committee on Uniform Succession Laws recommended that the Crown be able to “waive” its rights in these situations in favour of any dependants of the intestate, any person having a just or moral claim on the intestate, any person or organisation for whom the intestate might reasonably be expected to have made provision, any other organisation or person.³¹¹ As stated above, bona vacantia is rare and a nuisance to Treasury. Giving Treasury the type of discretion recommended by the Australian National Committee on Uniform Succession Laws accords with what is happening in practice in New Zealand.

³⁰⁹ Above n 297 for a definition of this term.

³¹⁰ That is, where a person is adopted, he or she has the same rights as other biological children of the adopting parents but loses succession rights in respect of his or her biological parents.

³¹¹ New South Wales Law Reform Commission, above n 288, Recommendation 38; subsequently enacted by the Succession Amendment (Intestacy) Act 2009, Schedule 1, ch 4 at Part 4.5.

Apart from the changes outlined above, the intestacy regime would remain as it currently is and distributions to relatives should be “*per stirpes*”.³¹² In chapter 4 I concluded that adult children should no longer enjoy the right to make application for further provision from an estate; however, I do recommend that their rights on intestacy remain. My reasons for excluding adult children from claims for further provision are first, because it offends against the principle of freedom of testation, and secondly, because of the impossibility of formulating a clear, agreed and simple basis for such claims. Neither of these problems exist on intestacy: first, the will-maker has not exercised the right to sign a will, and secondly, all children would be entitled to share equally *per stirpes*. The intestacy provisions are a set of default rules, and once established should be allowed to stand. Currently, adult children have entitlements on intestacy and none of the Law Commissions of New Zealand, Scotland or New South Wales recommend that this situation changes.

Entitlements on intestacy would be subject to rights under the Property (Relationships) Act 1976 and also subject to the rights of spouses, partners and minor children, stepchildren and grandchildren to make support claims.

II *Maori Land, Taonga and Property Interests*

A will-maker’s freedom to deal with interests in Maori land is restricted under Te Ture Whenua Maori Act 1993. A provision in a will that purports to give Maori land to a person other than those specified in s 108 of the Te Ture Whenua Maori Act 1993 is void and of no effect.³¹³ Shares in Maori Incorporations are deemed to be interests in Maori land.³¹⁴ The deceased does not need to be Maori.³¹⁵ Under s 2(2) of the Te Ture Whenua Maori Act 1993, the powers, duties and discretions under the Act are to be exercised in a manner that facilitates and promotes the retention, use, development and control of Maori land as *taonga tuku iho* (treasures of our past) by Maori owners, their whanau, their hapu and their descendants.³¹⁶

Since 2005 the owner of a beneficial estate in Maori freehold land can by will, leave that interest to the owner’s spouse, civil union or de facto partner for life, or for any shorter period.³¹⁷ However, a will-maker can leave a beneficial interest in Maori land to some or all of the will-maker’s children or remoter issue and that includes “whangai” (child adopted by Maori custom).³¹⁸ On intestacy, a surviving spouse or civil union partner is entitled as of right to an interest for life or until remarriage or entry into a civil union or de facto relationship. Otherwise, the interests vest absolutely in those entitled to succeed on intestacy under s 109 Te Ture Whenua Maori Act 1993; that is, issue (if any) and if there are no issue, brothers and sisters.

The Family Protection Act 1955 applies to interests in Maori land. There are restrictions on the types of orders that can be made. For example a family protection order cannot alienate Maori freehold land to a spouse; however, it can confer the right to reside in any dwelling.³¹⁹

³¹² Above n 297 for a definition of this term.

³¹³ John Earles and others *Wills and Succession* (LexisNexis, Wellington, 2008) at [16.4].

³¹⁴ *Ibid*, at [16.48].

³¹⁵ Te Ture Whenua Maori Act 1993, s 100(1).

³¹⁶ John Earles and others, above n 313, at [16.2].

³¹⁷ *Ibid*, at [16.11].

³¹⁸ *Ibid*, at [16.12].

³¹⁹ *Ibid*, at [16.28].

The courts recognise Maori custom and in particular, the strong attachment of Maori to the land.³²⁰

A number of principles have emerged from the interaction of the Family Protection Act 1955 and Te Ture Whenua Maori Act 1993 and they include:³²¹

- For Maori, land is more than just an investment; it has a deep spiritual meaning.
- Great respect must be paid to the will-maker's judgement.
- Financial need is a strong factor in favour of approving a claim.
- There is a prima facie obligation to leave appropriate interests in traditional and family land to all the will-maker's children.
- Maori cultural considerations will not predominate over a breach of moral duty especially if there is financial need; however, there is increasing acceptance that Maori custom should have a bearing on the moral duty owed by a Maori will-maker.

The Property (Relationships) Act 1976 does not apply in respect of Maori land within the meaning of the Te Ture Whenua Maori Act 1993.³²² No order can be made under the Law Reform (Testamentary Promises) Act 1949 which would alienate an interest in Maori freehold land to a person to whom that interest could not have been left by will.³²³ Apart from these exceptions in respect of Maori land, Maori are subject to current succession laws in New Zealand.

The Northern Territory Law Reform Committee concluded that there is now wider recognition that customary law should become in some way part of the general law of Australia and recommended that aboriginal customary law be recognised as a "source of law".³²⁴ The Law Reform Commission of Western Australia acknowledged that relevant customary laws are still practised in Western Australia for distribution of property on death.³²⁵ The situation in the Northern Territory is similar.

Virginia Grainer has suggested inheritance law may be an appropriate area for different rules to be developed along lines appropriate for iwi, hapu and whanau because a collective sense of moral duty may continue to prevail within tikanga Maori.³²⁶ Leaving aside interests in Maori land and taonga, which have been dealt with separately for many years, it is difficult to see how Maori would regard bank accounts, shares and chattels differently. Unlike land and taonga, there is no obvious historic difference in outlook and practice.

³²⁰ *Re Green (deceased): Green v Robson* [1995] NZFLR 330 at 334.

³²¹ John Earles and others, above n 313, at [16.29].

³²² See Property (Relationships) Act 1976, s 6; see also N Peart, M Briggs & M Henaghan (eds), above n 304, at [17.2.1].

³²³ Te Ture Whenua Maori Act 1993, s 106; see also see also N Peart, M Briggs & M Henaghan (eds), above n 304, at [17.2.4].

³²⁴ Northern Territory Law Reform Committee, above n 289; also Committee of Inquiry into Aboriginal Customary Law "Report on Aboriginal Customary Law" (Report No 28, 30 June 2003) Main Report at 38.

³²⁵ Law Reform Commission of Western Australia *Aboriginal Customary Laws* (LRCWA R94, 2006) at 223.

³²⁶ Virginia Grainer, above n 250, at 140.

Alternatively, others would argue that it is not appropriate and possibly confusing for a different set of rules to apply to interests in Maori land; succession rights should be standardised and simplified. However in New Zealand we have had special rules for Maori land for many years and recognition of the concept of taonga dates back to the Treaty of Waitangi. The rules set out in the Te Ture Whenua Maori Act 1993 recognise the special attachment of Maori to land and the desirability of avoiding alienation of Maori land interests. In some ways these rules are similar to the fixed rule regimes in European countries which I discussed and rejected earlier. The difference is however that special rules acknowledging that Maori land is communal rather than personal property have been accepted and practised in New Zealand for many years.

One point that does need to be reviewed is the ability of the Maori Trustee to obtain grants of administration of estates. Inquiries indicate that while this ability has existed for some time, it is seldom, if ever, exercised. If there is no need, consideration should be given to whether this should continue.

The principles applicable to Maori land and estates have been given consideration within the last 17 years and seem appropriate to New Zealand in the 21st century. There is no benefit in changing the principles that currently apply other than in the general context of proposed changes to family protection and testamentary promises claims discussed elsewhere in this thesis.

III *Testamentary Promises Claims*

The Law Reform (Testamentary Promises) Act 1949 is unique to New Zealand. Under the Act a claimant can bring proceedings where:

- the claimant has rendered services for the deceased (other than services which arise out of the natural incidents and consequences of life within a close family group); and
- a promise has been made by the deceased to reward the claimant for those services; and
- the promise has not been fulfilled either by testamentary provision or some other remuneration provided by the deceased.³²⁷

A number of problems with the Law Reform (Testamentary Promises) Act 1949 have arisen over the last 60 years:

- Difficulties of proof have arisen because the person alleged to have made the promise is no longer alive.
- Judicial definitions of “service” have been very liberal and this has led to inconsistency.³²⁸
- It is not certain who has priority if there are competing family protection claims and testamentary promises claims;³²⁹ in *Hamilton v Hamilton*,³³⁰ it was decided that neither claim has automatic priority.

³²⁷ Patterson, above n 301, at [13.1].

³²⁸ Ibid, at [13.9].

- If the deceased has entered into a contract to make provision by will but failed to carry out the promise, a claim can be made in contract and is not affected by competing family protection claims; claims under the Law Reform (Testamentary Promises) Act 1949 are affected.³³¹
- The remedy under the Act is discretionary and the Courts have frequently awarded less than the amount promised by the deceased.³³²
- What constitutes a “promise”? Under the Act the term “promise” includes any statement or representation of fact or intention, and it is not necessary that the promise should amount to a contractual undertaking;³³³ indeed, imprecise statements and ambiguous language have been accepted as sufficient.³³⁴
- Testamentary promises claims have been used as a “backstop” to family protection claims.³³⁵
- The exclusion of services arising out of the “natural incidents” of family life can mean that relatives who are ineligible under the Family Protection Act may have no remedies available at all.³³⁶
- What exactly are “the natural incidents and consequences of life within a family group”³³⁷ when the concept of “family group” is fluid?
- The courts can find that a promise gives rise to a contractual, an estoppel or a restitutionary claim and this classification makes a difference to the remedies available. The Act obscures this difference.³³⁸

A *Developments*

Since 1949, there have been huge developments in New Zealand in remedies based upon constructive trust, restitution, unjust enrichment and fiduciary obligations.³³⁹ The possible evolution of a law of obligations has been flagged.³⁴⁰ Section 3(8) of the Law Reform (Testamentary Promises) Act 1949 specifically preserves contractual or other remedies outside that Act. Why then is a specific remedy under the Law Reform (Testamentary Promises) Act 1949 needed in 2010? It is conceptually very different from a family protection claim and unique to New Zealand.³⁴¹

³²⁹ Ibid, at [13.7].

³³⁰ *Hamilton v Hamilton* [2003] NZFLR 883 (HC).

³³¹ Patterson, above n 302, at [13.6].

³³² Ibid, at [13.1].

³³³ Law Reform (Testamentary Promises) Act 1949, s 2.

³³⁴ Patterson, above n 301, at [13.13].

³³⁵ *Hamilton v Hamilton*, above n 330.

³³⁶ See *Parata v McGowan* [1994] NZFLR 937 at 941.

³³⁷ This phrase was used in *Re Welch* [1990] 3 NZLR 1.

³³⁸ Law Commission, above n 265, at [41].

³³⁹ Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Brookers, Wellington, 2009) at Part B.

³⁴⁰ Ibid, at [1.10].

³⁴¹ For example in England such claims can be dealt with under the doctrine of proprietary estoppel – see *Thorner v Majors and Others* [2009] UKHL 18.

The mischief the Act was designed to remedy was the tendency of testators to persuade people to render services to them by promises later found to be too vague to establish enforceable contracts.³⁴² However, in *Wishnewsky v Public Trustee*,³⁴³ a claim based on unjust enrichment succeeded where no testamentary promise was proved; subsequently in *Rennie v Hamilton*³⁴⁴ it was decided that if a testamentary promise is established, a claim based on unjust enrichment is not available. A claim based on quantum meruit may also be available.³⁴⁵ In *McFetridge v Bowater-Wright*³⁴⁶ it was decided that a claim based on constructive trust would also have succeeded in addition to the testamentary promises claim. Because of these alternative causes of action and the development of the law of restitution, constructive trusts and fiduciary obligations, and the range of remedies now available, the Law Reform (Testamentary Promises) Act 1949 has outlived its usefulness and should be repealed. The benefits of this will be one less inheritance law statute and hopefully, avoidance of some of the problems listed above. Another benefit will be that inconsistencies between the Act and other inheritance statutes will be removed.³⁴⁷

B Law Commission

In its 1997 Report³⁴⁸ the Law Commission discussed the various grounds for claims by those who contribute a “benefit” to the deceased. Claims can be based on contract, estoppel, quantum meruit, trusts and statute (specifically, the Law Reform (Testamentary Promises) Act 1949). The Law Commission recommended a statutory provision following the general principles of the common law. It suggested:³⁴⁹

Contributors and those to whom testamentary promises have been made may make a contribution claim for an appropriate amount in respect of their unremunerated services for the will-maker based on:

- An express promise to make provision for the claimant; or where there is no such promise
- The estate retaining the benefits of the services in circumstances where it is unjust for the estate to do so.

The Law Commission notes that claims could be made without an explicit promise to reward and such “contribution” claims would be separate from “support” claims.

If the deceased entered into a contract while alive, the terms of that contract can be enforced against his or her estate. Secondly, if a constructive or resulting trust can be imposed on property owned by a person, this should subsist following death against his or her estate. Thirdly, claims based on fiduciary obligations and unjust enrichment should be enforceable

³⁴² See *McCormack v Foley* [1983] NZLR 57 (CA).

³⁴³ *Wishnewsky v Public Trustee* [1995] NZFLR 166.

³⁴⁴ *Rennie v Hamilton* [2004] NZFLR 270 at [43].

³⁴⁵ Nicky Richardson *Nevill's Law of Trusts, Wills and Administration* (9th ed, LexisNexis, Wellington, 2004) at [18.2.9].

³⁴⁶ *McFetridge v Bowater-Wright* [1996] NZFLR 429.

³⁴⁷ As Patterson, above n 301, at [16.3] notes the term “final distribution” has different meanings under the Law Reform (Testamentary Promises) Act 1949 and the Family Protection Act 1955; see also *Lilley v Public Trustee* [1978] 2 NZLR 605 (CA); *Lilley v Public Trustee* [1981] 1 NZLR 41 (PC).

³⁴⁸ Law Commission, above n 265, at [37]-[44].

³⁴⁹ *Ibid*, at [85].

against a person and his or her estate. Those causes of action should cover the same grounds and remedy the same mischief that the Law Reform (Testamentary Promises) Act 1949 was designed to correct. Those grounds would however be narrower and simpler than “services” under a testamentary promise which have been liberally interpreted and created uncertainty³⁵⁰.

C Proposed changes

The recommendations of the Law Commission are consistent with the proposals in this thesis that the Law Reform (Testamentary Promises) Act 1949 be repealed and that an inheritance code incorporate and retain remedies against an estate based on contract, fiduciary obligations, unjust enrichment and implied trust.³⁵¹ Claims based on an implied trust could be described as “contribution” claims as suggested by the Law Commission. The grounds for a contribution claim would be the same as for a constructive or implied trust:

- contributions directly or indirectly;
- expectation of an interest;
- such expectation is reasonable; and
- the estate should reasonably expect to yield an interest to the claimant.³⁵²

These grounds would be included in the proposed inheritance code.

Claims based on breach of fiduciary obligations by a deceased person would be enforceable against the estate.

These remedies can be specifically incorporated within the proposed code; or most can be specifically incorporated and other remedies specifically preserved in the same way that s 51 of the Property (Relationships) Act 1976 preserves proceedings in tort. The Court of Appeal in *Kerridge v Kerridge*³⁵³ noted that a code does not cover all possible legal disputes that may arise (in that case between a couple). The best course is to include causes of action (and remedies) in contract, fiduciary obligations, unjust enrichment and implied trusts within the proposed inheritance code and preserve remedies in tort in the same way that the Property (Relationships) Act 1976 does. It is probably not possible to cover all future developments in this growing area of the law but it is to be hoped that implied trusts, unjust enrichment and fiduciary obligations will be sufficiently flexible to provide satisfactory remedies for most situations that arise in future. If, however, the law develops in a way that has not been anticipated by the proposed code, then legislative reform may be needed; that does not detract from the very significant benefits of having a comprehensive code.

IV Summary of Key Principles

The key principles formulated in this chapter are:

³⁵⁰ Patterson, above n 301, at [13.9] to [13.11] and earlier in this chapter.

³⁵¹ Constructive and resulting trusts are “implied trusts”.

³⁵² *Lankow v Rose* [1995] 1 NZLR 277 at 294.

³⁵³ *Kerridge v Kerridge* [2009] 2 NZLR 763, [2009] NZFLR 705 at [52].

- Testamentary promises and other common law or equitable claims would be replaced by “contribution claims”; that is, codified causes of action based on contract, fiduciary obligations or contributions (which would be similar to constructive trust claims).
- Support claims would be relegated in priority behind:
 - estate debts and debts incurred in the course of estate administration;
 - claims against estates based on contract, fiduciary obligations and contributions;
 - relationship property claims.
- The proposed inheritance code would include a default regime for intestacy which would give priority to the position of a surviving spouse, civil union or de facto partner, and provide a statutory legacy set initially at \$350,000 but updated regularly so as to take into account increases in the cost of housing and living. Entitlements of spouses, civil union and de facto partners would be limited to those who were living with the deceased as a couple at the time of death (or at least not legally separated) and there would be no entitlement for surviving de facto partners where the relationship was one of short duration.
- Accepted children who are members of the deceased’s family would have the same rights as biological or adopted children of the deceased on intestacy. This would include adult accepted children and rights would extend to the issue of accepted children.
- The restrictions on dealing with Maori land interests in the Te Ture Whenua Maori Act 1993 would be retained.
- The Crown should be able to waive its entitlements in the event of bona vacantia in favour of dependants of the deceased.
- The proposed inheritance code would incorporate and replace as far as possible all succession and inheritance laws currently in force.

Chapter 6

JURISDICTION

I *Two Issues*

Two problems identified in chapter 1 of this thesis have not been discussed so far. They are:

- At present some aspects of our inheritance laws are handled primarily in the Family Court and others in the High Court. Is it desirable for all matters to be handled in one court? If so what is the appropriate court?
- To what extent should New Zealand courts have jurisdiction to deal with assets of a deceased person that are located outside New Zealand? Should our current rules relating to movable and immovable assets change?

II *Family Court or High Court*

Where a particular case raises a number of issues it may be necessary for separate proceedings to be filed in the High Court and Family Court. For example if it is alleged that a will is invalid due to lack of testamentary capacity or undue influence, proceedings have to be filed in the High Court; in the same case it may be necessary for proceedings to be filed under the Property (Relationships) Act 1976 and Family Protection Act 1955 in which case the Family Court usually has jurisdiction.³⁵⁴ The first two claims are based upon common law rules whereas the latter are based upon statutes giving jurisdiction to the Family Court. While explicable historically there is no apparent logic to the separate but overlapping roles of the High and Family Courts.

Some examples from various inheritance law statutes illustrate the unnecessary complexities.

- Under the Property (Relationships) Act 1976 proceedings are commenced in the Family Court³⁵⁵ but a Family Court judge can remove a case to the High Court. The test for removal is the complexity of the case or any question arising in the proceedings.³⁵⁶
- Prior to 1 July 1992 proceedings under the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949 were commenced in the High Court. The Family Court and the High Court now have concurrent jurisdiction but a Family Court judge can refer proceedings to the High Court.³⁵⁷
- The High Court has jurisdiction under the Administration Act 1969 but registrars rather than judges deal with most probate matters.³⁵⁸ The trend over recent years has been to

³⁵⁴ Property (Relationships) Act 1976, s 22.

³⁵⁵ See s 22; previously under the Matrimonial Property Act 1976 the High Court and the Family Court had jurisdiction.

³⁵⁶ Webb and others *Family Law in New Zealand* (14th ed, LexisNexis, Wellington, 2009) at [7-304].

³⁵⁷ Family Courts Act 1980, s 14; WM Patterson *Law of Family Protection and Testamentary Promises* (3rd ed, LexisNexis, Wellington, 2004) at [15.2].

³⁵⁸ See High Court Rules, r 27.14.

extend the powers of registrars in probate matters³⁵⁹ and this follows a similar trend in England.³⁶⁰

- In the Family Court the new position of Senior Family Court Registrar has been created with powers to handle a wide range of matters.³⁶¹ The aim is to reduce the time judges spend on administrative decisions and to reduce delays in the Family Court.
- The High Court has jurisdiction under the Wills Act 2007 but the Family Court can approve the will of a person under 18 years of age.³⁶² The Family Court can also approve attorneys and property managers signing wills for persons who lack capacity.³⁶³
- The Family Court has jurisdiction to determine whether a person has mental capacity to sign an enduring power of attorney but not a will.³⁶⁴
- The Family Court Rules give registrars powers to hear and determine proceedings and make directions.³⁶⁵
- In some cases appeals from the Family Court are by way of rehearing where the appeal court can reach its own conclusions of fact and law and make decisions without remitting the case back to the Family Court.³⁶⁶
- The Supreme Court decision in *Austin Nichols and Co Inc v Stichting Lodestar*³⁶⁷ requires an appellate court to substitute its decision if it considers the decision under appeal is wrong; that is, outside the range of decisions available to the first instance court. This can create problems where the court is exercising its discretion as in family protection cases.³⁶⁸

III *One Court*

If it is seen as desirable for laws and access to justice to be clear, consistent and simple, then it is preferable that one court deal with as many related matters as possible. There are issues in relation to Maori land that are best handled in the Maori Land Court; the Maori Land Court was set up many years ago for this. However, it is difficult to understand why other inheritance or succession issues cannot be handled in one court. It is appropriate that the Family Court be given primary jurisdiction for the following reasons:

³⁵⁹ John Earles and others *Dobbie's Probate and Administration Practice* (5th ed, LexisNexis, Wellington, 2008) at [27.30.9].

³⁶⁰ John Winegarten, Roland D'Costa and Terry Synak *Tristram and Coote's Probate Practice* (30th ed, LexisNexis, United Kingdom, 2006) at [25.02].

³⁶¹ Family Courts Amendment Act 2008; see also "Senior Family Court Registrars" New Zealand Law Society *Law Talk* 727 (13 April 2009) at 10.

³⁶² Wills Act 2007, s 9(3).

³⁶³ Protection of Personal and Property Rights Act 1988, ss 54 and 55.

³⁶⁴ *Waldron v Public Trust* High Court Auckland CIV 2009-404-00485 19 January 2010.

³⁶⁵ Family Court Rules 2002, r 12.

³⁶⁶ For example s 75 Protection of Personal and Property Rights Act 1988; see also *D v S* [2003] NZFLR 81 (CA).

³⁶⁷ *Austin Nichols and Co Inc v Stichting Lodestar* [2008] 2 NZLR 141.

³⁶⁸ See for example *The National Heart Foundation of New Zealand and others v Carroll* HC Nelson CIV 2008-442-000495, 25 February 2009.

- Wills and succession affect all New Zealanders regardless of background, ethnicity and financial circumstances and it is important that access to justice be simplified and made as easy as possible³⁶⁹. Approximately 27,000 people die in New Zealand each year.³⁷⁰ Wills and succession are about families and this area of the law can be categorised as part of family law.³⁷¹
- Some estate litigation involves modest sums of money and some litigants want to represent themselves. For many this will be the first time they are involved in a court hearing and it is important that they are not overawed by the formality and technicality of court proceedings. Family Court proceedings are conducted in such a way as to avoid unnecessary formality; judges and lawyers cannot wear wigs.³⁷² Similarly the Family Court Rules require cases to be dealt with simply, speedily and expeditiously.³⁷³ The position of Senior Family Court Registrar has been created to handle routine matters, and new Mediation Rules have been developed which provide for non-judged mediation.
- The High Court has high filing fees and complex procedural rules; this is not the case in the Family Court. In *Field v Field* Robertson J stated:³⁷⁴

... the Family Court aided with the Matrimonial Property Rules, will be able to obtain more effectively, efficiently, cheaply and quickly, base information than could be the case in this Court. The ability to take action ex parte if there is a failure to provide necessary information, the ability to call a conference and confront the parties with the reality of their situation in my judgment will be of enormous advantage in dealing with the human problem which is presented by this case.
- The Family Court has its own rules which are much shorter than the High Court rules and are written in plain English. They were established in 2002 and replace the Matrimonial Property Rules referred to in *Field v Field*. Most applications do not require filing fees. In contrast the High Court Rules which have recently been rewritten have grown significantly in volume over the last 20 years.³⁷⁵ The standard filing fee is \$900.
- The trend in recent legislation such as the Property (Relationships) Act 1976 and amendments to the Family Protection Act 1955 and Law Reform (Testamentary Promises) Act 1949 has been to give primary or originating jurisdiction to the Family Court with power reserved to a Family Court judge to transfer complex matters to the High Court. The position is similar in some of the Australian States.³⁷⁶ For many years

³⁶⁹ David S Beattie *Report of Royal Commission on the Courts* (1978) at [489].

³⁷⁰ Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [12].

³⁷¹ For example Webb and others, above n 356 include a number of chapters on inheritance law in their family law text.

³⁷² Family Courts Act 1980, ss 10(2) and (3).

³⁷³ Family Court Rules, r 3.

³⁷⁴ *Field v Field* (1989) 5 FRNZ 337 at 340.

³⁷⁵ *McGechan on Procedure* the text on the High Court Rules and Procedure has more than doubled in volume over the last 20 years.

³⁷⁶ District Court of Queensland Act 1967, s 68(1)(b)(x).

a Family Court judge has been able to refer proceedings to the High Court;³⁷⁷ there has been no proposal to change this.

- In 1997 the Law Commission recommended³⁷⁸ that, as far as possible, all claims should be brought in a single set of proceedings and disposed of at the same time; this accords with s 4(2) of the Family Protection Act 1955. This objective will be facilitated if one court has primary jurisdiction for all claims rather than the High Court and Family Court having dual jurisdiction. In the interests of efficient estate administration and minimisation of costs it is desirable that, if possible, all claims be dealt with at once.
- One argument against inheritance or succession issues being handled in the Family Court is that these cases can be complex and may involve significant sums of money; therefore the skills and expertise of High Court judges are needed. However Family Court judges have been handling complex cases without any financial thresholds under the Property (Relationships) Act 1976 and Family Protection Act 1955 for many years and there are no proposals to change this. The Family Court is seen as a specialist court with expertise in dealing with family matters³⁷⁹ and the 1991 amendments to the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949 which extended jurisdiction to the Family Court under both Acts recognised this.³⁸⁰

IV *Recent Cases*

Some recent decisions tend to refute the claim that High Court Judges bring a greater level of expertise to inheritance and relationship property law. Examples are the following:

- In *Henry v Henry*³⁸¹ the applicant succeeded in a family protection claim against his mother's estate. In the High Court Asher J allowed the appeal against this decision and held that the Court's approach in family protection cases is analogous to challenges to decisions of public officials on the basis of unreasonableness. The Court of Appeal held that the High Court Judge was wrong to draw an analogy between judicial review claims and family protection claims. The matter was remitted to the Family Court for reconsideration.
- In *Kenyon & Another v Clough & Others*,³⁸² a family protection case, the High Court increased a legacy in a will from \$70,000 to \$300,000. On appeal this was reduced to \$150,000 and the Court of Appeal set out several errors in the High Court decision.
- In *Public Trust v Whyman*,³⁸³ an estate claim, the Court of Appeal was critical of the approach of High Court judges in that case and in an earlier case³⁸⁴ in respect of s 88(2) Property (Relationships) Act 1976.

³⁷⁷ Family Courts Act 1980, s 14.

³⁷⁸ Law Commission, above n 370, at page 155.

³⁷⁹ N Peart, M Briggs and M Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004) at [14.19].

³⁸⁰ See Family Protection Amendment Act 1991, s 3 and Law Reform (Testamentary Promises) Amendment Act 1991, s 3.

³⁸¹ *Henry v Henry* [2007] NZFLR 640 (CA).

³⁸² *Kenyon & Another v Clough & Others* [2005] NZCA 201 (CA).

³⁸³ *Public Trust v Whyman* [2005] 2 NZLR 696 (CA).

- In *Ward v Ward*³⁸⁵ which related to the variation of the terms of a family trust on dissolution of a marriage under s 182 of the Family Proceedings Act 1980, the decision of the Family Court judge, which was reversed by a High Court judge, was reinstated first by the Court of Appeal and subsequently by the Supreme Court.
- In *Rose v Rose*³⁸⁶ the Supreme Court and the Court of Appeal both overturned a High Court decision in respect of relationship property and made awards more in keeping with the decision of the Family Court judge.
- In *Sadler v Public Trust*³⁸⁷ which related to the content and extent of the duties of executors and trustees in estate administration an earlier High Court decision on this issue *Re Stewart*³⁸⁸ was criticised.

Another way to deal with this issue is to create a specialist Succession and Trust Law Court; indeed there have been calls for the establishment of an Equity Division of the High Court similar perhaps to the Chancery Division in England.³⁸⁹ The Chancery Division undertakes this role in the United Kingdom but this may not be feasible in a small country like New Zealand. What is possible is for succession, trust and elder law cases to be handled in most cases by Family Court judges who have shown ability and have experience in this area. This seems a better alternative to retaining significant areas of work solely within the jurisdiction of the High Court. Increased encouragement in any code to refer inheritance law disputes to mediation or alternative dispute resolution will also reduce the volume of cases coming before judges.

The High Court had almost exclusive jurisdiction in trust and inheritance laws in New Zealand for many years. Since the establishment of the Family Court in 1981, various aspects of inheritance and trust law have been delegated to the Family Court to the point where it has taken on a significant workload in this area. However, the High Court also retains sole jurisdiction in certain aspects of inheritance law. The traditional role of the High Court in this area is not a reason in itself to exclude the Family Court. At the very least, this jurisdictional issue should be reviewed and consideration given to appointing one court to handle all matters.

In any inheritance code primary originating jurisdiction should be given to the Family Court in all matters subject to:

- for Maori Land, jurisdiction remaining with the Maori Land Court; and
- the power of a Family Court judge to transfer complex matters to the High Court.

³⁸⁴ *Re Williams: Kinniburgh v Williams* [2004] 2 NZLR 132, [2004] NZFLR 467.

³⁸⁵ *Ward v Ward* [2009] NZSC 125 (SC).

³⁸⁶ *Rose v Rose* [2009] 3 NZLR 1, [2009] NZFLR 814.

³⁸⁷ *Sadler v Public Trust* [2009] NZCA 364.

³⁸⁸ *Re Stewart* [2003] 1 NZLR 809.

³⁸⁹ Anthony Grant "New Zealand Sham Trusts - Facing International Criticism" *NZ Lawyer* (New Zealand, 18 September 2009) at 15.

V *Assets Located Outside New Zealand*

It is not the purpose of this thesis to discuss conflict of laws issues in detail. However with increasing mobility and the greater likelihood that people will own assets in different countries, an inheritance code will need to state clearly what laws apply to assets located in New Zealand and overseas.

For the purposes of relationship property, family protection and testamentary promises claims, property is categorised as movable and immovable. Immovable assets include land, and movable assets include bank accounts and shares (other than shares in a company owning New Zealand real estate).³⁹⁰

Currently and for many years, if the will-maker is domiciled in New Zealand at the date of death a New Zealand court has had jurisdiction to make orders under the Family Protection Act 1955 affecting disposition of movable property whether situated in New Zealand or overseas.³⁹¹ There is also jurisdiction in respect of immovable property situated in New Zealand but not in respect of immovables outside New Zealand.³⁹² If the will-maker is domiciled at the date of death outside New Zealand orders can be made under the Family Protection Act 1955 to dispose of immovables situated in New Zealand but not immovables overseas. New Zealand courts cannot affect the disposition of the movable property of a will-maker domiciled at the date of death outside New Zealand, whether that movable property is situated inside or outside New Zealand.³⁹³ If there are immovable assets situated overseas and there are other assets in respect of which jurisdiction to make an order exists, the court can take the immovable assets into account in determining the provision, if any, that should be made for the applicant.³⁹⁴

In respect of relationship property claims on death the Property (Relationships) Act 1976 applies to immovable property situated in New Zealand regardless of the domicile of the parties; land overseas is excluded from the Act.³⁹⁵ Movable property situated in New Zealand or overseas is covered by the Act if one of the parties is domiciled in New Zealand.³⁹⁶ These rules are very similar to the rules that have been in force for some time in respect of family protection claims.

The rules for family protection and testamentary promises claims are the same except in one respect. In *Re Greenfield*³⁹⁷ it was held that as far as testamentary promises claims are concerned, there is jurisdiction to make an order in respect of movables situated in New Zealand of a person dying domiciled out of New Zealand. The judge in that case stated that the Law Reform (Testamentary Promises) Act 1949 is a singular remedial measure in New Zealand and said it would be unjust to defeat a claim merely because of a matter of domicile.³⁹⁸ It is difficult to understand why different rules apply to testamentary promises

³⁹⁰ *Re Knowles (deceased)* [1995] 2 NZLR 377.

³⁹¹ Patterson, above n 357, at [5.2].

³⁹² *Re Roper* [1927] NZLR 731 at 742; “immovables” are land and movables are assets such as bank accounts and shares (other than shares in a company owning New Zealand real estate).

³⁹³ Patterson, above n 357, at [5.2].

³⁹⁴ *Ibid.*

³⁹⁵ Property (Relationships) Act 1976, s 7; N Peart, M Briggs and M Henaghan (eds), above n 379, at [6.3.1].

³⁹⁶ Property (Relationships) Act 1976, s 7(2).

³⁹⁷ *Re Greenfield* [1985] 2 NZLR 662.

³⁹⁸ Patterson, above n 357, at [13.26].

and family protection claims; the reasoning in *Re Greenfield* is not convincing. I propose that the Law Reform (Testamentary Promises) Act 1949 be repealed and this will remove the anomaly. Even if this does not occur, for the sake of clarity and simplicity this anomaly should be removed.

VI *Forum Conveniens*

Apart from the rules in the Family Protection Act 1955, the Law Reform (Testamentary Promises) Act 1949 and the Property (Relationships Act) 1976 regarding movables and immovables discussed above, there is a well developed set of principles governing conflict of laws and forum conveniens issues in disputes. Relevant factors include:

- the relative cost and convenience of proceeding in each jurisdiction;
- the location and availability of documents and witnesses;
- the extent of litigation in another jurisdiction and the state of those proceedings;
- whether all relevant parties are subject to New Zealand jurisdiction so that all issues can be resolved in one hearing;
- the existence of an agreement to submit to a particular jurisdiction or relating to the appropriateness of a particular forum;
- where any judgment will fall to be enforced;
- whether the defendant's objection to jurisdiction or application for a stay, is brought to gain a tactical advantage;
- the strength of the plaintiff's claim;
- whether the law governing the dispute to be resolved is New Zealand law;
- procedural advantages in one jurisdiction;
- a decision in another jurisdiction that it is forum conveniens.³⁹⁹

This list of criteria is based on numerous decided cases⁴⁰⁰ and also the High Court Rules dealing with service out of New Zealand.⁴⁰¹

The textbooks indicate that the rules set out above in relation to movables, immovables and overseas assets are well established and relatively clear.⁴⁰² While there have been difficult cases, the rules are accepted and largely mirror rules in other jurisdictions.⁴⁰³ The rules were reviewed and largely retained when the Property (Relationships) Act 1976 came into force in

³⁹⁹ *Laws of New Zealand Conflict of Laws: Jurisdiction and Foreign Judgments* at [30].

⁴⁰⁰ Some of the cases are discussed in the recent case *Ochi v Trustees Executors Limited* HC Dunedin CIV 2008-485-002062, 18 December 2009.

⁴⁰¹ Rules 6.27-6.29.

⁴⁰² Patterson, above n 357, at [5.2] although this does raise conflict of laws issues with other countries.

⁴⁰³ For example Lawrence Collins and others (eds) *Dicey, Morris & Collins on The Conflict of Laws* (13th ed, Sweet & Maxwell, United Kingdom, 2009) at [27-011].

2002. I see no need for major or even minor changes. It is important to remember that there is increasing acceptance of the need to harmonise cross-jurisdictional laws. For example the Hague Convention on the law applicable to trusts and on their recognition has been adopted by a number of countries including the United Kingdom in 1987.⁴⁰⁴

As with other inheritance law issues, the current rules relating to jurisdiction where parties or assets are located or domiciled overseas (or partly in New Zealand and partly overseas) are contained in a mixture of statutes, decided cases and the High Court Rules. This affects access to the law and consistency. The issue will come up as people move between countries and acquire assets in different countries and under different ownership structures. An inheritance code which sets out the applicable rules for jurisdiction in a clear and comprehensive way is important.

VII *Summary*

What is proposed is that the law in relation to movables and immovables set out in the Property (Relationships) Act 1976⁴⁰⁵ and the other forum conveniens rules set out above be brought within the proposed inheritance code. It is proposed that these rules and the other forum conveniens rules cover all inheritance issues in the code.

⁴⁰⁴ David Hayton, Paul Matthews and Charles Mitchell *Underhill and Hayton's Law of Trusts and Trustees* (17th ed, LexisNexis Butterworths, London, 2006) at 1235; Recognition of Trusts Act 1987.

⁴⁰⁵ Sections 7 and 7A.

Chapter 7

ANTI-AVOIDANCE PROVISIONS

I *The Current Position*

Some will-makers transfer assets into family trusts or directly to individuals or set up joint ownership structures while alive with the intention or effect⁴⁰⁶ of defeating inheritance rights or claims. Some countries have anti-avoidance laws to prevent this. The Scottish Law Commission recommended in respect of intestacy⁴⁰⁷ that a child claiming a share should have to add notionally all lifetime gifts made by the deceased, other than Christmas, birthday and other conventional gifts (such as charitable donations) of a reasonable amount, to the share of the deceased's estate to be shared by the children.

As noted by the New South Wales Law Reform Commission⁴⁰⁸ the doctrine of "hotchpot" which originated in the Statute of Distributions⁴⁰⁹ provided that settlement and advancement conferred upon children during a person's lifetime were to be taken into account in determining their portions upon intestacy. However, hotchpot was abolished in a number of countries including New Zealand because of the difficulties it created including uncertainty in defining advancement and the date of valuation of benefits received. Those jurisdictions retaining it usually impose time limits⁴¹⁰ which can be arbitrary.

The arguments in favour of anti-avoidance provisions include the following:⁴¹¹

- If rules of law are established to protect people from disinheritance those rules should be protected from attempts to circumvent them; there is little point having rules that can be easily evaded.
- This is particularly so where the protective provisions are new and consistent with public opinion.
- If laws are easily evaded or ineffective this brings the law and legal system into disrepute and creates "industries" specialising in evasion of the law which can lead to other harmful consequences.⁴¹²

Where spouses, civil union or de facto partners separate or divorce there are anti-avoidance or trust-busting provisions in the Property (Relationships) Act 1976⁴¹³ and Family Proceedings Act 1980.⁴¹⁴ In relation to the Property (Relationships) Act 1976 a personal representative can apply under s 44 but requires leave from the court to apply under sections

⁴⁰⁶ The difference between "intention" and "effect" is significant as I will discuss shortly.

⁴⁰⁷ Scottish Law Commission *Discussion Paper on Succession* (SLC DP136, 2007) at [13.5].

⁴⁰⁸ New South Wales Law Reform Commission *Uniform Succession Laws: Intestacy* (NSWLRC R116, 2007) at [13.5].

⁴⁰⁹ Statute of Distributions 1670 (UK) 22 & 23 Cha II c10, s 5.

⁴¹⁰ New South Wales Law Reform Commission, above n 408, at [13.14]

⁴¹¹ Scottish Law Commission, above n 407, at [4.10]-[4.16].

⁴¹² For example see the article "Divorce New Zealand Style" in the August 2009 edition of *North and South* magazine at 30 which discusses the use of family trusts to avoid relationship property laws and rest home fees and the problems this has created.

⁴¹³ For example ss 43, 44 and 44C.

⁴¹⁴ For example s 182.

44C and 44F and it is not clear whether applications can be made after death under sections 44B and 44F.⁴¹⁵ Why are these limitations and restrictions imposed on potential claims on death? There are no obvious policy reasons and the Property (Relationships) Act 1976 gives no explanation.

As noted by the Scottish Law Commission⁴¹⁶ most jurisdictions including Australia have anti-avoidance provisions; this includes New Zealand.⁴¹⁷

II *Competing Arguments*

Arguments against anti-avoidance provisions are:

- People should be encouraged (indeed, have a right) to plan the transfer of assets to the next generations; anti-avoidance measures could affect sensible and legitimate asset planning;
- anti-avoidance rules complicate and slow down estate administration and add cost to the detriment of beneficiaries;
- wealthy people employ lawyers and accountants to devise arrangements to get around anti-avoidance provisions; not only does this create industries specialising in evading the law, but it means that only those without the means to circumvent the law are caught.

It is very difficult to answer the argument that having put rules in place to ensure provision for surviving spouses/partners and minor children, some protection is needed to ensure that those provisions are not easily avoided. In New Zealand we have for many years had anti-avoidance provisions in place to back up laws in areas such as bankruptcy, company liquidation and relationship property.⁴¹⁸

III *Section 88(2)*

Under the Matrimonial Property Act 1963 the personal representative of a deceased spouse could bring a claim without leave to establish the interests of the spouses in matrimonial property.⁴¹⁹ The leading case on this was *Irvine v Public Trustee*⁴²⁰ where the Public Trustee commenced proceedings under the Matrimonial Property Act 1963 with the express purpose of bringing part of jointly owned property (which would otherwise have passed by survivorship) into an estate so that a family protection claim could be made by children of the deceased's previous marriage. An application to strike out the proceedings was dismissed so that the determination of the beneficial ownership of assets could be brought to trial.

Included amongst the 2001 amendments to the Property (Relationships) Act 1976 was s 88(2) which authorises the personal representative of a deceased spouse or de facto partner, with

⁴¹⁵ N Peart, M Briggs and M Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004) at [10.9].

⁴¹⁶ Scottish Law Commission, above n 407, at [4.13].

⁴¹⁷ Property (Relationships) Act 1976, s 88(2).

⁴¹⁸ For example Property (Relationships) Act 1976, ss 44-44D.

⁴¹⁹ WM Patterson *Law of Family Protection and Testamentary Promises* (3rd ed, LexisNexis, Wellington, 2004) at [14.3].

⁴²⁰ *Irvine v Public Trustee* [1989] 1 NZLR 67 (CA); see also *Poppe v Grose* [1982] 1 NZLR 209 (CA)

the leave of the court, to apply for an order under s 25(1)(a) of the same Act; that is, an order determining the respective shares of spouses or partners in relationship property or dividing the relationship property. The leading case is *Public Trust v Whyman*⁴²¹ where Public Trust was appointed personal representative so that it could sever the joint ownership of assets and bring a half share into the deceased's estate to be made available for a family protection claim.

Section 88(2) is an anti-avoidance provision. It has been used primarily to prevent the survivorship rule for joint assets from defeating family protection claims. As noted in *Whyman*,⁴²² the primary reason for allowing claims by a personal representative is to address situations of the type presented in cases such as *Irvine v Public Trustee*. In the *Whyman* case William Young J stated:⁴²³

The putting of substantial assets into joint names was, on the affidavits, effected with a full awareness of the consequences. The consequences for the children were obvious. The cancellation of the life insurance policy would appear to have been intended to remove the possibility of the children taking anything from the estate. So on the limited facts we have, it is open to inference that Mr Russell sought to structure his affairs to avoid fulfilling what would otherwise have been his moral duty as that term is applied in family protection litigation, and to defeat what would otherwise have been the statutory rights of his children associated with the breach of duty.

And:⁴²⁴

As is apparent, these seem to us to be the type of circumstances which were envisaged by the legislature when it enacted s 88(2). So we would have thought that the Public Trust would have very reasonable prospects of obtaining leave under s 88(2) to commence proceedings. Indeed, for the moment, we can see no reason why leave would not be granted.

Clearly Parliament saw the need to prevent will-makers from evading their obligations under the Family Protection Act 1955 and creating serious injustice by the simple expedient of putting assets into joint ownership. Nothing has occurred since 2001 to indicate that this protection is no longer needed; indeed there have been a number of cases on s 88(2).⁴²⁵

IV Leave

Prior to the Property (Relationships) Amendment Act 2001 personal representatives did not need to get leave of the court to apply for division of relationship property. The original Bill made no allowance for personal representatives to apply but this was added at the last minute, along with the requirement for leave. The requirement for leave creates unnecessary problems such as the interpretation and application of the term "serious injustice" and the

⁴²¹ *Public Trust v Whyman* [2005] 2 NZLR 696 (CA); see also *Morgan v Public Trust* HC Auckland CIV 2006-404-003636, 20 November 2006.

⁴²² *Public Trust v Whyman*, above n 421, at [48].

⁴²³ *Ibid*, at [50].

⁴²⁴ *Ibid*, at [51].

⁴²⁵ *Re Williams; Kinniburgh v Williams* [2004] 2 NZLR 132; [2004] NZFLR 467; *Public Trust v Whyman* above n 421; *Morgan v Public Trust* above n 421; *Public Trust v Relph* HC Auckland CIV 2008-404-1922, 15 October 2008.

limitation of this power to “personal representatives” as opposed to “trustees”.⁴²⁶ Why should the personal representative have to get leave to apply for division of relationship property when the surviving spouse or partner does not? The surviving spouse has this advantage over the personal representatives of the deceased’s estate for no apparent reason.

The background to this was the report of the Working Group on Matrimonial Property and Family Protection which stated that the broad object of the reform was to ensure that the survivor was no worse off than a spouse whose marriage had come to an end during the parties’ joint lives.⁴²⁷ The report stated:⁴²⁸

It does not follow that the estate should be able to sue the survivor to ensure that the survivor is left with no more than his or her share of the matrimonial property. Where one spouse has died the contest is no longer between two partners who take their share and then go their different ways. It is between the survivor of a marriage and the beneficiaries under a will or on intestacy or potential family protection claimants.

However, as commentators have pointed out,⁴²⁹ this is not consistent with the Act’s object of equality between the parties to a relationship. It advantages the surviving spouse or partner to the detriment of the deceased and his or her estate. The New Zealand Law Commission in its Draft Succession (Adjustment) Act departs from this proposal; proposed cl 10(2) allows the administrator of a deceased person by application to the court to initiate a property division against a partner of that deceased or against the administrator of such a partner.⁴³⁰ Leave is not required.

V *Variation of Trusts*

If this exception to testamentary freedom is accepted because of the importance of providing for a spouse, partner or minor children, it is logical to extend this protection to the common situation where assets are transferred into a family trust with the intention or effect of avoiding family protection claims. It is difficult to see how, from a claimant’s point of view, this is very different from a transfer to joint ownership. At present a personal representative can apply under the Property (Relationships) Act 1976 to set aside a disposition of property if its purpose is to defeat the claims or rights of any other person under the same Act.⁴³¹ Leave of the court is not required and the meaning of “purpose” will be discussed shortly.

Under s 182 of the Family Proceedings Act 1980 the Family or High Court on the making of an order dissolving a marriage or civil union, can inquire into certain settlements (or trusts) made by the parties and make orders varying the terms of the settlement or trust. This section is based on old English legislation and has been used in New Zealand over recent years on marriage dissolution to make provision for one of the parties to the former marriage and

⁴²⁶ N Peart, M Briggs and M Henaghan (eds), above n 415, at [3.1]; also New Zealand Law Society “Trusts Conference Booklet” (2005) at 51.

⁴²⁷ *Report of the Working Group on Matrimonial Property and Family Protection* (Wellington, 1988) at [46]-[47].

⁴²⁸ *Ibid*, at [46].

⁴²⁹ N Peart, M Briggs and M Henaghan (eds), above n 415, at [3.2.6].

⁴³⁰ New Zealand Law Commission *Succession Law: A Succession (Adjustment) Act* (LC R 39, August 1997) at 58.

⁴³¹ See s 44; N Peart, M Briggs and M Henaghan (eds), above n 415, at [10.4.1].

children of the marriage from a trust or settlement established before or after the marriage.⁴³² Section 182 applies on death if an order of presumption of death of a spouse has been made under s 32 of the Family Proceedings Act 1980;⁴³³ however it is most often invoked where a dissolution order has been made. The personal representative of either party to the marriage or civil union can apply for a review of an order under s 182.⁴³⁴

If power to vary a trust and provide for certain parties is available on dissolution of a marriage or civil union, is there any reason it should not be available on death? Why should a surviving spouse, civil union or de facto partner be worse off? Like s 88(2) of the Property (Relationships) Act 1976 it could prevent will-makers from avoiding their obligations by transferring assets to a discretionary family trust. If a deceased person has settled assets on a trust while alive, the court could vary that trust to satisfy a support claim; a modernised version of s 182 could be enacted which would apply to support claims. This proposal does not as such breach testamentary freedom; arguably it may reinforce testamentary freedom by making assets available on death. Following the Supreme Court decision in *Ward v Ward*⁴³⁵, s 182 is about expectations and thus does not restrict freedom while alive.

Should any beneficiary under a will be entitled to apply, and thereby enlarge the estate? In keeping with the importance of testamentary freedom and restricting the intervention of the court, applicants should be limited to those who are eligible for and make a support claim (including litigation guardians for minor claimants) and the personal representatives of the deceased's estate. The powers in s 88(2) and the proposed power to vary a discretionary family trust would be available only to benefit a support claim by a surviving spouse, civil union or de facto partner and children, accepted children or grandchildren under 21 years of age⁴³⁶. The following factors would be taken into account by the presiding judge when making a decision:

- the size of the estate;
- the circumstances of the surviving spouse, partner, children and accepted children;
- competing claims;
- other provisions made for any claimants or likely to be made by third parties;
- the relationship between the deceased and the claimant.

This power would be available as a backup where inadequate provision has been made for the claimant and there are insufficient assets in the estate to make adequate provision for the claimant.

Giving judges discretionary powers to vary a trust is preferable to rules setting aside the transfers of assets to family trusts. Problems arise where transfers were made some years

⁴³² For example see *Ward v Ward* [2009] NZSC 125; *Mosaed v Mosaed* [1999] NZFLR 747, [1999] 3 NZLR 634.

⁴³³ N Peart, M Briggs and M Henaghan (eds), above n 415, at [10.1].

⁴³⁴ Family Proceedings Act 1980, s 182(5).

⁴³⁵ *Ward v Ward* [2009] NZSC 125.

⁴³⁶ See the summary at the end of chapter 4 for my recommendations on what types of support claims should be available.

before death and parties have acted in reliance on this and altered their positions. There are also valuation issues such as the date to be used for valuation of the benefits conferred, and the accuracy of valuations obtained some years after the event. How do you apportion subsequent increases in values, particularly where the transferee has carried out improvements? What happens if the transferee has sold the property and then bought and sold several times? Over longer periods the dates and details of gifts may become “sketchy”.⁴³⁷

VI *Intention v Effect*

The distinction between “intention” and “effect” is critical and this was recognised when the Property (Relationships) Act 1976 was passed. Section 44 empowers the Family Court to set aside a disposition if it was made with the intention of or in order to defeat a claim under the Act. However, proving the requisite intention of defeating a claim has proven to be a major stumbling block.⁴³⁸ For example in *Coles v Coles*⁴³⁹ the claim failed because the court decided that the intention behind the disposition to a company trust structure was to save tax and benefit children of the marriage rather than to defeat a claim. In *Gerbic v Gerbic*⁴⁴⁰ the claim failed because Mr Gerbic’s intention in transferring significant assets into two family trusts was to avoid income tax and death duties. In *Stewart v Stewart*⁴⁴¹ the claim failed because the intention in transferring the family home to a family trust was to avoid creditors.

In contrast, s 44C of the same Act empowers the Family Court to make compensatory orders if a disposition to a trust has the “effect” of defeating the applicant’s rights. For some time there was uncertainty about the meaning of this requirement.⁴⁴² Some courts adopted a narrow approach to avoid undermining carefully planned asset protection schemes while others interpreted the requirement widely. However, in *Nation v Nation*⁴⁴³ the Court of Appeal took a broad approach deciding that the meaning of “defeat” is mechanical; it does not turn on bad faith or improper motive. While s 44C has had limited effect, that is largely because of the very limited range of remedies available under the section, and in particular, the inability to pay capital from the trust to the applicant.⁴⁴⁴ If, however, there are wide powers of variation, as there are currently under s 182 (including the power to pay out capital), this type of provision could be very effective.

Recently in *Regal Castings Ltd v G M & G N Lightbody*,⁴⁴⁵ the meaning of intent to defraud was analysed in the context of s 60 Property Law Act 1952 and given a broader interpretation. This has been extended to s 44 of the Property (Relationships) Act 1976.⁴⁴⁶ However, in light of the historically narrow interpretation of s 44, the power to vary trusts should be available if a disposition of property was made with the intention **or** has the effect of defeating a claim under the proposed code. This raises the question whether the disposition should be set aside or assets resettled or whether (in line with s 44C) the court’s powers should be limited to awarding compensation. Setting aside transfers of money or property can

⁴³⁷ New South Wales Law Reform Commission, above n 408, at [13.14].

⁴³⁸ N Peart, M Briggs and M Henaghan (eds), above n 415, at [10.4.2].

⁴³⁹ *Coles v Coles* (1987) 3 FRNZ 101, 4 NZFLR 621 (CA).

⁴⁴⁰ *Gerbic v Gerbic* [1992] NZFLR 481.

⁴⁴¹ *Stewart v Stewart* [2003] NZFLR 400.

⁴⁴² N Peart, M Briggs and M Henaghan (eds), above n 415, at [10.6].

⁴⁴³ *Nation v Nation* [2005] 3 NZLR 46 (CA) at [146].

⁴⁴⁴ N Peart, M Briggs and M Henaghan (eds), above n 415, at [10.6].

⁴⁴⁵ *Regal Castings Ltd v G M & G N Lightbody* [2009] 2 NZLR 433.

⁴⁴⁶ *Ryan v Unkovich* [2010] 1 NZLR 434, [2009] NZFLR 948.

create a number of problems which I will discuss shortly. Resettlement of assets can have tax and other implications⁴⁴⁷ and involves the exercise of trustees' discretions. There is doubt that courts are appropriate bodies to exercise that type of discretion. However, there are no such issues awarding *compensation* (including payments of capital and income) from the trust which received the disposition, and compensation should be paid where the transfer of assets to a trust was made with the intention or has the effect of defeating claims under the proposed inheritance code.

VII *Proposed Powers*

What specific powers should the court have? Currently under s 44C the court can require payment of a sum of money, and the transfer of property from one party to another out of separate or relationship property, and it can order payment of the whole or part of the income of the trust either for a specified period or until a specific amount has been paid. However the court cannot order payment of trust income if adequate compensation is available by ordering payment of money or the transfer of a property out of separate or relationship property. The powers of the court under s 44C are restricted to payment of trust income and then only if other adequate compensation is not available. I propose that the court be given power to make and satisfy support awards by varying a trust into which the deceased will-maker has transferred assets or property and the power of variation will include a discretion to order payments of capital or income and the transfer of property or assets from the trust to the estate or to a successful applicant. The power should also extend to reducing or writing off a debt owed to the trust by a successful applicant.

The wording of s 182 has created a number of problems and will need to be modified if used as a model for variation of trusts on death. As pointed out by the High Court in *W v W*⁴⁴⁸ s 182 jurisdiction is a relic from the days when property rights were adjusted between separated spouses under what was known as the ancillary relief provision in the court's divorce jurisdiction. The origins of s 182 in New Zealand go back to s 37 of the Divorce and Matrimonial Causes Act 1867.⁴⁴⁹

In light of this long legislative history it is not surprising that there have been problems in the interpretation of the section against the backdrop of the Property (Relationships) Act 1976. The recent cases of *Williams v Williams*⁴⁵⁰ and *Ward v Ward*⁴⁵¹ illustrate how applications under s 182 have increasingly been used to get around the limitations on the effectiveness of the Property (Relationships) Act 1976 when assets are held in trust. In *X v X*⁴⁵² the Court of Appeal added that s 182 was a route available to the courts when there was little, if any, relationship property available for division. However, as the Supreme Court pointed out in *Ward v Ward*:⁴⁵³

⁴⁴⁷ N Kelly, C Kelly and G Kelly *Garrow and Kelly's Law of Trusts and Trustees* (6th ed, LexisNexis, Wellington 2005) at [26.5.3] for a discussion of the potential problems of resettlements.

⁴⁴⁸ *Ward v Ward* HC Napier CIV-2007-441-359, 16 November 2007 (subsequently reported in the Supreme Court as *Ward v Ward* [2009] NZSC 125).

⁴⁴⁹ *Mosaed v Mosaed* [1999] 3 NZLR 634 at 638, [1999] NZFLR 747 at 750.

⁴⁵⁰ *Williams v Williams* HC Christchurch CIV 2008-409-002948, 1 May 2009.

⁴⁵¹ *Ward v Ward* [2009] NZFLR 655 (CA).

⁴⁵² *X v X [Family Trust]* 2009 NZFLR 956 at [44].

⁴⁵³ *Ward v Ward* [2009] NZSC 125 at [20].

The fundamental starting point is that under s 182 there is no entitlement to a 50/50 or any other fractional division of the trust property. Nor is there any presumption in favour of a 50/50 or any other fractional division.

Other specific problems that have arisen in the interpretation and application of s 182 include:

- Interpretation of the words “post-nuptial settlement made on the parties” and whether the term “the parties” encompasses either of them or whether the settlement must be made on both of them.⁴⁵⁴
- Does the expression “ante-nuptial settlement” include all trusts set up before a marriage, or is it restricted to settlements referable to the particular marriage?⁴⁵⁵
- Section 182 is only available to spouses and civil union partners on dissolution; it is not available to de facto partners, nor is it available to spouse or civil union partners on separation.
- Section 182(6) prevents a court from using its powers to defeat or vary an agreement made under Part 6 of the Property (Relationships) Act 1976.
- There is a lack of guidance on how the court should exercise its powers.

Some of these problems can be avoided by careful drafting but it will also be important to set out clearly the purpose of the proposed provision. The intention is to satisfy a support award by varying a trust into which the deceased transferred assets while alive. Remedies available to the court will include paying capital or income or transferring property or assets from the trust to a successful applicant or to the estate.

I propose that when making an application for support, those eligible to make such a claim apply at the same time for variation of the trust into which the deceased made a disposition of property or assets. The right to apply should extend to litigation guardians of minor applicants and the personal representatives of the estate. Should there be a time limit on such applications? There is no time limit as such in s 182 although it is limited to “post” or “ante” nuptial settlements. The Insolvency Act 2006 refers to gifts between two and five years before bankruptcy adjudication.⁴⁵⁶ There should be a time limit, and I propose that the limit be five years in line with the Insolvency Act 2006 provisions and to enable capture of dispositions in a reasonable period before death.

Should transfers of assets or money by a will-maker while alive, to companies or third parties other than a trust, be set aside or taken into account? Setting aside the will-maker’s transfers of assets or money can create problems in the following situations:

- where the transfer was effected some years before death and subsequently there have been significant changes in the value of money or property;

⁴⁵⁴ *Mosaed v Mosaed*, above n 449.

⁴⁵⁵ See *Kidd v Van Den Brink* HC Auckland CIV 2009-404-4694, 21 December 2009.

⁴⁵⁶ Sections 204 and 205.

- where the recipient has acted in good faith to alter his or her position in reliance upon the ownership of the asset or funds, for example, by improving the property or subdividing it;
- where the transfer may have been in full or partial satisfaction of services or other consideration provided by the recipient;
- where the personal or financial circumstances of the will-maker or recipient have changed significantly since the transfer of the assets in question; for example, the recipient may have developed serious health problems;
- where the assets transferred by the will-maker have been sold by the recipient and there have been subsequent purchases and sales so that tracing the original fund is impossible.

As noted earlier in this chapter, similar rules in relation to hotchpot were abolished in New Zealand some years ago for these reasons and it is doubtful that they would work today. It should be noted also that when transferring assets to a trust, the common arrangement is that the asset is “sold” but the purchase price is never paid because it is gifted by the settlor or transferor to the trust. Gift duty exemption is not available when an asset is sold to a company or transferred to a person who is not a close relative or very close friend because there is no “natural love and affection”.⁴⁵⁷

Alternatively, should the transfer of assets to a particular person be taken into account in the event of a claim for further support from an estate? At present under the Family Protection Act 1955 where there are competing claims, provision made for certain family members, even through a discretionary family trust, is a relevant factor in the exercise of the court’s discretion.⁴⁵⁸ However, it must be remembered that under the proposals in this thesis these arrangements would be taken into account only where there are competing claims by a spouse, partner, children, grandchildren or accepted children under 21 years of age which are “support” claims as recommended in chapter 4 of this thesis.

VIII *Australian Legislation*

In New South Wales "Notional Estate" provisions have been enacted to deter avoidance of family provision claims by parties divesting property before death. The timing of the transaction and whether the transaction is supported by proper consideration are critical questions. The legislation is complex but in summary it works along these lines:⁴⁵⁹

- A person enters into a transaction which causes property to be held by another or creates a trust over property (a "relevant property transaction").
- Examples of relevant property transactions include powers of appointment, joint tenancies, life insurance funds or schemes and transfers of other property or assets.

⁴⁵⁷ Earles and others (ed) *Wills and Succession* (2009, LexisNexis, Wellington) at [15.10].

⁴⁵⁸ See for example *Flathaug v Weaver* [2003] NZFLR 730; see also Patterson, above n 419, at [4.20].

⁴⁵⁹ See Leonie Englefield “Family Provisions, Particularly in Respect of the Uniform Succession Laws” (paper presented to Law Society of South Australia, Adelaide, 7 May 2009) at [23]-[27].

- The court can designate property as notional estate where a relevant property transaction took effect within three years before the date of death with the intention of denying or limiting family provision or took effect or is to take effect on or after the deceased's death.

A particularly important issue in Australia is the interaction between superannuation death benefit claims and family provision claims. The death of a superannuation member will usually result in payment of a death benefit and an increasing portion of Australians' wealth is held in superannuation funds. Usually the terms of the relevant trust deed determine how the death benefit is paid out. In New South Wales the notional estate provisions allow account to be taken of the impact of funds received externally (for example from a superannuation scheme death benefit) when making family provision orders.⁴⁶⁰

Should New Zealand follow this path and introduce notional estate provisions to deter alienation of assets or establishment of structures to avoid support claims? The argument in favour of this is that there is little point having rules of law that are easily evaded and if laws are easily evaded the legal system is brought into disrepute.⁴⁶¹ The arguments against the notional estate provisions are:

- The Australian rules are very complex and have been enacted because disproportionate shares of individuals' assets are held in superannuation funds; this is not the case in New Zealand.
- The rules are based on outdated estate duty provisions and there has been criticism that the rules are designed for estate duty collection, not avoidance of family provision claims.⁴⁶²
- Problems have arisen with the timing of transactions and whether there is proper consideration; how far to go back and what constitutes adequate or partially adequate consideration.⁴⁶³
- Problems have arisen where the original transferee has died and orders are sought against a subsequent transferee or transferees.⁴⁶⁴
- Are omissions or failures to take opportunities such as failure to exercise share options caught?
- Is it realistic or practical to attempt to bring into the net of "notional estate" an increasing range of "assets" both in New Zealand and in overseas countries which may in the case of overseas assets be subject to estate duty or stamp duty, or other rules of law such as the fixed share entitlements common in Europe?

⁴⁶⁰ Ibid, at [45].

⁴⁶¹ See the start of this chapter.

⁴⁶² Rosalind F Croucher "Towards Uniform Succession in Australia - a Progress Report" at 16 (paper presented at Law Society of South Australia Succession Law Conference, Adelaide, 7 May 2009).

⁴⁶³ See for example *Cetojevic v Cetojevic* [2007] NSWCA 33 contrasted with *Wade v Harding* (1987) 11 NSWLR 551.

⁴⁶⁴ *Prince v Argue* [2002] NSWSC 1217.

While superficially attractive, the Australian experience is that the notional estate rules are complicated, arbitrary and difficult to enforce. This mirrors the New Zealand experience with the imposition of estate duty up until 1991; there were notional estate rules in the Estate and Gift Duties Act 1968 but they were only marginally effective. Hotchpot, which is similar in many respects, has been tried and rejected in New Zealand and most of the Australian states. While notional estate provisions are certainly worthy of consideration, it is more likely that they will result in applications attempting to claw back assets that organised will-makers and their lawyers have gone to considerable lengths to remove from reach. It is relevant to note also that while a Code is intended by its nature to be comprehensive a code does not necessarily preclude all possible causes of action between the parties.⁴⁶⁵

IX *Draft Clause*

In light of these problems, and bearing in mind the different context in which an inheritance code would operate, a provision along the following lines is proposed:

“Section ... Variation of Trusts

1. Where:

- (a) in the period of five years prior to death the deceased has transferred, disposed of or settled assets on trust (“the trust”); and
- (b) this transfer, disposition or settlement was made with the intention or has the effect of defeating or reducing a support claim under this Act

the court may in its discretion and on application vary the trust (or any other trusts or settlements into which the assets of the trust have since been transferred) to make provision for support claims under this Act.

- 2. An application under this section may be made at the same time or after a support claim is made under this Act against the estate of a deceased person by any of the following:
 - (a) an eligible surviving spouse, eligible surviving civil union partner or eligible surviving de facto partner of the deceased; or
 - (b) an eligible child or litigation guardian for an eligible child; or
 - (c) the personal representatives of the deceased or trustees of the deceased’s estate.
- 3. Any application under this section must be made within 12 months after the grant of administration except with the leave of the court.
- 4. When exercising its discretion under this section and without limiting its powers, the Court may take into account some or all of the following:
 - (a) the extent of the assets of the deceased’s estate;

⁴⁶⁵ *Kerridge v Kerridge and Others* [2009] 2 NZLR 763, [2009] NZFLR 705 (CA) at [52]; see also chapter 2 of this thesis.

- (b) the extent of the assets of the trust;
 - (c) the circumstances of the surviving spouse, partner, eligible children or eligible grandchildren of the deceased;
 - (d) competing claims;
 - (e) other provisions made for any claimants or likely to be made by third parties;
 - (f) the relationship between the deceased and the claimant; and
 - (g) whether an agreement under Part 6 of the Property (Relationships) Act 1976 has been completed by the deceased.
5. Without limiting its powers the Court may make all or some of the following orders:
- (a) payment of a sum or sums of money (whether capital or income) from the trust to the deceased's estate, any person or persons or any other trust;
 - (b) transfer of property or any asset from the trust to the deceased's estate, or any person or persons or any other trust;
 - (c) payment of the whole or any part of the income from the trust for a specified time or until a specified amount has been paid;
 - (d) cancellation of a debt or obligation owed by a person to the trust.

Chapter 8

CONTRACTING OUT

I *Current Position*

Currently under New Zealand law it is possible to contract out of obligations under the Law Reform (Testamentary Promises) Act 1949 but it is not possible, during the lifetime of the will-maker, to contract out of, or enter into, an agreement not to make a claim under the Family Protection Act 1955.⁴⁶⁶ It is common practice to compromise or settle a family protection claim once the will-maker has died and without issuing proceedings; this occurs frequently by deed of family arrangement. Despite this practice, there is some doubt whether such agreements are binding, void or voidable. Patterson discusses this issue in detail, and while he expresses the view that such compromises are binding, he concludes that the only satisfactory solution is clarification either judicially or legislatively of the right to enter into after-death compromises.⁴⁶⁷ It is also possible to contract out of the death provisions in Part 8 of the Property (Relationships) Act 1976 in relation to relationship property.⁴⁶⁸

The policy or rationale behind the prohibition on contracting out of family protection claims is said to be based on public policy and is long-standing.⁴⁶⁹ In *Gardiner v Boag*⁴⁷⁰ the Court pointed out that it would not be fair if the compromise was agreed when the estate was small and it later increased significantly in value as where for example the applicant's health subsequently deteriorated significantly. The rule applied also in Australia and the United Kingdom until legislative changes were made.⁴⁷¹

In the United Kingdom since 1975 on granting a decree of divorce or nullity or judicial separation the Court if it considers it just, and if the parties agree, can order that either party to the marriage shall not be entitled on death to apply for an order under the Act.⁴⁷² In New Zealand once a dissolution order is made, former spouses cannot make family protection claims because they are no longer “spouses” and do not fall within the list of potential claimants.⁴⁷³ In New South Wales the law was changed in 1982⁴⁷⁴ to enable a person to release his or her rights to apply for further provision. The release in New South Wales is subject to Court approval and before approving the release the Court will consider various matters.⁴⁷⁵ Securing a release of rights under the New South Wales Family Provision Act 1982 is a course that has arisen in the context of property settlements on divorce where the

⁴⁶⁶ WM Patterson *Law of Family Protection and Testamentary Promises* (3rd ed, LexisNexis, Wellington, 2004) at [6.1].

⁴⁶⁷ *Ibid*, at [6.3].

⁴⁶⁸ Property (Relationships) Act 1976, s 21.

⁴⁶⁹ Patterson, above n 466, at [6.2].

⁴⁷⁰ *Gardiner v Boag* [1923] NZLR 739; see also *Parish v Parish* [1924] NZLR 307.

⁴⁷¹ See for example *Liebermann v Morris* (1944) 69 CLR 69.

⁴⁷² Inheritance (Provision for Family and Dependents) Act 1975 (UK), s 15.

⁴⁷³ Family Protection Act 1955, s 3.

⁴⁷⁴ Family Provision Act 1982, s 31.

⁴⁷⁵ Section 31(5).

object has been to tie up matters once and for all between divorcing couples.⁴⁷⁶ For an illustration of the working of this section in practice see *Singer v Berghouse (No 2)*.⁴⁷⁷

The issue has also arisen in New Zealand in the context of matrimonial or relationship property settlements. In *Re Hilton*⁴⁷⁸ Dr and Mrs Hilton resolved matrimonial property matters between themselves on separation but Dr Hilton died before the marriage was dissolved. Mrs Hilton made a successful family protection claim on the basis that she was still Dr Hilton's spouse at his death and his obligations to her on death were different from and additional to matrimonial property entitlements on separation. It was not possible for the couple to contract out of their entitlements under the Family Protection Act 1955. The problem also arises where a couple separate, resolving relationship property issues but forget or fail to change wills that provide for each other. If a dissolution order is made, provision for a spouse in a will made before dissolution is void.⁴⁷⁹ If one party dies before a dissolution order is made, the provisions in the will in favour of the estranged spouse still apply. Similarly, estranged spouses and civil union partners retain rights on intestacy unless or until a separation or dissolution order is made.⁴⁸⁰ Making a new will is easily overlooked.

It is anomalous that parties can contract out of relationship property issues once and for all but not contract out of family protection claims or intestacy rights on separation. The existence and success of a claim depends upon whether the parties obtain a separation order, get around to dissolving their marriage or, in some cases, remember to change their wills. Clearly the legislatures in the United Kingdom and New South Wales recognised some years ago that when they separate “judicially” a couple should be able to contract out of their rights to make a family protection claim on death. This is mirrored in New Zealand in respect of relationship property rights but not family protection claims or intestacy rights.

There is one further anomaly which should be noted. A separation order negates entitlements on intestacy;⁴⁸¹ however, such an order does not prevent a family protection claim: s 26(2) specifically preserves family protection claims even if a separation order has been made.

II *Other Areas*

A person's ability to enter into agreements to make specific provision in respect of his or her estate while alive has long been recognised in New Zealand in other ways. A contract to leave property by will in a certain way if not carried out, can be enforced by an action for damages against the administrator of the estate of the deceased covenantor.⁴⁸² Where the agreement relates to specific assets or a specific sum of money enforcement can be by way of specific performance.⁴⁸³ If the deceased dies insolvent the person with whom the agreement is made can prove the claim in the deceased's estate as a creditor along with other estate creditors.⁴⁸⁴ Mutual wills have also been recognised in New Zealand, Australia and the

⁴⁷⁶ Rosalind Atherton and Prue Vines *Succession Families Property and Death: Text and Cases* (2nd ed, LexisNexis, Australia, 2003) at [15.32]-[15.33].

⁴⁷⁷ *Singer v Berghouse (No 2)* (1994) 123 ALR 481; also Atherton and Vines, above n 476, at [15.40].

⁴⁷⁸ *Re Hilton* [1997] 2 NZLR 734.

⁴⁷⁹ Wills Act 2007, s 19.

⁴⁸⁰ Family Proceedings Act 1980, s 26.

⁴⁸¹ Family Proceedings Act 1983, s 26(1).

⁴⁸² Patterson, above n 466, at [5.6].

⁴⁸³ *Ibid.*

⁴⁸⁴ *Ibid.*

United Kingdom for many years.⁴⁸⁵ The New Zealand Wills Act 2007 specifically authorises mutual wills;⁴⁸⁶ that is where two or more people contract between themselves to maintain and not to revoke wills without notice to the other.⁴⁸⁷ Property of a third party which is subject to a special (as opposed to a "general") power of appointment by the deceased by will is not subject to the provisions of the Family Protection Act 1955.⁴⁸⁸ A *donatio mortis causa*⁴⁸⁹ is recognised in the Family Protection Act 1955;⁴⁹⁰ although the property involved in the "donatio" is subject to the provisions of that Act.

It is possible for spouses to enter into voluntary maintenance agreements which are binding according to the law of contract.⁴⁹¹ Acceptance of such an agreement by the Commissioner of Inland Revenue does not stop a party from seeking a court order for spousal maintenance under the Act.⁴⁹² Similarly it is possible to enter into voluntary agreements in respect of child support which are binding according to the rules of the law of contract but do not prevent an application for a formula assessment.⁴⁹³

When a couple separates and resolves relationship property matters they do not expect that a family protection claim or intestacy rights will be available to the survivor if one of them dies before the marriage is dissolved. If they sign an agreement under s 21 of the Property (Relationships) Act 1976 resolving relationship property matters they usually expect and intend that this is in full and final settlement of all claims between them and do not realise that a potential family protection claim is left unresolved. Similarly if at the commencement of a relationship a couple sign a contracting out agreement which, preserves certain items of property and any inheritance that either subsequently receives as separate property, they would often want to contract out of obligations under the Family Protection Act 1955 and on intestacy (regardless of whether they separate or not). At present this is not possible in New Zealand.

As outlined in the Summary of Key Principles in chapter 5 of this thesis, my proposal is that in line with the current law in relation to *de facto* partners, the right to make a family protection or support claim will come to an end once a couple legally separates. This would apply to spouses, civil union partners and *de facto* partners. I propose also that this extend to intestacy; that is, rights on intestacy cease if spouses, civil union partners or *de facto* partners legally separate. In addition, even if a couple does not separate, they should still be able to contract out of support claims on the death of either of them.

III *Proposed Change*

The Family Protection Act 1955 does not specifically exclude contracting out of claims; but decisions made many years ago held that public policy overrode any such agreement. In the

⁴⁸⁵ *Lewis v Cotton* [2001] 2 NZLR 21; also *Fisher v Mansfield* [1997] 2 NZLR 230.

⁴⁸⁶ Wills Act 2007, s 30.

⁴⁸⁷ N Kelly, C Kelly and G Kelly *Garrow and Kelly's Law of Trusts and Trustees* (6th ed, LexisNexis, Wellington, 2005) at [15.19].

⁴⁸⁸ See *Nosworthy v Nosworthy* (1906) 26 NZLR 285; also Patterson, above n 466, at [5.3].

⁴⁸⁹ A gift that takes effect on death - see Nicky Richardson *Nevill's Law of Trusts, Wills and Administration* (9th ed, LexisNexis, Wellington, 2004) at [2.4.3].

⁴⁹⁰ Family Protection Act 1955, s 2(5).

⁴⁹¹ Child Support Act 1991, s 62(2).

⁴⁹² Section 66.

⁴⁹³ Webb and others *Family Law in New Zealand* (14th ed, LexisNexis, Wellington, 2009) at [5.280].

cases of spouses and civil union partners the right to make a claim is completely removed if the marriage or civil union is dissolved.⁴⁹⁴ In the case of de facto partners there is no claim at all if the couple were not living together at the time one of them dies, or the relationship is one of short duration (except in specific circumstances).⁴⁹⁵ It is anomalous that the existence of a claim depends upon whether either or both of the spouses or civil union partners gets around to dissolving the marriage or civil union before death. If the parties are able to settle property rights while alive, subject to the requirements of the Property (Relationships) Act 1976 it is difficult to understand why they cannot settle inheritance rights after receiving independent legal advice. It is time that New Zealand follows the lead of England and New South Wales in this respect.

In line with England and New South Wales it should be possible in New Zealand for a married couple and civil union or de facto partners to contract out of a family protection claim against each other, and entitlements on the intestacy of the other party, in the same way that this can be done under the Property (Relationships) Act 1976. In line also with the Property (Relationships) Act 1976 the parties should be able to do this at any time and not just on separation. Each would have to receive independent legal advice before contracting out and the independent witnessing lawyer would need to certify that matters have been fully explained. It could even be incorporated in an agreement under s 21 of the Property (Relationships) Act 1976. It should also be possible for a court to make orders to this effect if the parties are in agreement. The fact that the financial circumstances or health of one of the parties may later change significantly is largely irrelevant. Once the couple separates, it should be possible to sever all ties in respect of property and assets. Subsequent changes are not relevant to division of property on separation and it is difficult to see why they should be relevant to inheritance. Resolution of support claims and intestacy rights on separation is consistent with the clean break principle and the desirability of certainty.

It can be argued that because I am proposing that support claims for spouses and partners should be designed to enable them to enjoy a reasonable, independent standard of living until reasonably able to achieve this, they may not be able to predict future events and therefore should not be able to contract out of their rights. However, on separation spouses and partners would still be able to claim adult or spousal maintenance and also make an economic disparity claim⁴⁹⁶ in respect of relationship property. Once these issues are resolved there would be no potential family protection or support claims; most expect this anyway.

IV *Children and Others*

The position with respect to children and grandchildren is different. In this thesis it has been proposed that only minor or non-adult children, accepted children and grandchildren should have family protection or support claims. If so, minor children, accepted children and grandchildren would not be able to contract out of their rights; there would always be concerns that they do not understand the effects and implications of giving up their rights or that they were subjected to undue influence. If, as I recommend, claims by minor children, accepted children and grandchildren are based upon a duty to maintain that child, it is inappropriate to attempt to contract out of such a right. The existence of a voluntary child support agreement does not prevent an application for a formula assessment. Therefore the

⁴⁹⁴ That is because they are no longer spouses or civil union partners under s 3 Family Protection Act 1955.

⁴⁹⁵ Sections 3(aa) and 4A.

⁴⁹⁶ Property (Relationships) Act 1976, s 15.

ability to contract out of a support claim should be limited to married, civil union or de facto couples who have obtained independent legal advice, and the terms of the agreement recorded in writing

I have also recommended that claims by parents and relatives (other than minor children, grandchildren and accepted children) be removed. If so, there is no need for such parties to contract out of support claims. However if this is not accepted, I recommend that such adult relatives, upon receiving independent legal advice, should be able to contract out of support claims by a written agreement. I envisage that such an agreement would need to be witnessed and certified by a lawyer in similar fashion to an agreement under s 21 Property (Relationships) Act 1976. In addition the court should be given specific powers to ratify such arrangements.

V *Summary*

In summary, what is proposed is that a spouse, civil union or de facto partner, after receiving independent legal advice, should be able to sign a binding agreement under which he or she irrevocably waives all rights to make a support claim against the estate of another person and all entitlements on the intestacy of that person. I would not recommend that this extend to any potential benefits under the will of another person because that is easily effected by the will-maker changing his or her will or the beneficiary disclaiming or waiving any gift under a will. If once the will-maker has died, a beneficiary wishes to waive his or her entitlements as beneficiary under the will, the beneficiary should be required to obtain independent legal advice before signing the waiver.

Chapter 9

OUTLINE AND CONTENT OF THE PROPOSED CODE

I *Contents*

This chapter:

- sets out the principles underpinning the proposed inheritance code based upon the discussion in the previous chapters;
- discusses what is to be included;
- outlines the suggested parts and subparts of the proposed code;
- drafts some key definitions and sections of the proposed code.

II *Key Principles*

The key principles derived from previous chapters are:

- The importance of freedom of testation; the properly expressed wishes⁴⁹⁷ of a will-maker should be given primacy.
- Judicial intervention in inheritance law should be limited to situations where it is essential.
- Relationship property claims should remain as they are currently.
- “Support” claims (as defined in the proposed code) against an estate should be limited to spouses, civil union partners and de facto partners, living with the deceased at the date of death and in the case of de facto partners, excluding those in short duration relationship; and children, grandchildren, stepchildren, whangai or accepted children under 21 years of age.
- The priorities of competing claims would be clearly set out.
- Testamentary promises and other similar common law or equitable claims will be replaced by “contribution claims” which will be defined in the code.
- In the cases of grandchildren, stepchildren, whangai and accepted children, support claims should be limited to those who were members of the deceased’s family.
- Support claims should stand in priority behind estate debts, estate administration debts, claims based on contract, fiduciary obligations and contributions⁴⁹⁸ and relationship property claims.

⁴⁹⁷ Wills affected by lack of testamentary capacity or undue influence would continue to be invalid.

⁴⁹⁸ See chapter 5.

- Support claims of spouses, de facto and civil union partners should have priority over, but should not exclude, support claims by minor children, grandchildren or accepted children.
- Competing support claims will be determined by a judge whose discretion will be guided by a list of relevant factors set out in the code.
- The entitlements of spouses, civil union partners and de facto partners (other than those of short duration) on intestacy should have priority and will receive a statutory legacy set initially at \$350,000.
- Support claims by spouses, civil union and de facto partners should not exceed the statutory legacy and will be such as to enable the claimant to enjoy a reasonable standard of living until reasonably able to attain an independent standard of living.
- In the case of minor children, grandchildren or accepted children, support claims should be such as to maintain the child in a reasonable way and to a reasonable standard and so far as practical educated and assisted towards attainment of economic independence.
- The restrictions on dealing with Maori Land interests should be retained.
- The Family Court will have primary jurisdiction under the inheritance code, but complex issues can be referred to the High Court.
- The Crown should be able to waive its entitlements in the event of bona vacantia in favour of dependants of the deceased.
- To prevent avoidance of will-makers' obligations the court will have powers to make orders in respect of jointly-owned assets and assets settled by will-makers on trusts while alive.
- The code will, as far as possible, include all succession and inheritance laws to the intent that all inheritance rules can be found in one place.
- Causes of action based upon contract, tort, fiduciary obligations, contributions and constructive trusts will be either included in the proposed code or preserved.

III *What is to be Included in the Code?*

As described in chapter 2 of this thesis, a code is comprehensive by definition. Therefore, the starting point for an inheritance code is that all relevant statutes and common law rules should be included. There is really no issue for stand-alone statutes such as the Succession (Homicide) Act 2007 or the Wills Act 2007. They should be repealed and included in the new code. Other current statutes that will come into this category are the Law Reform Act 1936, Law Reform (Testamentary Promises) Act 1949, Family Protection Act 1955, Simultaneous Deaths Act 1958 and Administration Act 1969.

It is more difficult where inheritance provisions are included in a statute dealing with other issues. For example, Part 8 of the Property (Relationships) Act 1976 deals with the division of relationship property on death and while similar to the rules on separation, it does stand on

its own. For ease of access and to ensure comprehensiveness, the best course is to include Part 8 of the Property (Relationships) Act 1976 in the proposed inheritance code.

Dealing with each of the other statutes listed in chapter 1 of this thesis, and bearing in mind the desirability of having succession and inheritance laws in one place, I propose:

- Life Insurance Act 1908 contains only a few provisions relating to inheritance laws. Because of its age, the Act can be repealed and any provisions still relevant to inheritance laws can be incorporated in the proposed code.
- Maori Trustee Act 1953: The Maori Trustee obtains few, if any, grants of administration, and it is timely to review whether this power should continue.
- Adoption Act 1955 is relevant in terms of the effect of adoption orders on inheritance. These provisions should be contained in the proposed code.
- Trustee Act 1956 relates primarily to trustees, not executors and administrators. The provisions relating just to estate administration should be transferred to the proposed code.
- Estate and Gift Duties Act 1968: The sections relating to valuation and surrender of annuities and life interests should be transferred to the proposed code.
- Status of Children Act 1969 does not appear to contain any provisions that need to be included in the proposed code.
- Family Proceedings Act 1980: Sections dealing with recovery of child support and maintenance arrears from estates should be transferred to the proposed code.
- Protection of Personal and Property Rights Act 1988: The provisions relating to court approval of wills should be transferred to the new code, together with similar provisions relating to minors.
- Te Ture Whenua Maori Act 1993: I propose that the code contains a part dealing with Maori land and Maori interests on death.
- Insolvency Act 2006: I propose that the current Part 6 of this Act be incorporated in the proposed code.
- Property Law Act 2007: Provisions relating to the effect of death on interests in land should be incorporated in the proposed code.

Another issue is whether the High Court Rules dealing with probate and grants of administration should remain within the High Court Rules or be inserted into the proposed code. It is important that the rules relating to all High Court proceedings should be found in one place; the same applies to the Family Court. If as proposed in chapter 6 of this thesis inheritance laws come under the jurisdiction of the Family Court, rules relating to probate and grants of estate administration should be included in the Family Court Rules.

One point which has not been discussed in this thesis is whether New Zealand should have a wills' register. The intention is to make it easier to find out quickly if a person who has died has a will and if so, locate it. It will also be useful where a person lacks mental capacity and it is unclear whether he or she has a will and if so, whether it should be altered under the Protection of Personal and Property Rights Act 1988. Many European countries have national registers under the Basel Convention of 16 May 1972 and a voluntary register has been established in the United Kingdom under the name "Willdata". It seems wise to provide in a code for the establishment of a national wills register.

Included in the inheritance code will be principles of construction of wills. The word "principles" has been deliberately chosen rather than "rules" of construction because the word "rule" implies mandatory or strict regulation; "principle" does not. There is authority for the view that expressions such as "guides" or "canons of construction" are preferable terms.⁴⁹⁹

IV *Outline of Code*

- A. Key Principles and Creation of Code.
- B. Key Definitions and Jurisdiction.
- C. Administration of Estates
- D. Regime on Intestacy and Partial Intestacy.
- E. Wills and Testamentary Documents.
- F. Approval of Wills for Minors and Persons under a disability.
- G. Disqualification of Killer.
- H. Rules for Interpretation of Wills.
- I. Relationship Property claims on Death.
- J. Support Claims, Contribution Claims and Priorities.
- K. Insolvent Estates.
- L. Preservation of common law doctrines on testamentary capacity and undue influence.
- M. Maori land and interests in Maori land.
- N. Anti-Avoidance Provisions.
- O. Preservation of Rights on Death
- P. Transitional Provisions.

⁴⁹⁹ Nicky Richardson *Nevill's Law of Trusts, Wills and Administration* (9th ed, LexisNexis, Wellington, 2004) at [16.1].

V *Draft Inheritance Act*

The Parliament enacts as follows:

1. **TITLE**

This Act is the Inheritance Act 2010

2. **COMMENCEMENT**

This Act comes into force on 1 July 2010.

Part 1

Preliminary Provisions

3. **PURPOSES**

The principal purposes of this Act are to –

- a. replace and simplify the existing statutory equitable and common law rules and presumptions regulating inheritance and succession laws in New Zealand
- b. change certain aspects of inheritance law;
- c. codify inheritance law in New Zealand;
- d. make inheritance law more accessible to New Zealanders;
- e. simplify the administration of deceased estates in New Zealand;
- f. empower courts to make property division awards on death;
- g. empower Courts to make support awards where no sufficient provision has been made under the will or on the intestacy of a deceased person.

4. **PRINCIPLES**

This Act is to be interpreted with regard to the principles stated in this section.

- a. The rules relating to division of relationship property as set out in the Property (Relationships) Act 1976 apply and extend to the death of either or both partners to the relationship.
- b. A surviving spouse or partner who does not have sufficient resources to maintain a reasonable, independent standard of living is entitled to support from the deceased's property until the survivor is reasonably able to achieve a reasonable, independent standard of living of his or her own.
- c. A minor child, grandchild, stepchild or accepted child of a deceased (including whangai) if a member of the deceased's family is entitled to support which is

sufficient to educate and assist the child towards attainment of economic independence.

- d. Causes of action or rights of a deceased person or against a deceased person continue and are available after the person's death.
- e. A person (the killer) who kills another person (the victim) by committing homicide must not benefit as a result of the victim's death from the victim's estate or other property arrangements.
- f. The right of a person to dispose of his or her property by will as he or she thinks fit.
- g. The right of a spouse, civil union or de facto partner to settle or contract out of rights in relation to relationship property, support claims and entitlements on intestacy.
- h. The primary position and rights of a surviving spouse, civil union partner, de facto partner (other than de facto partners of short duration) on intestacy.
- i. The importance of facilitating and promoting the retention, use, development and control of Maori land on death.
- j. The importance of clarity and the efficient administration of solvent and insolvent estates.
- k. The importance of the intention and wishes of a will-maker when interpreting or amending that will-maker's will.

5. APPLICATION

- a. This Act applies to all natural persons and also to the estates of persons who die with a will or without a will after 1 July 2010.
- b. This Act does not apply to Maori freehold land, Maori customary land or shares in a Maori incorporation as those terms are defined in s 6 Te Ture Whenua Maori Act 1993; nor does it apply to trusts incorporated under Part 12 of Te Ture Whenua Maori Act 1993.
- c. This Act is subject to the Rules in Part IV subpart 5 of this Act as to movables and immovables and applicable system of law.

6. ACT BINDS THE CROWN

This Act binds the Crown.

7. ACT TO BE A CODE

Except as otherwise expressly provided in this Act, and in particular section ... of this Act which preserves certain causes of action, this Act has effect as a code in place of

the rules and presumptions of the common law and equity to the extent that they apply to:

- a. the interpretation, signing and validity of wills;
- b. grants of administration;
- c. claims on deceased persons' estates;
- d. entitlements and priorities of entitlements to the property of a deceased person;
- e. entitlements to Maori land on death; and
- f. insolvent deceased estates.

8. INTERPRETATION

For the purposes of this Act unless the context requires another meaning the following definitions apply:

“Accepted child” or “accepted children” includes any child, grandchild, step-child, great-grandchild or whangai of a deceased person who was a member of the deceased’s family or for whom the deceased accepted responsibility in an enduring way as determined by the Court after taking into account:

1. the nature of the relationship between the deceased and the child;
2. the residential living arrangements of the child;
3. the child’s inclusion in ordinary family life and activities; and
4. financial and other support provided by the deceased.

“Administration” and “Grant of Administration” mean an order of the Court granting probate, letters of administration or letters of administration with will annexed or an election to administer in respect of the assets and undertaking of a deceased person’s estate.

“bona vacantia” means property which no longer has an owner, does not pass to any person or entity under a will or on intestacy, and passes by default to the Crown.

“Children” means any child of a deceased whether born to the deceased or adopted by him or her and includes a child in his or her mother’s womb.

“Contribution Claim” means a claim that arises where the following circumstances occur:

1. contributions made directly or indirectly by the claimant to the property of the deceased; and

2. a reasonable expectation by the claimant of an interest or part of an interest in property; and
3. a reasonable expectation on the part of the deceased's estate to yield an interest to the claimant.⁵⁰⁰

"Court" means the Family Court of New Zealand.

"De Facto Relationship" has the meaning prescribed by s 29A of the Interpretation Act 1999.

"Deathbed Gift" means a gift made in contemplation of and conditional on death.

"Disposition of Property" has the meaning set out in s 2(2) of the Estate and Gift Duties Act 1968.

"Domicile": a person's domicile is determined in accordance with the Domicile Act 1976.

"Eligible child" means any child or accepted child of a deceased person aged under 21 years at the date of the deceased's death.

"Eligible Surviving De Facto Partner" means a surviving de facto partner who was not living in a de facto relationship of short duration with the deceased at the date of death and was not legally separated from the deceased at the date of the deceased's death.

"Eligible Surviving Spouse" and "Eligible Civil Union Partner" mean a surviving spouse and a surviving civil union partner respectively who were not legally separated from the deceased at the date of the deceased's death.

"Intestate" means a person or circumstance where a deceased person dies without leaving a valid will or testamentary document as defined in this Act and "Partial Intestacy" includes a person or circumstance where a person leaves a will but dies intestate as to some beneficial interest in his or her real or personal estate.

"Issue" means any lineal descendant of a person to all degrees and whether adopted or natural born.

"Legal Separation" means the parties to a marriage, civil union or de facto relationship: (a) are physically separated; and (b) one or both parties regard the relationship as at an end.⁵⁰¹

"Maori Land" means land within the meaning of Te Ture Whenua Maori Act 1993.

"Minor" means aged under 21 years of age at the date of the deceased's death.

⁵⁰⁰ See chapter 5 of this thesis.

⁵⁰¹ See N Peart, M Briggs and M Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004) at [2.6].

“Partner” means a civil union partner or a person living with another person in a de facto relationship.

“Personal Belongings and Effects” means, in relation to any person who has died, taonga, vehicles, boats, aircraft and their accessories, garden effects, horses, stable furniture and effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liqueurs and consumable stores which immediately before death were owned by him or her or in which immediately before death he or she had an interest but does not include money or security for money.

“Property” includes both real and personal property and any estate or interest in real or personal property, any debt or thing in action and any other right or interest but excludes:

1. Maori Land within the meaning of Te Ture Whenua Maori Act 1993.
2. Immovable property located outside New Zealand.

“Relationship of Short Duration” has the meaning specified in s 2E of the Property (Relationships) Act 1976.

“Relationship Property” and “Separate Property” have the meanings set out in the Property (Relationships) Act 1976 at ss 8 to 10.

“Statutory Legacy” means the sum of \$350,000 as increased annually in accordance with the New Zealand consumer price index published by the Reserve Bank of New Zealand.

The relationship of “Step-parent”, “Stepson” or “Stepdaughter” or any other relationship described by a word containing the prefix “step” may be established by civil union or by de facto relationship as well as by marriage.

“Support Award” means a support claim awarded by the court under this Act.

“Surviving De Facto Partner” means a person living with the deceased in a de facto relationship at the date of death.

“Surviving Spouse” or “Surviving Civil Union Partner” means a spouse or civil union partner who survives the deceased and whose marriage or civil union with the deceased had not been legally dissolved prior to the deceased’s death.

“Testamentary Capacity” means having a full understanding of the extent of assets owned, full understanding of persons to whom moral obligations are owed and understanding the effect and implications of making a will.

“Undue influence” means influence or coercion over a person (“A”) by another person which destroys A’s freedom of action or impairs A’s judgement.

“Whangai” means any person adopted in accordance with Maori custom.

Part II

Administration of Estates

This Part would largely follow Parts 1, 1A and 2 of the Administration Act 1969 with the following additional clauses:

- Surrender of annuities and life interests.
- Causes of action subsisting on death.
- Recovery of arrears of maintenance and child support.

Part III

Regime on Intestacy and Partial Intestacy

This part would largely follow Part 3 of the Administration Act 1969 with the following additional clauses:

- Distribution of estate where no surviving relatives - "bona vacantia".
- Discretion of Crown where estate vests bona vacantia.
- Distribution of Maori estates.
- Disclaimer of interest under intestacy.
- Contracting out of entitlements on intestacy.
- Transitional provisions.

Part IV

Wills and Testamentary Documents

Subpart 1

Definitions.

The definitions would largely follow the definitions in the Wills Act 2007.

Subpart 2 – making, changing and revoking wills

This Part would largely follow Part 2 of the Wills Act 2007.

Subpart 3

Court Authorisation of Wills

- Court may authorise minors to make, alter or revoke a will.

- Will of minor made under order of overseas court.
- Court may make an order preventing a person from making a will.
- Court may authorise a will to be made, altered or revoked for a person lacking testamentary capacity.
- Procedure for court authorisation of wills.
- Criteria for court's authorisation of a will for a minor or person lacking testamentary capacity.
- Execution of will pursuant to court order.
- Separate representation of person lacking testamentary capacity.
- Retention and recognition of court approved wills.

Subpart 4

Construction of wills

- What property can be disposed of by will.
- When a will has effect.
- Effect of simultaneous deaths.
- Failure of a disposition.
- Extrinsic evidence in construction of wills.
- Purpose of construction of wills.
- Words construed in their ordinary sense.
- Legal terms construed strictly.
- Whole will to be considered.
- Dictionary principle.
- Eiusdem generis (meaning of the same kind or nature) rule.
- Two possible constructions.
- Conflicting provisions.
- Presumption against intestacy.
- Change in will-maker's domicile.

- What a general disposition involves.
- Delegation of will-maker's powers.
- Income on contingent, delayed or future dispositions.

Subpart 5

Overseas wills and overseas laws

- Recognition of overseas or foreign wills.
- Rules for validity of overseas wills.
- Deciding system of law applicable to wills.
- Deciding system of law applicable to movables and immovables.
- Application of overseas law applicable to wills.

Subpart 6

Disqualification of killer and simultaneous deaths

This Part would largely follow the Succession (Homicide) Act 2007.

Subpart 7

Access to wills

- Access to wills before grant of administration or if no grant of administration.
- Availability of copy of will after grant of administration.
- Power of court to prohibit availability of part or all of will or testamentary document.
- Voluntary register of wills.
- Determination of disputes on access to wills.

PART V

Relationship property and trust claims on death

This part would largely follow Part 8 of the Property (Relationships) Act 1976 with the following additional clauses.

- Applications for variation of trust settled by deceased and/or surviving spouse/partner.

- Appeals.
- Incidence of orders against personal representative of spouse/partner.
- Transitional provisions.

PART VI

Support claims and contribution claims and procedures

- Support claims by a surviving spouse, civil union or eligible de facto partner.
- Support claims by eligible children.
- Contribution claims.
- Preservation of other causes of action.
- Priorities of support, contribution and other claims on an estate
- Discretion of court on support claims and relevant factors
- Contracting out of or settling support claims.
- Applications to set aside agreement contracting out of or settling support claims and criteria.
- Time limits and procedure for notification of support and contribution claims.
- Lapse of notice of support and contribution claims.
- Distribution of estate where no notice of claim given or notice lapses.
- Assets subject to support and contribution claims.
- Following and tracing estate assets.
- Types of orders within jurisdiction of court.
- Appeals.
- Costs.
- Transfer of proceedings to High Court.
- Referral of proceedings to alternative dispute resolution.

PART VII

Insolvent deceased estates

This part would largely follow Part 6 of the Insolvency Act 2006.

PART VIII

Rules regarding validity of wills

- Definitions.
- Requirements for testamentary capacity.
- Meaning and effect of undue influence.
- Presumption of due execution.

PART IX

Maori Land and Interests in Maori Land

- Further definitions.
- Disposition of Maori land by will.
- Succession to Maori land on intestacy.
- Claims on Maori land.
- Effect of support and contribution claims on Maori land.

PART X

Transitional provisions

- Wills of persons who die before 1 July 2010.
- Wills made before 1 July 2010.
- Administration of estates of persons dying before 1 July 2010.
- Administration of intestate estates of persons dying before 1 July 2010.
- Correction by Court of wills made before 1 July 2010.
- Consequential amendments.

Schedules

Intestacy Table

Form of notice of choice of option

Form of notice of support claim

VI *Key Sections of Inheritance Act*

The following are key clauses for inclusion in the Draft Inheritance Act 2010.

- Entitlements of eligible surviving spouse, eligible civil union partner and eligible de facto partner on intestacy
 - (1) Where a person dies wholly intestate the eligible surviving spouse, eligible surviving civil union partner or eligible surviving de facto partner of that deceased person is entitled to:
 - (a) the statutory legacy; and
 - (b) the deceased's personal belongings and effects; and
 - (c) the share in the residue of the deceased's estate specified in this Act or in the intestacy table attached to this Act.
 - (2) Where the value of the deceased's estate is less in value than the statutory legacy, the eligible surviving spouse, eligible civil union partner or eligible de facto partner is entitled to the whole of the deceased's estate.
 - (3) If the deceased is not survived by children, accepted children or any other issue, an eligible surviving spouse, eligible civil union partner or eligible de facto partner is entitled to the whole of the deceased's estate.
- Priorities on intestacy between eligible surviving spouses/partners and children of the deceased.
 - (1) Where a person dies wholly intestate leaving an eligible surviving spouse, eligible civil union partner or eligible de facto partner and children, accepted children or issue the eligible surviving spouse, eligible civil union partner or eligible de facto partner is entitled to:
 - (a) the estate assets as set out in section X of this Act;
 - (b) one half of the residue (if any) of the deceased's estate.
 - (2) Where subsection (1) applies the child, children and accepted children of the deceased are entitled to the remaining one half of the residue (if any) of the deceased's estate and if more than one in equal shares; provided that if any child or accepted child dies before the deceased leaving a child or children who survive the deceased such child or children take the share or interest their parent would have taken had he or she survived the deceased.
- Powers of Crown where estate vests *bona vacantia*⁵⁰².

⁵⁰² This clause is based on cl 38 of the draft Intestacy Bill 2007 shown as Appendix A to NSWLRC R116.

- (1) If the Crown is entitled to an estate under this Act bona vacantia, the Minister of Finance or his or her nominee may on application waive or disclaim the Crown's rights and entitlements in part or in whole in favour of:
 - (a) dependants of the deceased; or
 - (b) any persons who have in the Minister's opinion a just or moral claim on the deceased; or
 - (c) any organisation or person for whom the deceased might reasonably be expected to have made provision; or
 - (d) the trustees for any person or organisation mentioned in subsections (a), (b) or (c); or
 - (e) any other person or organisation.
 - (2) The Minister may grant a waiver or disclaimer under this section on conditions the Minister considers appropriate.
- Contracting out of entitlements on intestacy
 - (1) Any person ("A") may enter into an agreement waiving or contracting out of part or all of his or her entitlements on the intestacy of another person before or after the death of that person on the following grounds:
 - (a) that the agreement is recorded in writing; and
 - (b) before signing the agreement A obtained independent legal advice from a lawyer as defined in the Property (Relationships) Act 1976; and
 - (c) the agreement must contain a certificate signed by the lawyer who witnessed A's signature recording that before the agreement was signed the lawyer explained the legal effects and implications of the agreement to A.
 - (2) An agreement entered into under this section is void unless all the requirements in subsection (1) have been met.
 - (3) The court may set aside an agreement under this section if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice to any of the parties.
 - (4) This section does not limit or affect any enactment or rule of law or in equity that makes an agreement void, voidable or unenforceable on any other grounds.
 - (5) If deciding whether giving effect to an agreement under this section would cause serious injustice the court must have regard to the matters set out in section 21J(4) of the Property (Relationships) Act 1976.
 - Interpretation of wills

- (1) The court has general jurisdiction to construe and interpret the meaning and effect of a will or testamentary document (“will”) and may take into account extrinsic evidence to the extent specified in section X of this Act.
 - (2) The general purpose of the Court when exercising its powers of interpretation of a will is to ascertain and give effect to the intention of the will-maker as expressed in the will but only in the absence of a contrary intention appearing in the will.
 - (3) In exercising its powers of interpretation the Court may use any or all of the principles of construction set out in the succeeding sections X to X of this Act as a guide to determine the intention of the will-maker expressed in the will.
- Who can apply for division or declaration of relationship property

The following persons may apply for an order under section 25(1)(a) or (b) or declaration under section 25(3) of the Property (Relationships) Act 1976:

- (a) the surviving spouse, civil union or de facto partner;
 - (b) the personal representative or trustee of the estate of a deceased spouse, civil union or de facto partner;
 - (c) the Official Assignee in Bankruptcy of the property of either spouse, civil union or de facto partner;
 - (d) any person on whom conflicting claims in respect of property are made by the surviving spouse, civil union or de facto partner or the personal representative or trustee of the estate of a deceased spouse, civil union or de facto partner;
 - (e) an appointee in whom the estate of a deceased spouse, civil union or de facto partner vests under the Insolvency Act 2006.
- Who can apply to sever joint tenancy

Where a person dies owning any asset or property jointly with another person, the executor, administrator or trustee of the deceased’s estate or any surviving spouse, civil union or de facto partner may apply to the court to sever the joint tenancy and on making such an order the court may also order that a share or interest in the asset or property in question vests in the estate of the deceased and becomes subject to the terms of the deceased’s will or intestacy.

- Application for variation of trust settled by deceased and/or surviving spouse or partner

See chapter 7 paragraph IX of this thesis.

- Contribution claims

On the death of any person and within the time limits specified in this Act a contribution claim may be made against the estate of the deceased person and the court shall determine such claim and the amount of an award (if any) in its discretion.

- Support claims by surviving spouse, civil union, eligible de facto partner or eligible child.
 - (1) On the death of a person and within the time limits specified in this Act an eligible surviving spouse, an eligible surviving civil union partner, an eligible surviving de facto partner or an eligible child may apply to the court for a support award from the estate of the deceased person.
 - (2) The purpose of an award for an eligible surviving spouse, civil union or de facto partner is to enable the applicant to enjoy a reasonable and independent standard of living judged against the standard of living enjoyed by the applicant and deceased while the deceased was alive and until the survivor is reasonably able to achieve a reasonable and independent standard of living on his or her own.
 - (3) The purpose of an award for an eligible child is to maintain the child in a reasonable way and to a reasonable standard and so far as practical, educated and assisted towards attainment of economic independence.
 - (4) An award under subsection (2) shall not exceed the amount of the statutory legacy applicable at the date of the deceased's death exclusive of any entitlements the claimant may have under the deceased's will or on intestacy.
- Priorities of support, contribution and other claims
 - (1) Claims on and debts of an estate shall be paid in the following priorities:
 - (a) estate administration costs;
 - (b) reasonable funeral expenses;
 - (c) proven estate debts;
 - (d) the protected interest in the family home;
 - (e) relationship property claims;
 - (f) contribution claims and preserved causes of action;
 - (g) support claims by eligible spouses, eligible civil union partners, eligible de facto partners and eligible children.
 - (2) In assessing support claims the court must give priority to support claims by eligible surviving spouses, eligible civil union and eligible de facto partners but not to the exclusion of support claims by eligible children.
- Discretion of court on support claims and relevant factors
 - (1) In assessing support claims by eligible spouses, civil union partners and de facto partners the court must take into account some or all of the following factors:

- (a) the relationship between the applicant and the deceased including the nature and duration of the relationship;
 - (b) the nature and extent of the deceased's obligations and responsibilities to the applicant and any other family member;
 - (c) the nature and extent of the deceased's estate;
 - (d) the financial resources and needs of the applicant and any other person applying for further provision or named as a beneficiary in the deceased's will;
 - (e) any physical, intellectual or mental disability of the applicant or any other person applying for further provision or named as a beneficiary in the deceased's will;
 - (f) the age of the applicant;
 - (g) provision made by the deceased while alive to the applicant or under the deceased's will or on intestacy;
 - (h) the date of the will and circumstances in which it was made;
 - (i) whether the applicant was being maintained wholly or partly by the deceased at the time of death;
 - (j) whether any other person is liable to support the applicant;
 - (k) the standard of living of the deceased and the applicant while both were alive;
 - (l) whether adequate housing or accommodation will be available for a surviving spouse or partner;
 - (m) the applicant's custodial responsibilities for a child or children;
 - (n) the applicant's ability to continue in, train or qualify for suitable paid employment; and
 - (o) any other matter considered relevant by the court.
- (2) In assessing support claims by an eligible child or eligible children the Court must take into account some or all of the following factors:
- (a) the age and stage of development of the child including the level of education or technical or vocational training reached by the child;
 - (b) any other actual or potential sources of support available to the child including support from a surviving parent or a support award from the estate of another deceased parent;
 - (c) the amount of support provided by the deceased to the child;

- (d) the actual and potential ability of the child to meet his or her other reasonable needs;
- (e) the nature and duration of the relationship with the deceased; and
- (f) any other matter considered relevant by the court.

- Contracting out of or settling support claims

Any spouse, civil union partner or de facto partner, and any eligible surviving spouse, civil union partner or de facto partner (“A”) may enter into an agreement waiving or contracting out of part or all of his or her entitlements to a support claim against a deceased person’s estate at any time before or after the date of death of the deceased person subject to the following:

- (a) that the agreement is recorded in writing; and
 - (b) before signing the agreement A obtained independent legal advice from a lawyer as defined in the Property (Relationships) Act 1976; and
 - (c) the agreement contains a certificate signed by the lawyer who witnessed A’s signature recording that before the agreement was signed the lawyer explained the legal effects and implications of the agreement to A.
- (2) An agreement entered into under this section shall be void unless all the requirements in subsection (1) have been met.

- Application to set aside agreement contracting out of or settling support claims.

- (1) Any person who has signed an agreement under this Act contracting out of a support claim can apply to set aside the agreement at any time before final distribution of the deceased’s estate affected by such agreement.
- (2) Before setting aside an agreement under this section the court must, after having regard to all the circumstances, be satisfied that giving effect to the agreement would cause serious injustice to any of the parties.
- (3) This section does not limit or affect any enactment or rule of law or in equity that makes an agreement void, voidable or unenforceable on any other grounds.

- Requirement for testamentary capacity

- (1) A will or testamentary document is void and of no effect if at the time of signing it the will-maker lacked testamentary capacity.
- (2) The burden of proving testamentary capacity is on the person proving the will.

Chapter 10

CONCLUSION

I *Reform*

A comprehensive Code containing consistent policies is needed to replace the 20 statutes presently covering inheritance laws in New Zealand. A Code will facilitate access for all New Zealanders. There is urgent need for reform of New Zealand's succession laws. As Professor Rosalind Croucher has noted "succession law is one of the slower moving waterways of jurisprudence."⁵⁰³ While Australia has planned regular changes, reform in New Zealand has been piecemeal.

II *Underlying Philosophy*

A philosophical basis for New Zealand's succession law must be established. In chapter 3 of this thesis I analysed the two competing regimes currently in force around the world.⁵⁰⁴ Both systems attempt to balance testamentary freedom and personal obligations. I have concluded that in line with New Zealand's history and longstanding recognition of private property rights, testamentary freedom must be the cornerstone of any reform.

III *Restrictions on Testamentary Freedom*

However, as recognised by Sir Robert Stout more than 100 years ago there have to be limitations on testamentary freedom. In line with current social policy in other areas of family law intervention is needed to protect the weak and vulnerable and in inheritance law this primarily means a surviving spouse or partner and minor dependent children. Other important principles that have been identified are certainty and clarity in the law and self reliance.⁵⁰⁵

IV *Proposed Reform*

Having identified these principles, the proposed code limits the number of potential claimants on an estate but at the same time it introduces anti-avoidance measures currently not in existence in New Zealand to enhance the potential claims of those who truly are in need of provision.

As this thesis illustrates inheritance law provokes very different approaches which mirror the philosophical debate over testamentary freedom and personal obligations. Both approaches have merit. What is clear however is that reform is long overdue. Inheritance law reform is not a vote winner but the families and friends of the 27,000 New Zealanders who die each year deserve and need a better system than that currently in place.

⁵⁰³ Rosalind F Croucher "Towards Uniform Succession in Australia" (2009) 83 ALJ 728 at 751.

⁵⁰⁴ Fixed rule scheme and court-based discretionary system.

⁵⁰⁵ Rosalind F Croucher, above n 503, at 751.

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