



New Zealand Report on New Developments in Succession Law

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Introduction

When a person dies in New Zealand, the estate is distributed according to the terms of the deceased's will or, in the absence of a will, by the rules of intestate succession in the Administration Act 1969.¹

New Zealand adheres to the principle of testamentary freedom and one of the aims of the new Wills Act 2007 is to give better effect to testamentary wishes. However, testamentary freedom is significantly curtailed by three statutes:

1. Property (Relationships) Act 1976, which entitles a surviving spouse,² civil union partner,³ or de facto partner⁴ to apply for division of the couple's relationship property;
2. Family Protection Act 1955, which gives the Court the discretion to override a will or the intestacy rules to make provision from the estate for the proper maintenance and support of family members of the deceased; and
3. Law Reform (Testamentary Promises) Act 1949, which empowers the Court to award compensation if the deceased has not fulfilled a promise to reward the applicant for services rendered to the deceased.

The Property (Relationships) Act, the Administration Act (which contains the intestacy rules), and the Family Protection Act underwent significant change in 2001 and 2005. They were the focus of this report when it was presented at the 17th World Congress of Comparative Law in 2006. Since then, the imperial Wills Act 1837 has been replaced by a home grown statute. The Wills Act 2007 makes substantive changes to the law governing wills. This report has

* Professor of Law, University of Otago. This paper was originally prepared for the 17th World Congress of Comparative Law in Utrecht, the Netherlands, in 2006. It was updated in September 2010 to incorporate significant developments since 2006.

¹ Sections 77-79 Administration Act 1969.

² Legally married to deceased.

³ Legal relationship under the Civil Union Act 2004. See further 1.1 below.

⁴ Two persons living together as a couple, but not married or in a civil union: s 2D Property (Relationships) Act 1976. See further 1.1 below.

been updated to incorporate those changes and further developments in relation to the other statutes.

Structure of this report

This report addresses the questions outlined in the *Guidelines for National Reporters* and is structured under the three major headings:

1. General tendencies with regard to recent changes;
2. The influence on these changes of any comparative legal analysis; and
3. The impact of (regional) economic integration.

1. General Tendencies

Three significant developments have occurred in New Zealand succession law in the past decade. The first is Parliament's decision to accord increased recognition to non-marital relationships as part of its policy to remove discrimination on the ground of marital status. The second development is a series of legislative amendments to enhance the succession rights of married and unmarried partners. The effect of both of these developments is to curtail testamentary freedom more than before, because they broaden the scope of potential claims that can be brought against an estate.

The third development runs in the opposite direction. It emphasizes the importance of wills and restores testamentary freedom to some degree. This development results from changes brought about by the Wills Act 2007 to give better effect to testamentary wishes and from a more conservative judicial approach to claims under the Family Protection Act. However, neither of these changes has done much to constrain the limitations on testamentary freedom resulting from the Property (Relationships) Act, the Family Protection Act and the Testamentary Promises Act.

The limitations and uncertain scope of the Property (Relationships) Act, Family Protection Act and Testamentary Promises Act are part of the reason for the increased use of trusts as a vehicle through which to own property.⁵ Assets held in trusts where the beneficiaries' entitlement is at the discretion of the trustees are generally beyond the reach of the Court's jurisdiction under the Property (Relationships) Act, the Family Protection Act and the Testamentary Promises Act.⁶

1.1 Increased Recognition of Non-marital Relationships

New Zealand law now recognises three distinct types of intimate relationship:

- Marriage;
- Civil union; and
- De facto relationship.

⁵ The number of trusts cannot be ascertained with certainty, because they are not registered and, if they do not produce an income, no tax return needs to be filed. Estimates put the total number at between 400,000 and 500,000 trusts, which on a population of just over 4 million means that one in 10 people has a trust.

⁶ *Hunt v Muollo* [2003] 2 NZLR 322 (CA); *Johns v Johns* [2004] 3 NZLR 202 (CA); *Kain v Hutton* [2008] 3 NZLR 589 (SC).

Marriage is reserved for heterosexual couples.⁷ Civil unions and de facto relationships are open to heterosexual and same sex couples.⁸

Civil unions

Civil unions were created by the Civil Union Act 2004, which came into force on 26 April 2005. Its aim was to remove discrimination on grounds of marital status by giving same sex couples, in particular, the opportunity to have their relationship formally recognised. However, heterosexual couples may also enter into a civil union in stead of a marriage. The formalities and requirements for civil unions are virtually the same as for marriage and they are registered under the Births, Deaths, Marriages, and Relationships Registration Act 1995 to give them the same status as marriage.⁹ The Relationships (Statutory References) Act 2005, the companion statute to the Civil Union Act, amended over 100 statutes to give civil union partners the same rights as married spouses. However, it did not change all statutes. One notable exception is the Adoption Act 1955, which allows couples to adopt jointly only if they are “spouses”, a term normally reserved for married persons.¹⁰ It seems that New Zealand was not ready to permit same sex couples to adopt.

De facto relationships

De facto relationships are informal partnerships. Unlike marriages and civil unions, de facto relationships are not registered and have no legal status. Their existence is a question of fact rather than law. They are defined slightly differently in various statutes. For purposes of the Property (Relationships) Act, the Family Protection Act and the intestacy rules in the Administration Act, a de facto relationship means two persons, whether of the same sex or the opposite sex, who are both 18 years or older and are living together as a couple without being married to, or in a civil union with, each other.¹¹ The Property (Relationships) Act provides a list of nine factors to assist the Court in determining whether two people were living together as a couple, such as sharing a common residence, caring for children, financial interdependence, sexual intercourse, mutual commitment to a shared life, and public reputation.¹² Although the definition then goes on to state that none of the factors is essential, the Courts treat the mutual commitment to a shared life as an essential ingredient of a de facto relationship.¹³

For purposes of the Wills Act 2007 a de facto relationship is defined differently.¹⁴ It means two people, whether of the same sex or the opposite sex, who are both 16 years of older, and who live together in a relationship in the nature of a marriage or civil union, but are not married to each other or in a civil union with each other. The lower minimum age and the comparison with marriage in this definition could have the effect of two people being in a de

⁷ Although the Marriage Act 1955 is phrased in gender neutral language, the Court of Appeal held in *Quilter v Attorney General* [1998] 1 NZLR 523 that the Act did not provide for marriage between same sex couples.

⁸ Section 4 Civil Union Act 2004; s 2D Property (Relationships) Act 1976 and s 29A Interpretation Act 1999.

⁹ Section 39 Civil Union Act 2004.

¹⁰ However in *Re AMM* [2010] NZFLKR 629 a full bench of the High Court, rather controversially, held that the expression “spouses” included a man and a woman who were unmarried but were living together in a stable committed relationship. The Court explicitly confined this meaning of “spouses” to heterosexual couples.

¹¹ Section 2D Property (Relationships) Act 1976. Section 2 Administration Act 1969 and s 2 Family Protection Act 1955 define “de facto relationship” by referring to the Property (Relationships) Act definition.

¹² Section 2D Property (Relationships) Act 1976.

¹³ *Scragg v Scott* (2006) 25 FRNZ 942 (HC); *Public Trust v Cornelius* unreported High Court Hamilton, CIV 2007-419-1046, 25 February 2009.

¹⁴ Section 29A Interpretation Act 1999.

facto relationship for certain purposes but not for others.¹⁵ While opposing findings may not be a problem if the question arises in unrelated contexts, it would be most unfortunate if it occurred within the same context, such as succession law.

The Relationships (Statutory References) Act 2005, as originally drafted, gave de facto partners the same rights and duties as civil union partners in the various statutes it was amending. But Parliament's aim of removing all discrimination based on marital status was abandoned when it became clear that the uncertainty surrounding the existence and commencement of de facto relationships would create significant problems for the application of many statutes.¹⁶ There was also opposition to same sex couples being accorded certain rights, such as the right to adopt. It was decided instead to include references to de facto relationships in statutes on a case by case basis. As a result de facto partners are not treated in exactly the same way as married spouses and civil union partners under New Zealand law. This differentiation affects some aspects of succession law.

Terminology

In this report, married persons are referred to as "spouse(s)". Where the term "partner(s)" is used, it includes civil union partners as well as de facto partners.

1.2 Legislative Changes to Succession Rights

The succession rights of spouses and partners were changed radically in 2001 when the Property (Relationships) Amendment Act, the Administration Amendment Act and the Family Protection Amendment Act were adopted. The Property (Relationships) Amendment Act 2001 amended the Matrimonial Property Act 1976. The latter Act established a system of deferred community property for marriages ending on separation. The Property (Relationships) Amendment Act extends that regime to marriages ending on death and de facto relationships ending on separation or death. To reflect the wider range of relationships to which the new Act now applies, the Matrimonial Property Act was renamed the Property (Relationships) Act 1976. The Administration Amendment Act 2001 changed the intestacy rules to include de facto partners, and the Family Protection Amendment Act 2001 added surviving de facto partners to the list of family members eligible to claim provision from the estate of their deceased partner. All of these Amendment Acts came into force on 1 February 2002. The three statutes were further amended in 2005 to incorporate civil unions with effect from 26 April 2005.¹⁷

The new Wills Act 2007 also makes some changes to the succession rights of spouses and civil union partners, but of more importance, perhaps, is the relaxation of the formal requirements for executing a will and the power to validate wills and testamentary gifts that do not comply with the formal requirements.¹⁸

¹⁵ *O'Connell v Muharemi* unreported High Court Auckland, CP546-SD01, 24 October 2003 analyses the different definitions.

¹⁶ Report of Justice and Electoral Committee on Relationships (Statutory References) Bill, 151-2 at p5.

¹⁷ Property (Relationships) Amendment Act 2005; Administration Amendment Act 2005. The Family protection act was amended by the Relationships (Statutory References) Act 2005, Schedule 1.

¹⁸ Sections 11 and 14 Wills Act 2007.

1.2.1 Policy Reasons Underpinning the Legislative Changes

The statutory amendments were the result of several policy changes. The first was to remove an anomaly created by different Matrimonial Property Acts applying on separation and on death, which left surviving spouses in a worse position than separated spouses. The second policy change implemented Parliament's intention of gradually removing all discrimination on grounds of marital status. The third policy change relates to the Wills Act and was aimed at giving better effect to testamentary wishes by facilitating the making of wills and preventing wills being invalidated on technical grounds.

Matrimonial property rights on separation and death

Prior to the Property (Relationships) Amendment Act 2001, matrimonial property rights differed on separation and death. The 1963 Matrimonial Property Act initially applied on separation and on death. It gave the Court discretion to redistribute the assets of the spouses based on their respective contributions to the property.¹⁹ Awards under that Act seldom produced an equal division, because domestic contributions were generally undervalued, usually to the detriment of the wives.²⁰ Dissatisfaction with the way that Act was operating led to the adoption of a new Matrimonial Property Act in 1976, but it was restricted to marriages ending on separation, because of the complication of succession rights.²¹

The 1976 Act shifted the focus from contributions to property to contributions to the relationship.²² Marriage was seen as a partnership to which both spouses were presumed to contribute equally, albeit in different ways. That entitled them to an equal share of the matrimonial property on separation, subject to limited exceptions. It was in essence a deferred community property regime.²³ During the marriage the spouses were free to deal with their own property as they saw fit.²⁴ This property regime was simpler, more certain and ensured greater equality between husband and wife when they separated. The discretionary system of the 1963 Act, by comparison, left spouses in an uncertain position with no guarantee of sharing equally in the assets accumulated during the marriage.²⁵ The Property (Relationships) Amendment Act 2001 redresses that anomaly.

Removing discrimination

The second policy change was to treat marital and non-marital relationships alike on death of a spouse or partner. Prior to the 2001 amendments, de facto partners had no statutory property rights on separation or on death. They were dependent on the Court exercising its equitable jurisdiction by imposing a constructive trust over the assets of the owning partner in favour of the non-owning partner based upon the non-owner's direct or indirect contributions to those

¹⁹ Section 5 Matrimonial Property Act 1963.

²⁰ The application of this Act is analysed in Mark Henaghan and Nicola Peart "Relationship Property Appeals in the New Zealand Court of Appeal 1958-2008: The Elusiveness of Equality" in Rick Bigwood (ed) *The Permanent New Zealand Court of Appeal* (Hart Publishing, Oxford, 2009) 99-113.

²¹ See Margaret Briggs "Historical Analysis" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004), 10-13.

²² See the long title to the Matrimonial Property Act 1976.

²³ AH Angelo and WR Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 *New Zealand Universities Law Review* 237.

²⁴ Section 19 Matrimonial Property Act 1976.

²⁵ The equal sharing regime did not influence the discretion under the 1963 Act and division was rarely equal, even in long marriages ending on death: Margaret Briggs "Historical Analysis" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004), 10-13.

assets and the parties' reasonable expectations.²⁶ Orders made under this head seldom gave the claimant partner a half share in the assets accumulated during the de facto relationship, even if the parties had lived together for many years. De facto partners also had no entitlement to succeed under the intestacy rules or to bring a claim under the Family Protection Act. Their right to inherit depended on the deceased partner making testamentary provision for the surviving partner.

The 2001 statutory amendments give de facto partners virtually the same rights as spouses and civil union partners. Such differences as remain reflect the fact that marriages and civil unions create a legal bond between the parties from the moment they are solemnised, whereas de facto relationships have no legal status and tend to develop gradually without a clear starting date.

Marriages and civil unions are thus treated in exactly the same way under the Property (Relationships) Act, the Family Protection Act and the intestacy rules in the Administration Act. Spouses and civil union partners have rights under those Acts irrespective of the duration of their relationship and they retain their entitlement to inherit under the intestacy rules or to claim under the Family Protection Act until their marriage or civil union is legally dissolved.²⁷ Separation does not normally deprive them of their entitlement under those Acts.²⁸

De facto relationships, by contrast, are generally not covered by any of those Acts until the parties have lived together for three or more years.²⁹ If they have lived together for less than three years, the Court may not make orders under those Acts unless two conditions are met. The first condition is that there must be a child of the relationship³⁰ or the applicant partner must have made substantial contributions to the relationship. If either of those criteria is satisfied, then the second condition is that serious injustice would result if no order was made under the Act.³¹ This second condition is not easy to satisfy.

There is a further difference between marriages and civil unions, on the one hand, and de facto relationships, on the other hand. A de facto relationship ends when the parties separate. There is no remaining legal bond. Hence, the right to succeed on intestacy or to apply under

²⁶ *Gillies v Keogh* [1989] 2 NZLR 327 (CA); *Lankow v Rose* [1995] 1 NZLR 277 (CA). See further Henaghan and Peart, note 20 above at 129-146.

²⁷ For example, *Re Hilton* [1997] 2 NZLR 734, where the widow successfully claimed under the Family Protection Act, even though she was separated from the deceased and had received her matrimonial property settlement. Similarly, in *Re Trotter* unreported High Court Christchurch CIV-2009-409-2584, 10 May 2010 the deceased had been separated from his wife since 2001, but they did not divorce and consequently she was entitled to inherit his estate under the intestacy rules.

²⁸ Judicial separation, which is rarely sought, does deprive the surviving spouse or civil union partner of their intestate entitlement, but it does not affect their eligibility under the Family Protection Act: s 26 Family Proceedings Act 1980.

²⁹ Sections 14A and 85(3) Property (Relationships) Act 1976; s 77B Administration Act 1969 and s 4A Family Protection Act 1955.

³⁰ Child of a de facto relationship is broadly defined in s 2 Property (Relationships) Act and can include children who are not children of either partner, but who were living with the couple when the deceased died.

³¹ Sections 14A and 85(3) Property (Relationships) Act 1976; s 77B Administration Act 1969 and s 4A Family Protection Act 1955.

the Family Protection Act is lost if the survivor was not living with the deceased in a de facto relationship when the deceased died.³²

The Wills Act 2007 also treats de facto partners differently from spouses and civil union partners. Entry into a marriage or civil union automatically revokes a prior will of either party unless the will was made in contemplation of the particular marriage or civil union.³³

Marriage is seen as such a significant change in status that a prior will is presumed to be inappropriate and that in the absence of a new will the intestacy rules are preferred. The same rationale applies to divorce and hence gifts in a will to a former spouse or civil union partner are revoked on dissolution of the marriage or civil union.³⁴ Entry into a de facto relationship, by contrast, does not affect the validity of a prior will of either of the partners. Nor does termination of a de facto relationship revoke gifts in the will to a former de facto partner.

Giving better effect to testamentary wishes

The third policy change relates exclusively to the Wills Act 2007. One of the principal aims of that Act was to replace the old imperial Wills Act 1837 with a modern New Zealand Act that stated the law in plain language and was easy to use by the ordinary lay person. As wills can be made in New Zealand without legal advice or assistance, the need for simple statutory language is paramount. But even with simple language, wills would be invalid if they were not executed in accordance with the formal requirements. A further aim therefore was to give the Court powers to validate wills and testamentary gifts that fell foul of the requirements but clearly expressed the testator's wishes. Parliament thus sought to shift the focus from form to substance and early indications suggest that aim is being achieved.

1.2.2 Property (Relationships) Amendment Act 2001

The Property (Relationships) Amendment Act 2001 makes sweeping changes to the property rights of spouses and partners whose relationship ends on separation or death. It redistributes property as between the parties irrespective of which spouse or partner has title to the property.³⁵

Property subject to the Act

The Act applies to all movable property wherever it is held and to immovable property in New Zealand owned by either spouse or partner.³⁶

Only "relationship property" is subject to division between the parties. That term is exhaustively defined in sections 8 to 10 of the Act to capture assets produced by or closely associated with the relationship, such as:

- The family home and family chattels whenever they were acquired;
- Property owned as tenants in common in equal shares or as joint tenants;³⁷

³² Section 2 Administration Act 1969; s 3(aa) Family Protection Act 1955. See for example, *Benseman v Ball* [2007] NZFLR 127 where the Court found that the parties' de facto relationship ended before Ms Foster died.

³³ *Public Trust v Stirling* [2009] 3 NZLR 693.

³⁴ Section 19 Wills Act 2007.

³⁵ For a detailed analysis of the operation of this Act on death of a spouse or partner, see Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004).

³⁶ Section 7 Property (Relationships) Act 1976.

³⁷ New Zealand uses the English doctrine of estates and tenures for holding of land. Where two or more persons co-own land they are either joint tenants or tenants in common. Joint tenants own the asset as a whole so that

- All property acquired after the relationship began subject to some exceptions;
- Property acquired before the relationship began in contemplation of that relationship for their common use or benefit; and
- Insurance policies and pension schemes to the extent that they are attributable to the relationship.³⁸

Property acquired from a third party by way of gift, inheritance, survivorship,³⁹ or as a beneficiary of a trust settled by a third party is not relationship property, unless it has become so intermingled with relationship property that it is impracticable or undesirable to exclude it.⁴⁰ That exception recognises that such property is not the result of the joint efforts of the parties.

Property that is not relationship property is “separate property” of the spouse or partner and is retained by the owner.⁴¹ It includes increases in the value of separate property, unless the increase resulted from the application of relationship property or the direct or indirect actions of the non-owning spouse or partner.⁴² In that case the increase in value becomes relationship property and is subject to division. That acknowledges that increases in value in separate property can be the result of the joint efforts of the parties.

When the relationship ends on death, the entire estate and anything acquired by the estate after death is presumed to be relationship property.⁴³ The person wishing to rebut this presumption has the onus of proving that assets in the estate are separate property of the deceased. This presumption favours the surviving spouse or partner, because classification often depends on knowledge of details known only to the spouses or partners, such as whether an asset was acquired before or after the relationship began or whether it was a gift from a third party.

The Act does not apply to Maori land - that is land that has been declared to be held in accordance with Maori custom.⁴⁴ The Maori are the indigenous people of New Zealand and their land tenure differs significantly from European land tenure. Rights to Maori land, including succession rights, are subject to the Te Ture Whenua Maori Act 1993 (Maori Land Act), which gives effect to Maori custom as far as practically possible. Broadly speaking, Maori land is held, rather than owned, by a tribal community with blood connection to the land. Custom dictates that it should remain within that community. Spouses and partners, being strangers to the community connected to the land, can acquire at most a life interest in the Maori land held by their spouse or partner.⁴⁵

when one tenant dies the other continues to own the whole by survivorship. The deceased tenant ceases to own the asset and it does not form part of the estate. If the property is held as tenants in common, then each tenant owns a proportion of the asset and their share forms part of their estate on death.

³⁸ Section 8 Property (Relationships) Act 1976.

³⁹ For example, where the spouse or partner was the joint owner of property with a third party who has died. See note 37 above.

⁴⁰ Section 10 Property (Relationships) Act 1976.

⁴¹ Section 9 Property (Relationships) Act 1976.

⁴² Section 9A Property (Relationships) Act 1976. For a critical comment on this provision, see Margaret Briggs and Nicola Peart “Sharing the increase in value of separate property under the Property (relationships) Act 1976: a conceptual conundrum” (2010) 24(1) *New Zealand Universities Law Review* 1-20.

⁴³ Sections 81 and 82 Property (Relationships) Act 1976.

⁴⁴ Section 6 Property (Relationships) Act 1976.

⁴⁵ Maori custom in regard to succession is described by Jacinta Ruru in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004) chapters 16 and 17.

The options

The basic scheme of the death provisions in the Property (Relationships) Act is to give the surviving spouse or partner a choice of two options: option A and option B.⁴⁶ Under option A the survivor elects to apply for a division of relationship property in accordance with the provisions of the Act. Under option B the survivor chooses not to apply for a division, but to retain his or her own property, take assets that the survivor and the deceased owned as joint tenants by survivorship,⁴⁷ and inherit such provision as is available under the deceased's will or the intestacy rules. Whichever option is chosen, the surviving spouse or partner may in addition apply for an award under the Family Protection Act.⁴⁸ Family protection claims are considered below in 1.2.4 and 1.3.

Multiple partners

By according rights to de facto partners, the possibility of multiple surviving partners is a real possibility. Multiple successive relationships are common. The two year delay before an application for divorce can be sought means that many separated spouses re-partner before dissolving their marriage or civil union.⁴⁹ Concurrent relationships also occur.

Where a deceased leaves more than one surviving partner, each one has the choice of electing option A or B. For example, in *Chapman v P* Mr P died intestate leaving his widow, to whom he was married for 65 years, and a concurrent de facto partner who moved into the family home a few years before his death.⁵⁰ His widow elected option A, taking half the relationship property, while his de facto partner elected option B because her intestate entitlement was financially more beneficial to her. What would have happened if both had elected option A or option B is discussed further below.

Effect of electing option A on succession rights

If option A is elected the surviving spouse or partner forfeits such provision as is available to the survivor under the deceased's will or the intestacy rules, unless the will expresses a contrary intention or the Court permits the survivor to take some or all of the inheritance.⁵¹ Anecdotal evidence suggests that few testators insert a contrary intention clause in their wills and forfeiture of testamentary provision is thus the norm for spouses electing to take their relationship property entitlement. Sometimes, they seek reinstatement of their inheritance, but more commonly they will apply for further provision from the estate under the Family Protection Act if they believe that their relationship property entitlement is inadequate.⁵²

The effect of electing option A is that every gift in the will to the surviving spouse or partner is treated as revoked and the will is interpreted as if the surviving spouse or partner predeceased the testator. Gifts that would not have vested until the death of the surviving spouse or partner are then accelerated. If the deceased died without leaving a will, the

⁴⁶ Section 61 Property (Relationships) Act 1976.

⁴⁷ See note 38.

⁴⁸ Section 56 Property (Relationships) Act 1976.

⁴⁹ Section 39 Family Proceedings Act 1980.

⁵⁰ *Chapman v P* unreported High Court Wellington CIV-2007-485-1372, 2 July 2009.

⁵¹ Sections 76(1) and 77 Property (Relationships) Act 1976.

⁵² For example, in *EM v SL* [2005] NZFLR 281 the widow was awarded further provision from the estate under the Family Protection Act and in *B v Adams* (2005) 25 FRNZ 778 the widow's inheritance was reinstated and supplemented with an award under the Family Protection Act.

surviving spouse or partner has no entitlement to succeed to the estate under the intestacy rules.⁵³ The estate is distributed as if the deceased was not survived by that spouse or partner.

Election formalities

Choosing one of the two options is a formal process. The surviving spouse or partner must complete a “Notice of Election” after the surviving spouse or partner has been advised by a lawyer of the effect and implications of the choice of option.⁵⁴ This means that the lawyer must have the necessary information to advise on both options, so that the surviving spouse or partner can make an informed choice. The choice of option is effective when the notice has been lodged with the administrator of the estate.⁵⁵

Time limits

The choice must be made within 6 months of death or grant of probate, whichever is the later.⁵⁶ If the election is not made within this time limit and in accordance with the prescribed formalities, the survivor will be treated as having elected option B.⁵⁷ An extension of time may be granted by the Court provided the estate has not been finally distributed.⁵⁸

Setting aside the choice of option

The survivor cannot revoke the chosen option.⁵⁹ Only the Court can set aside the chosen option on the application of the surviving spouse or partner, provided the estate has not been finally distributed and the Court is satisfied that it would be unjust in all the circumstances to enforce the chosen option.⁶⁰ However, the Court can exercise that jurisdiction only in one of the following four prescribed circumstances:

- The choice was not freely made; or
- The surviving spouse or partner did not fully understand the effect and implications of the choice; or
- Since the choice was made, the surviving spouse or partner has become aware of relevant to the making of the choice of option; or
- Since the choice was made, a person (other than the surviving spouse or partner) has made an application under the Family Protection Act or the Testamentary Promises Act against the deceased estate.

In *Mulder v Mulder* the Court was unable to set aside option B, because the surviving de facto partner failed to establish that any of the circumstances existed.⁶¹ She chose not to apply for a division of the couple’s relationship property, because she did not want to upset her deceased partner’s will. She was grief stricken after losing her partner of 37 years, but she made the choice freely in the knowledge that her investments had dropped significantly in value and understanding the consequences that would have on her financial position. She was able to apply for further provision from her late partner’s estate under the Family Protection Act, but

⁵³ Section 76(3) Property (Relationships) Act 1976.

⁵⁴ Section 65 Property (Relationships) Act 1976.

⁵⁵ Section 65(4) Property (Relationships) Act 1976.

⁵⁶ Section 62 Property (Relationships) Act 1976.

⁵⁷ Section 68 Property (Relationships) Act 1976.

⁵⁸ Section 62(3) and (4) Property (Relationships) Act 1976.

⁵⁹ Section 67 Property (Relationships) Act 1976.

⁶⁰ Sections 69 and 70 Property (Relationships) Act 1976.

⁶¹ *Mulder v Mulder* [2009] NZFLR 727.

awards under that Act are at the discretion of the Court and not premised on a principle of equal sharing of accumulated assets.

Distribution

The administrator of the estate may distribute the estate once the surviving spouse or partner has chosen one of the options or the 6 month time limit has expired, whichever is the sooner.⁶² Any part of the estate that is then distributed may not be disturbed by a subsequent application under the Act.⁶³

Division under the Act

If a surviving spouse or partner elects option A, then all of the parties' relationship property is equally divided,⁶⁴ unless there were extraordinary circumstances that make equal sharing repugnant to justice.⁶⁵ This is a notoriously difficult exception to satisfy, but if it applies the relationship property is divided according to the parties' respective contributions to the relationship.

On separation, marriages and civil unions of less than three years duration do not normally share their relationship property equally, because they have not had sufficient time to build their contribution to the relationship to justify an equal share.⁶⁶ Division is generally based on the parties' respective contributions to the relationship. On death the rules are different, at least for marriages and civil unions. Surviving de facto partners of short duration relationships still have no entitlement under the Act,⁶⁷ but surviving spouses and civil union partners do. Their relationship property is shared equally unless that would be unjust.⁶⁸ The reason for treating marriages and civil unions ending on death differently from those ending on separation is that on death the relationship does not end voluntarily, whereas it does on separation. That rationale has not been extended to de facto relationships. This is one of the few remaining discriminations against de facto relationships in the area of succession law.

Where there are multiple surviving partners and more than one elects option A, the relationship property of successive relationships is divided in chronological order. If the relationships were at some point contemporaneous, then the relationship property claims must be satisfied from the assets attributable to the particular relationship or, where that is not possible, the claims must be determined by the contributions that each relationship made to the acquisition of the property.⁶⁹

⁶² Section 71 Property (Relationships) Act 1976.

⁶³ Section 74 Property (Relationships) Act 1976.

⁶⁴ Section 11 Property (Relationships) Act 1976.

⁶⁵ Section 13 Property (Relationships) Act 1976.

⁶⁶ Sections 14 and 14AA Property (Relationships) Act 1976.

⁶⁷ Unless there is a child of the relationship, or the surviving partner has made substantial contributions to the relationship, and the Court is satisfied that serious injustice would result if no order were made under the Act: s 85(3) Property (Relationships) Act 1976.

⁶⁸ Section 85(1) and (2) Property (Relationships) Act 1976. For example, *S v S* unreported Family Court Invercargill FAM-2007-025-749, 7 March 2008.

⁶⁹ Sections 52A and 52B Property (Relationships) Act 1976. See Mark Henaghan "Multiple relationships on death" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004) chapter 12.

Contracting out of the Act

The Act's sharing regime applies unless the parties to the relationship contract out of the Act.⁷⁰ Agreements must be made in accordance with prescribed formalities which include independent legal advice to each party about the effect and implications of the agreement. Failure to comply with the formalities renders the agreement void.⁷¹ Even if the formalities have been satisfied, the agreement can still be set aside if enforcing it would be seriously unjust.⁷²

The test for setting aside agreements was changed in 2001 from injustice to serious injustice. This was done in response to widespread criticism that agreements were being set aside too easily. If parties have been properly advised, as required by the Act, they should be able to rely on the agreement determining their property rights, particularly if the agreement seeks to protect assets acquired by either party before the relationship began as the separate property of that party. The ability to contract out of the Act and have those agreements upheld was an important justification for including de facto partners.⁷³ An "opt out" scheme was thought to provide better protection to de facto partners than an "opt in" scheme.

Priorities

The application of the surviving spouse or partner for division of relationship property takes priority over the rights of any beneficiaries under the will or intestacy rules and over any claimants under the Family Protection Act or the Testamentary Promises Act.⁷⁴

Application for division by the estate

Under the old Matrimonial Property Act 1963 applications could be made by either the surviving spouse or by the personal representative of the deceased spouse. The personal representative would apply for an order under the Act to increase the estate to provide for beneficiaries under the will or the intestacy rules or to ensure sufficient assets were available to satisfy claims under the Family Protection Act or the Testamentary Promises Act. These considerations have assumed greater importance as more people re-partner leaving children from prior relationships. These children may not inherit any of their deceased parent's estate if the estate passes to the surviving spouse or partner. That is even more likely if the surviving spouse or partner also has children from a former relationship. The Courts are sympathetic to children in those circumstances and used to make orders under the Matrimonial Property Act 1963 transferring assets from the surviving spouse to the estate of the deceased spouse if the deceased had contributed to those assets directly or indirectly.

Such claims can no longer be made as of right under the Property (Relationships) Act. The personal representative of the estate must first seek leave from the Court to apply for a division of relationship property, which must not be granted unless refusing leave would cause serious injustice.⁷⁵ This was a change from the original legislative proposal which would have precluded the estate from applying for a division. The legislation as originally drafted gave rights only to the surviving spouse or partner. It was not thought necessary for

⁷⁰ Section 21 Property (Relationships) Act 1976.

⁷¹ Section 21F Property (Relationships) Act 1976. For example, *Wells v Wells* [2006] NZFLR 870 (HC).

⁷² Section 21J Property (Relationships) Act 1976. *Harrison v Harrison* [2005] 2 NZLR 349 (CA) is the leading case.

⁷³ *Wells v Wells* [2006] NZFLR 870.

⁷⁴ Section 78 Property (Relationships) Act 1976.

⁷⁵ Section 88(2) Property (Relationships) Act 1976.

the estate to have the opportunity of increasing its assets, since that would be at the expense of the surviving spouse or partner and merely benefit less deserving persons. Submissions expressing concern that this could render dependents of the deceased destitute, such as minor children from a prior relationship, persuaded Parliament to permit the estate to apply for division, but only with leave of the Court on proof of serious injustice.

In the first case to consider an application for leave, that High Court set the serious injustice threshold at a very high level.⁷⁶ The deceased in that case owned most of his assets jointly with his second wife. Those assets passed by survivorship to his wife, leaving an estate of \$8000 which also went to the wife under the will. The deceased's adult daughter from his first marriage was awarded provision from the estate under the Family Protection Act, but the Court declined leave to apply for a division under the Property (Relationships) Act to claw back some of the couple's jointly owned assets into the estate. The result was that the daughter was unable to enforce payment of her Family Protection award.

In a subsequent case, the Court of Appeal criticised the High Court decision and held that leave should be granted whenever a meritorious claim would otherwise be unenforceable.⁷⁷ This lowers the threshold for granting leave considerably, particularly in view of the Court's liberal approach to Family Protection claims, discussed in 1.3 below. It permits third parties to force a division of relationship property against the wishes of the surviving spouse or partner and, quite possibly, against the wishes of the deceased and often in circumstances where neither partner during their life time would have had a duty to support the third party.

The aim of the legislature to strengthen the rights of surviving spouses or partners by giving them a range of options on death in priority to those with an interest in the estate has been significantly weakened by permitting the estate to apply for a division under the Act. On the other hand, the Court's liberal approach to such leave applications is in keeping with its approach to claims under the Family Protection Act. By not limiting the ground upon which Family Protection claims are decided, Parliament lost an opportunity to change succession law comprehensively.

Blurring principles

The death provisions in the Property (Relationships) Act were intended to remove existing anomalies, but they do not fully achieve that aim and they blur several important principles. First, as the discussion above indicates, death is not like a separation. Whereas on separation both parties can apply for a division as of right, on death the estate requires leave to do so. Furthermore, the death provisions give the Court discretionary powers it does not have on separation, for example in relation to short duration marriages and civil unions and in classifying property that has passed to the surviving spouse or partner by survivorship.

More importantly, the election and its consequences blur the distinction between duty and debt. The Act forces spouses and partners to choose between their relationship property entitlement and their succession rights. The relationship property entitlement gives effect to the debt owed by one spouse or partner to the other based on their respective contributions to the relationship, whereas succession law is concerned with conventional private property rights and the duties that a deceased owes to close family members. As a matter of principle, a surviving spouse or partner should be entitled to both their relationship property entitlement

⁷⁶ *Kinniburgh v Williams* [2004] 2 NZLR 132.

⁷⁷ *Public Trust v Whyman* [2005] 2 NZLR 696 (CA).

and their succession entitlement. But Parliament was apparently concerned that testators might have made different wills if they had known that their surviving spouse or partner would also be entitled to an equal share of the couple's relationship property. Besides, any disadvantage to the surviving spouse or partner from the loss of either entitlement could be remedied through the Family Protection Act. The blurring of principles was therefore a policy decision driven by pragmatism.⁷⁸

1.2.3 Administration Amendment Act 2001

In keeping with the changes made by the Property (Relationships) Act, the intestacy rules in the Administration Act were amended in 2001 to give surviving de facto partners the same rights as spouses. The Act was amended again in 2005 to include civil union partners.⁷⁹

In contrast to spouses and civil union partners, however, de facto partners must satisfy two conditions. First, they must have been living with the deceased in a de facto relationship when the deceased died⁸⁰ and, second, the relationship must have existed for 3 or more years.⁸¹ They have no intestate entitlement if they had separated from the deceased before the deceased died. This is in contrast to spouses and civil union partners. Separation does not disqualify them from succeeding on intestacy of their spouse or partner. They lose that entitlement only on divorce or on the rare occasion where there is a judicial order of separation.⁸²

They have no intestate entitlement if their relationship was of less than three years duration, unless there was a child of the relationship, or the surviving partner made substantial contributions to the relationship, and the Court is satisfied that serious injustice would result if the partner was not entitled to succeed. Although this rule is the same as for orders under the Property (Relationships) Act, the outcome may not be the same, because the serious injustice of not making an order has to be assessed in relation to the benefits of the particular Act. So, it is possible for a surviving partner of a short duration relationship to qualify for an order under the Property (Relationships) Act, but not to be entitled to succeed on intestacy, and vice versa. This reflects the different nature of the entitlements under each Act.

Except in regard to Maori land,⁸³ spouses and partners are accorded priority over any other family members under the intestacy rules.⁸⁴ They are entitled to the deceased's personal chattels and a capital sum, currently set at \$155,000.⁸⁵ The residue of the estate is then distributed between the surviving spouse or partner and other family members. If the deceased

⁷⁸ For further discussion about the conceptual difficulties inherent in this Act and in succession law generally, see Nicola Peart "New Zealand's succession law: subverting reasonable expectations" (2008) 37 *Common Law World Review* 356-379.

⁷⁹ Administration Amendment Act 2005.

⁸⁰ Section 2 Administration Act 1969. For example, *Down v Corbett* unreported High Court Whangarei CIV-2004-488-658, 20 July 2006 and *Chapman v P* unreported High Court Wellington CIV-2007-485-1372, 2 July 2009 where the respective applicants were successful in persuading the Court that they were living with the deceased in a de facto relationship when the deceased died.

⁸¹ Section 77B Administration Act 1969. In the two cases noted in the preceding footnote the relationships were also found to have lasted for more than three years.

⁸² Section 26 Family Proceedings Act 1980.

⁸³ Succession to Maori land is governed by the Te Ture Whenua Maori Act 1993, s 109. Spouses and partners are entitled only to a life interest in the land.

⁸⁴ Section 77 Administration Act 1969.

⁸⁵ The prescribed sum is adjusted from time to time. The current sum was set by the Administration (Prescribed Amounts) Regulations 2009 with effect from 1 June 2009.

is survived by children as well as a spouse or partner, the spouse is entitled to 1/3 of the residue and the children take the remaining 2/3.

Multiple surviving partners

If the deceased is survived by a spouse or civil union partner as well as a de facto partner, or by multiple de facto partners, and more than one elects to inherit rather than proceed with a division under the Property (Relationships) Act, the partners share equally the intestate entitlement that one surviving spouse or partner would have received.⁸⁶ That means that the personal chattels, the prescribed sum and the share of the residue are equally divided between all the surviving partners, provided of course the de facto partners satisfy the two conditions referred to above.

1.2.4 Family Protection Amendment Act 2001

The Family Protection Act dates back to 1900. The Testator's Family Maintenance Act, as it was then called, gave the Court discretion to override a will if the testator had failed to make adequate provision for the proper maintenance and support of the testator's wife, husband or children. The Act was amended in 1939 to permit claims against intestate estates.

The class of eligible claimants has widened over the years, most recently in 2001 by adding de facto partners and again in 2005 to include civil union partners.⁸⁷ Section 3 now provides that applications may be made by:

- (a) The spouse or civil union partner of the deceased;⁸⁸
- (aa) A de facto partner who was living in a de facto relationship with the deceased at the date of his or her death;⁸⁹
- (b) The children of the deceased;
- (c) The grandchildren of the deceased living at his death;⁹⁰
- (d) The stepchildren of the deceased who were being maintained wholly or partly or were legally entitled to be maintained wholly or partly by the deceased immediately before his death;⁹¹
- (e) The parents of the deceased.⁹²

⁸⁶ Section 77C Administration Act 1969. In *Chapman v P* unreported High Court Wellington CIV-2007-485-1372, 2 July 2009 the surviving de facto partner did not have to share her intestate entitlement, because the surviving widow elected option A under the Property (Relationships) Act.

⁸⁷ Relationships (Statutory References) Act 2005, Schedule 1.

⁸⁸ Unless the surviving spouse or partner is within the class of permissible alienees according to Maori custom, the Court has no power to make an order under this Act in favour of the spouse or partner in respect of Maori land beyond a life interest: s 106 Te Ture Whenua Maori Act 1993.

⁸⁹ Section 4A Family Protection Act 1955 provides that no order may be made if the de facto relationship was of less than three years duration unless there was a child of the relationship or the applicant partner made substantial contributions to the relationship, and it would cause serious injustice if no award was made under this Act.

⁹⁰ Section 3(2) Family Protection Act 1955 provides that in considering a grandchild's application, the Court must have regard to any provision made by the deceased, or by the Court under this Act, in favour of either or both of the grandchild's parents.

⁹¹ If the stepchild is a child of the deceased's de facto partner, then the stepchild may claim only if the de facto partner was living with the deceased at the time of death and the relationship was not one of short duration, subject to the usual exception: s 2(1) Family Protection Act 1955.

⁹² A parent may not make a claim unless (a) he or she was wholly or partly being maintained by the deceased immediately before his or her death, or (b) at the date of the claim there was no surviving spouse, civil union

The vast majority of claims emanate from the surviving spouse or partner and the children of the deceased. A child is eligible irrespective of age or financial circumstances and most of the applicants in this group are adult and not financially dependent on their deceased parent. A recommendation from the Law Commission in 1996 to restrict claims by adult children to those who are dependent on the deceased or in financially straitened circumstances has not been implemented.⁹³

The statutory basis upon which the Court may make awards is laid down in s 4(1):

If any person dies, whether testate or intestate, and in terms of his or her will or as a result of his or her intestacy adequate provision is not available from his or her estate for the proper maintenance and support of the persons by whom or on whose behalf application may be made under this Act, the Court may, at its discretion on application so made, order that any provision the Court thinks fit be made out of the deceased's estate for all or any of those persons.

This section has remained substantively the same throughout the Act's existence, but the Court's approach towards its discretion has changed radically over the years. This is discussed below in 1.3.⁹⁴

1.2.5 Law Reform (Testamentary Promises) Act 1949

A report on recent legislative developments in New Zealand's succession law would not be complete without mentioning the Law Reform (Testamentary Promises) Act 1949. Although this Act has not been amended, it is the third source of statutory claims against deceased estates and its current application is to some degree affected by the changes made by the Property (Relationships) Amendment and the Family Protection Amendment Acts 2001.⁹⁵

The Testamentary Promises Act is unique to New Zealand. It was adopted to enforce unfulfilled promises to reward services provided to the deceased. The Act has a quasi contractual origin and that remains apparent in its application. To succeed, an applicant must prove:

- A promise by the deceased;
- Services by the applicant;
- A causal connection between the promise and the services; and
- The promise was not, or not entirely, fulfilled.

partner, or de facto partner in favour of whom an order could be made, or child of the marriage, civil union or de facto relationship: s 4(1A) Family Protection Act 1955.

⁹³ NZLC Report 39 *Succession Law; A Succession (Adjustment) Act* Wellington, 1997.

⁹⁴ For a detailed discussion of the Family Protection Act, see WM Patterson *Law of Family Protection and Testamentary Promises* (LexisNexis Wellington, 2004). Recent leading cases are *Byrne v Bishop* [2001] 3 NZLR 780 and *Samuels v Atkinson* [2009] NZCA 556.

⁹⁵ For example in *C v A* (2007) 26 FRNZ 389 the applicant was found not to be in a de facto relationship with the deceased when he died and was therefore not eligible to apply for orders under the Property (Relationships) Act or the Family Protection Act. His will in which she was a beneficiary was void for invalid execution, but her claim under the Testamentary Promises Act was successful.

The promise must be to make provision from the estate, normally by will. The promise may be express or implied, and may be made before, during or after the services were performed. The promise may be made to the applicant or to others. Corroboration of the applicant's claim that the deceased promised to reward the applicant's services from the estate is desirable, but not essential.

The services can take a variety of forms and are assessed from the viewpoint of the deceased. They can consist of labour at reduced wages, nursing and caring for the deceased, financial support, foregoing opportunities, domestic contributions, including housekeeping, providing meals regularly, gardening, and even companionship. If the services are provided by a family member, they must go beyond what would normally be expected in a family relationship.

The promise must be made as a reward for the applicant's services. However, it need not be the applicant's motive for providing the services. The applicant in *Re Welch* failed on this ground. His stepfather promised to leave him his estate, but that promise was made out of love and affection for his stepson, not as a reward for his services.⁹⁶

Prior to gaining rights under the Property (Relationships) Act and the Family Protection Act, de facto partners sometimes used the Testamentary Promises Act to obtain provision from the estate of their deceased partner. It was the only statutory claim they could make against an estate. The Court showed some leniency in the type of services it would accept and it would infer the required nexus if there was evidence that the deceased had indicated that the applicant would be "looked after" in the deceased's will and that the claimant had continued to provide services in reliance on that assurance. Those claims are now much less likely to occur. On the other hand, the more cautionary approach to Family Protection claims, discussed below, may see a rise in Testamentary Promises claims. The quasi-contractual nature of the Testamentary Promises Act may be seen as a more legitimate basis for intervening in the testator's wishes.

1.2.6 Wills Act 2007

The last legislative change in succession law is the adoption of the Wills Act 2007. It replaces the imperial Wills Act that was the foundation stone of New Zealand's law governing wills since colonisation in 1840. It had been amended in several ways during the time of its application, but much of the substance was left unchanged even after England made several significant amendments in 1982.⁹⁷

The aim of the 2007 Act was to restate the existing law in plain English and to make only a few amendments to ensure better effect was given to testator's wishes. In fact, the changes are quite major. One of the changes was to relax the formal requirements for execution of wills by removing the requirement that the testator's signature appear at the foot or end of the will. Following an amendment to the imperial Wills Act in 1852 to expand the meaning of that requirement, the position of the signature ceased to be a major cause of invalidity. Wills were admitted to probate where signatures had been placed at the start or beside the will or even on envelopes containing the will. The new Wills Act merely requires that the will be signed. As before, the common law requires that the signature must be intended to give effect to the will.

⁹⁶ *Re Welch* [1990] 3 NZLR 1 (Privy Council).

⁹⁷ Administration of Justice Act 1982.

A second and more substantive change is that the Court has been given the power to validate wills that do not comply with the formal requirements of the Act.⁹⁸ A will that is unsigned or unwitnessed is therefore not necessarily void, as it would have been under the old Act.⁹⁹ If the Court is satisfied that the document appears to be a will and expresses the deceased person's testamentary intentions, the Court can declare the will valid. This power derives from Australia where South Australia was the first state to depart from strict compliance with the statutory formalities for making wills.¹⁰⁰ Australian experience over some 30 years revealed no major problems with such a power.

New Zealand's validation power appears to be framed more broadly than the Australian provisions. In Australia, the Courts have to be satisfied that the document in question constitutes the deceased's will.¹⁰¹ If the testator intended to formalise his or her wishes by executing a formal will, then the Courts have generally not upheld an informal document as the deceased's will.¹⁰² In New Zealand, by contrast, the Court merely has to be satisfied that the document expresses the testator's testamentary wishes. That would appear to allow informal documents to be validated even if the deceased intended to execute a formal will. The focus of the New Zealand jurisdiction is thus firmly on the substance of the document rather than its form, which befits its remedial purpose.

The Court can admit evidence about the preparation, signing and witnessing of the document as well as evidence about the deceased's testamentary intentions and statements made by the deceased in relation to the will.¹⁰³ This range of evidence is wider than the Court would have admitted under the old common law rules. It has enabled the Court to validate a signed suicide note and documents that were neither signed by the testator nor witnessed by two witnesses, as required by the Act.¹⁰⁴

Even though the new Act applies to all persons dying on or after 1 November 2007, the Court has no power to exercise the validation power in respect of wills executed before that date.¹⁰⁵ While the lack of retrospective effect reflects general legislative policy, it is unfortunate in this case as no harm would appear to come from exercising the validation power in respect of wills executed before the Act came into force if the testator died on or after 1 November 2007.

⁹⁸ Section 14 Wills Act 2007.

⁹⁹ Section 9 Wills Act 1837.

¹⁰⁰ Section 12(2) Wills Act 1936 (SA), as amended in 1975.

¹⁰¹ Section 8 Succession Act 2006 (NSW); s 12(2) Wills Act 1936 (SA); s 32 Wills Act 1970 (WA); s 11A Wills Act 1968 (ACT); s 9 Wills Act 1997 (Vic); s 10 Wills Act 2000 (NT); s 10 Wills Act 2008 (Tas); s 18 Wills, Probate and Administration Act 1898 (Qld)

¹⁰² For example, *Re Application of Brown; Estate of Springfield* (1991) 23 NSWLR 535; *Hatsatouris v Hatsatouris* [2001] NSWCA 408; *Costa v Public Trustee in the Estate of Robert Costa* [2007] NSWSC 1271; *Estate of Schwartzkopff* (2006) 94 SASR 465; *Dalton v Dalton* [2008] WASC 56; *Spencer v Spencer* [2009] WASC 198; *In the Estate of Pischner* [2004] ACTSC 129; *Estate of Peter Brock* [2007] VSC 415; *Application by Becroft* [2009] VSC 481.

¹⁰³ Section 14(3) Wills Act 2007.

¹⁰⁴ *Re Estate of Hickford* unreported High Court Napier CIV_2009-441-369, 13 August 2009; *Re Macneil* (2009) 10 NZCPR 770; *Re Rejouis* unreported High Court Nelson CIV 2010-442-156, 23 June 2010; *Re Zhu* unreported High Court New Plymouth, CIV-2010-443-21, 17 May 2010.

¹⁰⁵ Sections 4 and 40(2)(k) Wills Act 2007.

The Wills Act makes several other changes to avoid wills or testamentary gifts being invalidated by mere technicalities. Wills executed before entry into marriage or a civil union are revoked by the marriage or civil union.¹⁰⁶ That basic rule is unchanged. But the power to uphold the will if it was made in contemplation of marriage has been widened. In the past the will had to include an expression that clearly indicated that the will was not to be revoked by the contemplated marriage.¹⁰⁷ A will providing for the testator's fiancée was not a sufficient expression of contemplation of marriage.¹⁰⁸ The gift might have been intended to last only during the engagement. Under the new Wills Act, aside from an expression in the will, the will is also not revoked if the circumstances show clearly that the will was made in contemplation of a particular marriage or civil union.¹⁰⁹ Despite the wider scope of the jurisdiction, early indications are that satisfying the onus may still be difficult. The requirement that the circumstances must "show clearly" that the will was made in contemplation of marriage has been construed to mean that if the circumstances are equivocal the will is revoked by the subsequent marriage or civil union.¹¹⁰

Another example of the Act's aim of preventing unnecessary invalidation relates to testamentary gifts to a witness or their spouse, civil union partner or de facto partner.¹¹¹ In contrast to the old Act, where such gifts were inevitably void, the new Act provides a mechanism for upholding them. The gift is not invalid if all the beneficiaries who would benefit directly from the avoidance of the gift consent to the gift or if the High Court is satisfied that the testator knew and approved of the gift and made it voluntarily.

All these changes are aimed at giving effect to testamentary intentions. However, the claims that can be made against the estate by spouses, partners and other family members detract very significantly from that aim.

1.3 Changes in Judicial Approach to Claims under the Family Protection Act

The statutory amendments described above were all the result of changes in legislative policy. Another recent development is the change in judicial approach to claims under the Family Protection Act. While the amendments to the Property (Relationships) Act and the Family Protection Act, described in 1.2.2 and 1.2.4 above, have curtailed testamentary freedom by broadening the scope and range of claims against deceased estates, the change in judicial approach to claims under the Family Protection Act has enhanced testamentary freedom somewhat by reversing the expansive approach to such claims that had developed in the latter years of the 20th century.

New Zealand was the first common law country to give the Court discretion to intervene in the testamentary wishes of a deceased if adequate provision was not available from the estate for "the proper maintenance and support" of the deceased's spouse or children. The earlier

¹⁰⁶ Section 18(1) Wills Act 2007.

¹⁰⁷ Section 13(1) Wills Amendment Act 1955.

¹⁰⁸ *Public Trust v Crawley* [1973] 1 NZLR 695.

¹⁰⁹ Section 18(3) Wills Act 2007.

¹¹⁰ *Re Stirling (deceased)* [2009] NZFLR 976 where the Court declined to uphold the deceased's will even though he was engaged to be married and knew that he was terminally ill with cancer at the time when he made his will. The wedding date had not yet been set and the deceased did not realise his death was imminent. In answer to the question from the person who took the instructions for his will whether he was making his will in contemplation of marriage, he answered in the negative, possibly not appreciating the significance of the question.

¹¹¹ Section 13 Wills Act 2007.

proposals, following the Scottish example of limiting testamentary power to 1/3 or 1/2 of the estate, were rejected by Parliament out of concern that it would reward the undeserving. The Testator's Family Maintenance Act 1900, later renamed the Family Protection Act, did not restrain testamentary power, but gave the Court discretion to intervene if the will did not make adequate provision for the proper maintenance and support of the surviving spouse and children. The aim of the Act was to prevent destitution of family members and dependence on the State.¹¹² Its characterisation as a basic maintenance provision was reflected in the early cases. The Courts awarded widows no more than maintenance to cover the necessities of life if they were unable to support themselves.¹¹³ Their awards were normally in the form of an annuity and limited to the period of their widowhood to avoid their late husband's estate supporting a subsequent husband.

Initially, children succeeded only if they were young and financially dependent on the deceased.¹¹⁴ The Courts saw no reason to intervene in a will to provide for able-bodied sons or married daughters. That minimalist approach was abandoned in 1909 in favour of a concept of moral duty owed by the deceased to the applicant. This meant that destitution was no longer a pre-requisite. Financial need in a broad sense would be sufficient. This enabled adult children to succeed if they had modest means and widows to receive provision commensurate to the lifestyle they had enjoyed during their marriage.

Financial need in this broad sense remained an essential prerequisite for the next 50 years of the Act's existence, but then the judiciary became more liberal both in what it regarded as financial need and in the awards it was prepared to make. Widows started to receive capital awards,¹¹⁵ and annuities were no longer limited to their widowhood.¹¹⁶ Adult children, including able bodied sons and married daughters, began to succeed even if they were not in financial need.¹¹⁷

By the mid 1980s judicial interference in testators' wills had reached a high point. A survey of 235 decisions between 1985 and 1994 involving claims by adult children revealed that 91.5% of the claims were successful and that 27.6% of the claimants had no financial need whatsoever.¹¹⁸ Some applicants were financially better off than their deceased parent! They succeeded because they had done nothing to disentitle themselves and deserved to be recognised as a worthy member of the family. Disinheriting a child, or giving a child less than a fair share of the estate, was tantamount to rejecting the child from the family bond. The Family Protection award thus served to recognise the family relationship. Judicial interpretation had changed the Act from a mere maintenance provision to a system of forced heirship, albeit at the Court's discretion.

¹¹² NZ Parliamentary Debates 1900, Vol 111, cols 503-504.

¹¹³ *Re Rush* [1901] 20 NZLR 249; *Laird v Laird* (1903) 5 GLR 466; *Re Russell* (1907) 9 GLR 509.

¹¹⁴ *Handley v Walker* (1903) 22 NZLR 933; *Re Cameron* (1905) 25 NZLR 907; *Re Green* (1911) 13 GLR 477.

¹¹⁵ *Re Wilson* (1975) 2 NZLR 359 (CA).

¹¹⁶ *Re Z* [1979] 2 NZLR 495.

¹¹⁷ *Re Harrison* [1962] NZLR 3 (CA) marks a turning point in regard to claims by adult children. This was followed by *Little v Angus* [1981] NZLR 126 (CA) and *Re Leonard* [1985] 2 NZLR 88 (CA)

¹¹⁸ Nicola Peart "Awards for children under the Family Protection Act 1955" (1995) 1 *Butterworths Family Law Journal* 224.

Not surprisingly, this liberal approach to claims under the Family Protection Act, particularly in regard to adult children who were not in financial need, provoked widespread criticism and several reviews.¹¹⁹ In 1997, the Law Commission recommended new legislation that would give children no greater rights than they had during their parents' lifetime.¹²⁰ That recommendation has not been implemented and is unlikely to be enacted now. The criticism recorded in the Law Commission's Report nonetheless found its mark and provoked a judicial reaction. In three landmark decisions, the Court of Appeal cautioned against the liberal interventions of the past and directed a less interventionist approach.¹²¹ However, it did not go so far as to restrict awards to bare maintenance for the necessities of life. It explicitly affirmed the importance of recognising the family bond as part of a parent's support obligations. In *Williams v Aucutt Richardson P* held:

The test is whether adequate provision has been made for the proper maintenance and support of the claimant. "Support" is an additional and wider term than "maintenance". In using the composite expression, and requiring "proper' maintenance and support, the legislation recognises that a broader approach is required and the authorities referred to establish that moral and ethical considerations are to be taken into account in determining the scope of the duty. "Support" is used in its wider dictionary sense of "sustaining, providing comfort". A child's path through life is supported not simply by financial provision to meet economic need and contingencies but also by recognition of belonging to the family and of having been an important part of the overall life of the deceased.¹²²

In that case the applicant daughter was well off with assets exceeding those of her late mother. Her family membership and her importance to the deceased's life nonetheless deserved recognition.

The dictum quoted above has since been relied on in several other cases to reduce awards made by the lower courts, including cases where the applicants were in financial need.¹²³ Furthermore, the more conservative approach to Family Protection claims is not confined to adult children. It also applies to surviving spouses and partners, even when the claim emanates from widows who traditionally enjoy a paramount status under this Act.¹²⁴ The clear message from the Court of Appeal is that judges should not use the Family Protection Act to do what they think is fair in the circumstances. They should intervene only where the applicant has shown that the deceased has failed to make adequate provision for the applicant's proper support and maintenance.

While there is a clear move towards a less interventionist approach, there is no clarity as to what amounts to "adequate provision" for proper support and maintenance. How much is enough? In *Williams v Aucutt* Justice Richardson commented that that was

¹¹⁹ *Report of the Working Group on Matrimonial Property and Family Protection* (Wellington, 1988); NZ Law Commission, Preliminary Paper 24 *Succession Law; Testamentary Claims* (Wellington, 1996)

¹²⁰ NZ Law Commission Report 39 *Succession Law; A Succession (Adjustment) Act* Wellington (1997).

¹²¹ *Williams v Aucutt* [2000] 2 NZLR 479; *Auckland City Mission v Brown* [2002] 2 NZLR 650 and *Henry v Henry* [2007] NZFLR 640.

¹²² [2000] 2 NZLR 479 at para [52].

¹²³ *Henry v Henry* [2007] NZFLR 640 (CA) is the leading authority on adult children in financial need.

¹²⁴ *Wylie v Wylie* (2003) 23 FRNZ 156.

a matter of judgment in all the circumstances of the particular case. It may take the form of lifetime gifts or a bequest of family possessions precious to its members and often part of the family history. And where there is no economic need it may also be met by a legacy of a moderate amount. On the other hand where the estate comprises the accumulation of the family assets and is more than sufficient to meet other needs, provision so small as to leave a justifiable sense of exclusion from participation in the family estate might not amount to proper support for a family member.¹²⁵

Given the high number of successful appeals since this decision, it is obviously not simply a matter of judgment. There is no workable formula. The jurisdiction is riddled with uncertainty and any advice given to testators and their survivors is therefore no more reliable than taking a bet on the horses. So, although the more conservative approach is intended to accord greater respect for testamentary freedom, the confusion surrounding its application is such that nobody can be certain that testamentary wishes will indeed withstand challenge. That is one of the reasons for the increase in trusts. They give the settlor more control over the destination of assets they have accumulated.

1.4 Conclusion

In answer to the questions in regard to general tendencies:

- a. New Zealand's succession law underwent changes as a result of both legislative and judicial intervention.
- b. These changes are fundamental and far-reaching, but they are driven by different and inconsistent policy considerations. The changes introduced by the Wills Act 2007 suggest legislative endorsement of the importance of wills and support for the principle of testamentary freedom. The Property (Relationships) Act and the Family Protection Act undermine that policy. The Court's redirection of its discretion under the Family Protection Act acknowledges the criticism that they had been too liberal in their interventions, but it falls well short of restoring testamentary freedom in any significant way. The Wills Act empowers the Court to give better effect to testamentary wishes, while the other statutes give it licence to disregard those wishes. New Zealand's succession law is therefore in a most unsatisfactory state.
- c. The relationship property changes are a response to the perceived inadequacies of the Matrimonial Property Acts 1963 and 1976 as well as the equitable jurisdiction on which de facto partners had to rely. Reform was needed to place the property rights of spouses and partners on a more secure and equitable footing. The intestacy rules were amended to remove discrimination based on marital status. In contrast to Holland, there was no attempt to reform the intestacy rules to obviate the need for wills. Given the wide range of family relationships in New Zealand, no one set of rules is likely to accommodate the needs and expectations of a significant portion of the population.

¹²⁵ [2000] 2 NZLR 479 at para [52].

2. The Influence of Comparative Legal Analysis on These Changes

Many of the recent changes were influenced by research carried out by New Zealand academics either independently or at the request of the Law Commission or government agencies. However, the new Wills Act was heavily influenced by developments in Australia. When the New Zealand Law Commission first proposed a new Wills Act in 1997, it drew heavily on the Uniform Succession Law Project in Australia. It saw value in harmonising New Zealand's wills legislation with that of Australia given the number of migrants between these two countries.¹²⁶ Unfortunately, the Commission's proposal was not implemented at the time and when it was resurrected a decade later, Parliament did not seem to share the Commission's harmonisation aim. There is no evidence that the ministerial officials who updated and amended the Commission's draft Act looked at the Australian statutes that implemented the Uniform Succession Law Project's Wills Bill. Had they done so, some technical problems with New Zealand's Act might have been avoided.¹²⁷

The Property (Relationships) Act is unique to the common law world. Other jurisdictions with which New Zealand is mostly closely aligned - England, Australia, Canada (other than Quebec) and, to a lesser degree, the United States of America – do not have a community of property regime. Their property adjustment systems are discretionary in nature and apply only on separation and divorce, not on death.

New Zealand was the first common law country to adopt family provision legislation. Australia, Canada and England subsequently followed suit, but the courts in those countries do not appear to apply the jurisdiction as liberally as in New Zealand. The expansive view of support to include recognition of the family relationship seems to be unique to New Zealand.

3. Impact of Regional Economic Integration

New Zealand has close economic relations with Australia and there is a great deal of migration between the two countries. While there is no attempt as yet to create supra-national law, there are efforts to assimilate legislation between the two countries where that is possible and practicable.

Some parts of succession law are very similar between the two countries, such as the intestacy rules and the Family Protection legislation. The Wills Act is also quite similar to the Australian statutes. But the very different property regimes for spouses and partners makes further harmonisation of succession legislation unlikely in the near future.

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¹²⁶ NZLC Report 41 *Succession Law; A Succession (Wills) Act* (Wellington, 1997).

¹²⁷ For example, the transitional provisions that prevent the validation power from being applied to wills executed before 1 November 2007. Also, there are several errors in the formal requirements in s 11, which have the effect of invalidating wills that would have been valid under the old Act.