

What should happen to your property when you die?

We welcome your views

The Law Commission welcomes comments from people who consider that they are affected by the proposals, options and views in this paper, and especially from Māori, and ethnic and cultural groups.

These should be forwarded
by 14 November 1996.



The Director
Law Commission
PO Box 2590
Wellington
Phone: 04/473-3453
Freephone: 0800 883-453
Fax: 04/471-0959
E-mail: com@lawcom.govt.nz

THE LAW COMMISSION

The Law Commission is an independent, publicly funded advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand. The Commissioners are Professor Richard Sutton (Deputy and Acting President), Leslie H Atkins QC, Joanne Morris OBE and Judge Margaret Lee.

Use of comments and submissions

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus copies of comments and submissions made to the Commission will normally be made available on request, and the Commission may mention them in its reports. Any request for the withholding of information on the grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act.

CONTENTS

CHAPTER ONE

The Succession Project page 4

CHAPTER TWO

Why change the law? page 6

CHAPTER THREE

What should the new law be? page 9

CHAPTER FOUR

Widows' and widowers' claims page 10

CHAPTER FIVE

De facto partners' claims page 12

CHAPTER SIX

Children who cannot support themselves page 14

CHAPTER SEVEN

What claims should adult children be able to make? page 16

CHAPTER EIGHT

Other relatives' claims page 20

CHAPTER NINE

Contributors' claims page 22

CHAPTER TEN

Binding agreements for property on death page 24

CHAPTER ELEVEN

Effect of proposals on support for the elderly page 26

CHAPTER TWELVE

Do our proposals affect claims between living partners? page 30

The Succession Project

The law of succession is a system of rules which says what must happen to people's property when they die.

Each year, some 27,000 people die in New Zealand. Throughout their lives, these people will have had relationships with a wide range of family members, friends and organisations. Everyone may be affected, to a greater or lesser extent, by the law of succession.

Many of those who die leave significant amounts of property (their "estates"). The main form of wealth is the family home which represents, on average, nearly half of what people own. Around 65 percent of estates are worth \$40,000 or less (in March 1996 terms), and 90 percent are worth \$170,000 or less.

Most of the people who die in New Zealand each year are older, but many younger people also die. The trend to an older society means that often people, for the greater part of their adult lives, will be partners in a family without growing children.

Women often outlive their husbands and male partners. A law which decides how property must pass from one partner to another must allow for the fact that men are more often the main property owner.

We began the succession project in 1993. Its purpose is to review the current system of rules, and then reform and develop the law of succession. The ultimate aim is to have a new Succession Act drafted in plain language which will:

- provide for all succession matters in one statute
- simplify the law
- ensure that will-makers' wishes are better carried out, and
- take account of the diversity of New Zealand families.

The testamentary claims which are discussed in this paper are a major aspect of our succession project. Other aspects include discussion of succession as it applies to ancestral property belonging to Māori families. Assisted by consultants, we have consulted about this with tangata whenua at a number of hui in different regions. The third aspect relates to wills and administration of estates, for which we will also propose necessary changes.

What is a Testamentary claim?

Normally a dead person's property is handed on to the people named in the person's will. But in some cases the will can be challenged in court. A court may order that those named in the will ("beneficiaries") take the property in different proportions from those the will-maker intended. A court may even order that all or part of the estate goes to someone not named in the will. In this paper, challenges to the way a person's property is divided up when they die (the "distribution" of the estate) are called testamentary claims.

Testamentary claims usually attack the provisions of a will. But claims can also be made where a dead person left no will, an invalid will or a will which does not dispose of all their property. The person is then said to have died "intestate". In these cases, the Administration Act 1969 says who receives the benefit of all or part of the estate.

The rules of intestacy result in a dead person's property being divided up in a relatively simple and standard way, which may not meet all potential claims. We consider that the way a dead person's property is distributed – when there is no valid will disposing of all of their estate – should continue to be open to challenge.

Why change the law?

Three choices under present Law

The present law allows people to make three kinds of testamentary claims:

- **MATRIMONIAL AND DE FACTO PROPERTY.** A husband, wife or de facto partner of a will-maker may claim a share in the will-maker's estate (using the Matrimonial Property Act 1963, or claims under trusts).
- **FAMILY PROTECTION.** Close members of a will-maker's family such as a husband, wife, child (of any age), grandchild or parent may claim "adequate provision" for their "proper maintenance and support" (using the Family Protection Act 1955).
- **TESTAMENTARY PROMISES.** People who have acted generously and conferred benefits on a will-maker ("contributors") may have the will changed in their favour if the will-maker promised to leave them something in the will (using the Law Reform (Testamentary Promises) Act 1949).

Urgent review needed

The law of testamentary claims is in urgent need of review. There are many inconsistencies. For example, the law which applies to widows and widowers does not match the law applying to living spouses who divorce. Similarly, courts apply the legislation regarding adult children's claims very differently from the way they did in the 1950s when Parliament last endorsed it. During their lifetime, no-one making a gift to an adult child is required by law to consider whether they are being fair to their other children. But when a person dies, courts often question the fairness of wills as between two or more children.

The practice of the courts has been well-intended and, in some ways, beneficial. To some extent, it has prevented abuses of power in family relationships. But the policies which now lie behind the law are unclear. It frequently operates in an uncertain and unpredictable way.

The courts' present powers are broad and discretionary. This might have been acceptable when people had a common (if male-centred and monocultural) vision of the family. But we now accept that families are different and should not all be treated the same way. They differ in their ethnic and cultural backgrounds (eg, Pacific Islands, Indian), and they differ in their structure (eg, second marriages, single parent households). We now believe that the value systems of a single culture or a particular type of family should not be applied indiscriminately to others who do not share that system.

The law also needs to be reviewed for technical reasons, especially the law of testamentary promises.

What should new law do?

The law should recognise and support New Zealand families

The law which says how family property will be divided up should recognise and support New Zealand families today. Defining “family” in a way that is relevant to everyone in our society is hard. However, for succession law in New Zealand today, we suggest a model of family in which partners share equally in the wealth they have created, and growing children are cared for and have their needs met. In the past, the law treated passing wealth from one generation to another as important. Modern law instead treats other things as important, such as the bringing up and educating of children, and the support of partners.

The law should recognise the variety in New Zealand families

New Zealand families are different ethnically, socially and culturally. Particular families will see themselves in different ways. Different members of the same family may have different views on their function and role in a family. These views will be based on family members’ different gender, age or personal characteristics and experiences.

When the laws governing testamentary claims were framed in the first half of this century, people had a clearer view of the family than they do now. Consider New Zealand today:

- **CULTURE AND ETHNICITY.** There are Māori perspectives on family structures. There are also those of Pacific, Indian, Asian, Greek, Dalmatian, Dutch and other ethnic minority communities.
- **MARITAL STATUS.** Marriage dissolution and remarriage are now more common. Marriages are more often of a shorter duration. De facto relationships are increasing. People now live openly in same-sex relationships. More people are living alone, not having children, and not forming relationships in the nature of marriage.
- **PARENT-CHILD AND FOSTER RELATIONSHIPS.** More of New Zealand’s children are born to de facto partners. More children are living with one parent and a step-parent. Informal adoptions and the fostering of children are not uncommon.
- **ADOPTION AND ART.** The secrecy which once surrounded adoption is lifting. Adopted children may well have relationships with both adoptive and biological parents. Children born following the use of assisted reproductive technologies (ART) may in time find themselves in a similar position.

Family life in New Zealand continues to change in these and other ways. Financial support claims in the existing law have not kept up with these changes.

The law should take into account cultural differences

In theory, the present law enables courts to take into account cultural differences. But courts are unsure how far they should go in treating cultural expectations as an answer to a Family Protection Act 1955 claim.

We believe the law of succession should provide more room for the expression of gender, ethnic and cultural values in will-making. Where the law cannot achieve a clear purpose (eg, resolving conflicts between parents and children), we need to ask whether it is useful

to retain it. Where the law can intervene usefully, it should do so by applying clearly stated and well-known principles. Families should nevertheless be able to alter the effect of these principles by a well-informed and fairly-obtained agreement.

The law should encourage families to solve their own disputes

The law should help claimants to test what mediation can do for them before taking a dispute to court – often with more expense and delay. Disputes can be destructive. Where a family is close-knit, members often wish to take a wider view of a dispute and preserve that closeness.

The law should sustain property rights

In most modern countries property owners have the right to pass on their property when they die. This right is not limited to doing so by will (eg, a jointly-owned home usually passes to the surviving joint-owner automatically). The right to pass on property on death:

- lets people bargain for goods and services and pay for them at death, so that will makers can keep and use their property while they need it, and service providers can get a greater than usual payment for the delay in receiving payment;
- lets will-makers give effect to family expectations;
- lets charities and community organisations be beneficiaries, and so benefits the community collectively; and
- is individual – a will gift can have much more personal significance than property passed on only because of a court order.

Many people think that, because property owners normally acquire their property through their hard work and effort, they deserve an absolute right to pass on their property on death. However to be fair to others and make will-makers' duties before and after they die more alike, we believe that this right should have clear and sensible limits:

- People close to will-makers sometimes provide services to will-makers in the hope that they will be rewarded by will. If a contributor's expectation of reward is reasonable, the will-maker should not be allowed to accept a benefit and give nothing in return.
- From at least 1976 we have accepted that married partners' contributions to the property of a partnership, whether in the form of earnings or services in the home (including care of children), have the same value. If a will denies that a partner's contributions to a partnership have the same value, it should not be allowed to stand.

The law which lets children of any age claim against estates can greatly reduce will-makers' rights to pass on property on death as they decide is best. It can also make it hard for will-makers to give effect to family expectations. While courts say that it is not their job to remake wills, they have broad powers to do this, and often exercise them.

What should the new law be?

We now set out and explain our proposals and options for new law. Some are contentious. This is especially true of our proposals for claims by de facto partners, and also true of our options for adult childrens' claims. Both need full debate before we can recommend them to Government as new law. We welcome your comments on the shape and detail of our proposals, and on whether there are better ways of changing the law.

We talk about the rights to claim of these groups of people:

Widows and widowers

De facto partners

Children who cannot support themselves

Adult children

Other relatives, and

Contributors

Generally our proposals treat widows and widowers better than the present law does. Our proposals would be considerably more generous to de facto partners who make claims. On the other hand, they raise questions about the claims which may be made by will-makers' children and other relatives.

We also propose to set out the rights of people whose actions have contributed to the will-maker's estate. Contributors may or may not be family members. Their contributions may take the form of services, additions to the will-maker's assets or actions which save the will-maker significant expense.

None of the proposals in this paper would apply to Māori freehold land, Māori incorporation shares or trusts under Te Ture Whenua Māori/Māori Land Act 1993. We are giving separate consideration to other taonga, such as cloaks, greenstone or property handed back as a result of Treaty of Waitangi claims.

Widows and widowers



Currently, if the will-maker does not leave their widow or widower enough property, he or she may apply for an award under the Matrimonial Property Act 1963. Usually this award is based on their contributions to the will maker's property. The law, unlike that which applies on divorce, does not usually result in couples sharing their property equally. Widows or widowers may also apply for an award for maintenance and support under the Family Protection Act 1955. Courts decide what the size of these awards will be.

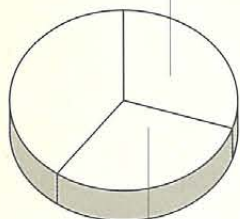
TAKE THIS EXAMPLE

Tom and Edith have been married for 25 years. Edith works part-time as a shop assistant. When Tom dies, they own assets worth \$300,000, all acquired during the marriage. The assets are all in Tom's name. The couple have three children, the eldest of whom is 20 years old when Tom dies. Tom leaves \$30,000 to Edith. The rest is left on trust, and Edith has a right only to receive income from that part of the estate until she dies. When she dies or remarries, the children will have the estate.

Edith makes a testamentary claim because she wishes to have greater control of the capital held by the administrator trustee.*

PRESENT LAW

Edith's property
award 30% =
\$90,000



Edith's support
award 30% =
\$90,000

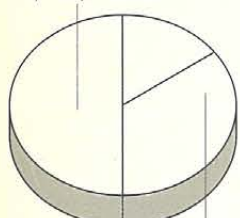
How does the present law work?

Under the present law, Edith gets a property award which the judge will decide. On past experience, this will be approximately 30-45 percent of the value of the property. The judge may or may not order that Edith's right to income during her life be cancelled.

How will the proposed new law work?

Under our proposals, Edith (assuming she contributed equally to the partnership) may apply for a property division of \$150,000, her share of the property. She can also seek a support award (probably a lump sum) to help her live independently. The size of that award will be determined by the judge. The judge will consider Edith's need, and the fact that she has given up her own reasonable financial independence in order to look after her family. As well, the children may claim personal awards to meet educational and support needs. The 20 year-old child may make his or her own claim. Edith, caring for the younger children, may make their claims for them.

Edith's property
division 50% =
\$150,000



PROPOSED LAW

Edith's support
award 30% =
\$90,000

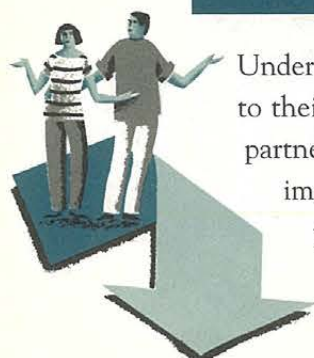
* This example, and those which follow in this paper, are not based on any specific case involving actual claimants. They have features, however, which appear in a great number of cases coming before the courts.

PROPOSED NEW LAW

Widows and widowers would have:

- **A RIGHT TO A SHARE IN THE PROPERTY OF THE MARRIAGE** based on their contribution to the marriage partnership (which courts would usually treat as equal in value to the will-maker's)
- **A CLAIM TO FINANCIAL SUPPORT** which provides them with a reasonable, independent standard of living until, considering the consequences of the marriage for them, they can provide it for themselves.

De facto partners

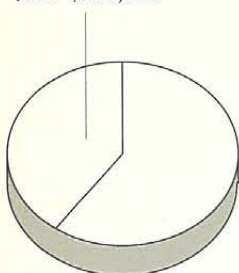


Under the present law, courts do not usually consider de facto partners' contributions to their partnership as counting towards their property rights. However, if a de facto partner has made contributions to property owned by the will-maker, the court may impose a trust which gives the partner property rights. Partners' contributions to property are not usually treated as equal, but must be shown in every case. Surviving partners have no support claim.

TAKE THIS EXAMPLE

Hone lived with Ngaire in a de facto relationship for 25 years. They have two children under 20. Before the children were born, Ngaire worked full-time as a librarian. The parties did not make any agreement about sharing property or supporting one another when the relationship ended. The partners accumulated \$250,000 during the relationship, all of which is in Hone's name. Hone's will leaves Ngaire \$50,000 and a life-interest in a further \$50,000. The rest of the estate goes to the two children and to a charitable cause.

Ngaire's property
40% = \$100,000



PRESENT LAW

Ngaire exercises her right to share in the partnership property and claim support.

How does the present law work?

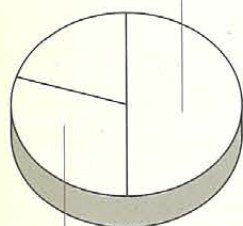
Ngaire gets an award of only part of Hone's property. The judge will decide how large this is, taking into account Ngaire's contributions to that property.

How will the proposed new law work?

Under our proposals, Ngaire will have the right to \$125,000 as her share of the property accumulated during the relationship. She will also be entitled to a support award (probably a lump sum) to help her live independently. The size of the award will be determined by the judge, taking into account Ngaire's actual income, the effect of Ngaire's past (and likely future) absences from the workforce and the effect of these absences on her earning capacity. The children will also have a claim.

The principles in our proposals are the same as those that apply to the property disputes of living spouses who divorce. This still allows de facto partners some flexibility, to take into account the fact that the particular relationship may not carry the same expectations as a marriage does. In particular, a couple may agree on a different division of property. Agreements (whether or not they are in writing) will be given effect so long as they are reached in a way that is fair and operate in a way that is reasonable. Property which has been kept separate will not usually be shared equally between the partners. Partners who have worked throughout their relationship and have not suffered financially will not be awarded support.

Ngaire's
Property
division
50% =
\$125,000



Ngaire's
support
award
30% =
\$75,000

PROPOSED LAW

PROPOSED NEW LAW

De facto partners (including de facto partners of the same sex) would have:

- **A RIGHT TO SHARE IN THE PROPERTY OF THE PARTNERSHIP** based on their contribution to the partnership (which courts would normally treat as equal in value to the will-maker's)
- **A CLAIM TO FINANCIAL SUPPORT** which provides them with a reasonable, independent standard of living until, considering the consequences of the partnership for them, they can provide it for themselves.

Children who cannot support themselves

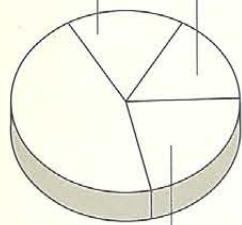


Under the present law will-makers must support their children. If they are given nothing or only a small share of the estate, the courts can make them large awards. It does not matter whether the children are mature (eg, in their 60s). A study done for us showed that claims often result in each child being awarded from 12.5% to 20% of the estate. A child without brothers or sisters can receive more than half of the estate.

PRESENT LAW

Alice's support award 20% = \$54,000

Oliver's support award 20% = \$54,000



Ken's support award 20% = \$54,000

TAKE THIS EXAMPLE

Bob was married twice. Ken is the only child of his first marriage. There are two children from Bob's second marriage to Sue: Alice and Oliver. Bob's estate is worth \$270,000. Under the will, Sue receives \$50,000 from her husband's estate, Alice and Oliver (aged 10 and 19 years respectively) receive \$5,000 each. Ken, now aged 34 and in full-time employment, also receives \$5,000 from his father's estate.

Sue applies for a property division and makes a support claim against her late husband's estate. Under our proposals she would be awarded a total of \$200,000. This represents her contributions to the marriage partnership, \$135,000, together with a \$65,000 lump sum support award, to help her enjoy a reasonable, independent standard of living.

How does the present law work?

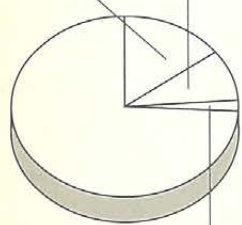
Under the present law, each of the three children might be awarded from \$33,750 to \$54,000. Alice and Oliver, who are still dependent, get no special or stronger award. However, they do receive a lump sum which could be larger than that awarded to their older half-brother Ken.

How will the proposed new law work?

Applying our new law, the judge looks at the children's claims which are made against the last \$70,000 of the estate. Alice must complete secondary school (and perhaps university) before she can reasonably be financially independent. Alice might get a lump sum of \$40,000, depending on the circumstances. Oliver might get \$25,000, slightly less, because he has begun polytech and has part-time employment. At this point, we leave open the question whether Ken, who is over 25 and has no disability, is entitled to claim. Because the estate is large enough, Ken can keep the \$5,000 his father left to him anyway.

Oliver's support award 9.25% = \$25,000

Alice's support award 14.8% = \$40,000



Ken's will gift 1.85% = \$5,000

PROPOSED LAW

PROPOSED NEW LAW

Children would be able to claim support if they are:

- under twenty; or
- under 25, and undertaking educational or vocational training; or
- unable to earn a reasonable, independent livelihood because of a physical, mental or intellectual disability that arose before they reached 25.

Adult children



At present, our proposals do not include an independent adult child's claim. Instead, we suggest four options. We welcome your comments on what should be done.

Courts can now intervene if an adult child claims. They do so because children of any age may claim for "adequate provision for their proper maintenance and support". Courts appear to have the following goals, any one of which may support their decision:

- To acknowledge and strengthen the close ties which ought to exist in an ideal family.
- To reward the child's good behaviour or compensate the child for the will-maker's bad behaviour.
- To protect an adult child who is in need.

However, the present law needs review because of these problems:

- Courts make different awards to adult children in cases that seem similar.
- Will-makers therefore find it hard to know and do what the law requires of them.
- Courts are uncertain why they are altering the will-maker's arrangements. This makes it hard to know whether the way the court is dividing up the estate is any better than the way the will-maker intended.
- Almost every adult child's claim succeeds, even though the will-maker, during their lifetime, had no duty to look after the adult child. Such awards can reduce the amount of property available for the will-maker's widow or widower, surviving de facto partner and dependent children.

TAKE THIS EXAMPLE

Helmut separated from his wife a year before he died. After gifts of \$10,000 to a chess club, and of personal effects to his three children, he left all his estate to his unborn grandchildren. His children were then aged 30, 28 and 25.

▼
The court considered that Helmut acted not for the purpose of disposing of his estate properly, but instead out of a sense of spite towards his wife and children.

How does the present law work?

This example is one of a will which most people would think was neither sensible nor fair. Other wills might express the will-maker's approval or disapproval of a child's help, behaviour or lifestyle.

There are various reasons for wills like these. They may be made out of distress at the failure of a relationship, the fickleness of old age, ignorance of a child's true situation, or hurt or disappointment because of a child's failure to meet the will-maker's demands or expectations. However, the underlying causes of unfair wills have to be set aside from the standards by which they are assessed. Unless those standards are spelt out, there will be problems in knowing when a court is likely to interfere. It will also be hard for the courts to be consistent in making arrangements to replace those made by the will-maker.

Under the present law, the courts would find little difficulty in making an award to the adult child in the above example, assuming there were no stronger claims. However, the amount awarded, and the precise reason for settling that amount, are much more uncertain. This uncertainty is made worse when the courts move beyond the (comparatively few) cases where there is clearly no good reason for the will-maker's actions.

OPTIONS TO CONSIDER

Adult children may:

- claim awards where a financial need can be shown
- claim awards to prevent arbitrary or vindictive, mistaken, or accidental disinheritance
- claim awards where will-makers have no reasonable grounds for disinheriting them
- not claim awards; and courts have no power to intervene at all.

The first three options may be considered either as alternatives, or else in combination – for example, the first and third options, or the first three options together, and so on.

Option 1

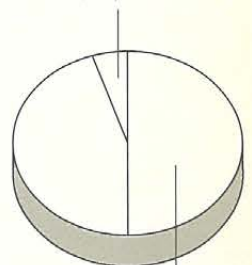
Claims where a financial need can be shown

Only children in need can claim, while will-makers must leave each adult child enough to meet that need.

HOW WOULD THIS OPTION WORK?

Suey Wah dies, at age 80, leaving two children over 25 years of age and without disability, Clara and Kam Lee. Her estate is worth \$250,000. She leaves it all to her local church. Clara and her husband are retired, with their own freehold house, motor car and \$20,000 in the bank. Kam Lee is still working, but is approaching retiring age. He lives in rented accommodation, and has no substantial savings.

Clara's award
5% =
\$12,000



Kam Lee's
award 50%
=\$125,000

Neither Clara nor Kam Lee is wealthy, but Clara is comfortable while Kam Lee is not. Kam Lee is awarded a large share of the estate (say, 50%) whereas Clara gets either nothing, or a much smaller amount (say, 5%).

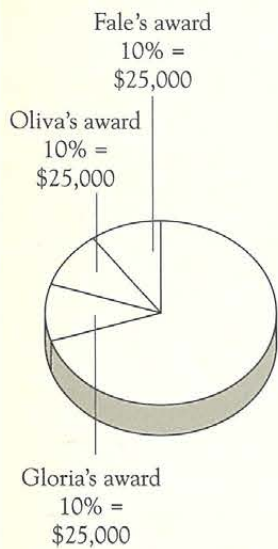
Option 2

Claims to prevent arbitrary or vindictive, mistaken or accidental disinheritance

If a will-maker disinherits a child in any of these ways, then that child could receive a fixed share of what remains of the estate, but only after all other claims are met.

HOW WOULD THIS OPTION WORK?

Tiavolo dies, at age 80, leaving three children over 25 years of age and without disability, Oliva, Gloria and Fale. His estate is worth \$250,000. He leaves it all to his local church.



Tiavolo cuts out his son Fale because they had a bitter disagreement years earlier.

Tiavolo mistakenly believes that he has left a very valuable car to Oliva, his favourite child, when, in fact, the car is worth very little because it is ordinary and in poor condition.

Gloria was born after what would become Tiavolo's last will, and even though he told all his children that Gloria would be included in his next will, he failed to make a will which made provision for her.

The court would first set aside part of the estate it thought was enough for all three children. Unless there were special circumstances, each child would then be entitled to an equal share of what the court set aside (say, 30%)

Option 3

Claims to prevent disinheritance without reasonable grounds

Reasonable grounds for not providing for adult children would be set out in the law. If a will-maker had no reasonable grounds for not including a child in the will, that child could receive a fixed share of what remains of the estate, but only after all other claims are met.

HOW WOULD THIS OPTION WORK?

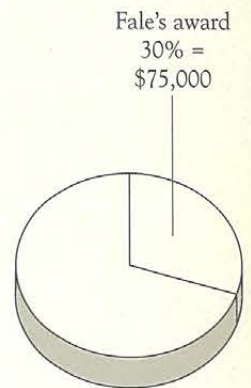
Tiavolo dies, at age 80, leaving three children over 25 years of age and without disability, Oliva, Gloria and Fale. His estate is worth \$250,000. He leaves it all to his local church.

The law would say that it is reasonable to leave no property to a child whom the will-maker has not seen for long periods. Tiavolo has not seen Oliva, his favourite child, for years, and so leaves nothing to him.

▼
The law would say that it is reasonable to leave no property to a child who has already received lots of property from a will-maker during the will-maker's lifetime. Tiavolo gave money to Gloria to help her buy a house, and so leaves nothing to Gloria.

▼
Tiavolo cut out Fale for the sole reason that Fale did not baptise his children.

▼
Under this option, only Fale would be entitled to a part of the estate which the court thought was enough for him (say, 30%), because Tiavolo cut him out of the will without reasonable grounds.



Option 4

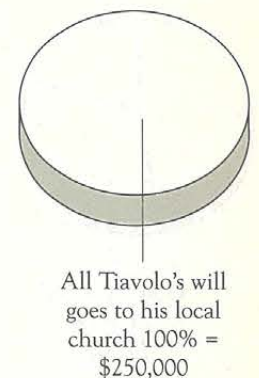
No claims

Adult children would not be able to challenge their parents' wills in court. As it is unclear what provision the law should require will-makers to make for their adult children, the law should leave it to will-makers' better judgment, accepting that some will-makers act in ways that are difficult to justify and for their adult children to accept.

HOW WOULD THIS OPTION WORK?

Tiavolo dies, at age 80, leaving three children over 25 years of age and without disability, Oliva, Gloria and Fale. None of them has especially looked after or even had usual family contact with Tiavolo. His estate is worth \$250,000. He leaves it all to his local church.

▼
None of Tiavolo's three children is entitled to claim.



Other relatives



Grandchildren, stepchildren and parents are currently permitted to claim support. The grandchild's claim can be used, eg, where a child is dead or irresponsible, to pass part of the child's entitlement down to the child's children. There are restrictions on claiming in some cases. Stepchildren and parents, for example, may claim only if they are were being supported by the will-maker, or had a legal right to be.

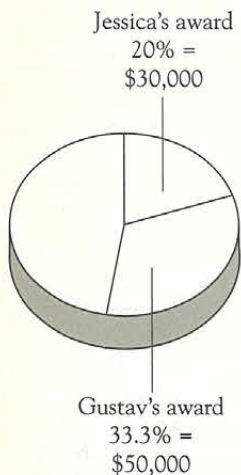
We propose instead that support claims should depend on establishing a direct responsibility between the will-maker and claimant.

TAKE THIS EXAMPLE

Beatrice is divorced. She had only one child during the marriage, James, who settled in Australia and had a child of his own (Jessica) before he died at 35 years of age. Because James fell out with his mother, it meant that Beatrice never met her only grandchild who grew up in Australia.

When James had left home, Beatrice became a foster parent for her sister's child, Toni. Beatrice was the sole provider of care for Toni although Beatrice did not formally adopt her. Beatrice's father, Gustav, an elderly man, occasionally helped her out by babysitting Toni. Beatrice dies leaving Toni (aged 15) \$5,000 of her \$150,000 estate, and the rest to a charitable organisation.

PRESENT LAW



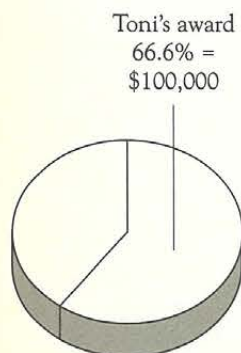
How does the present law work?

Under the present law, Toni would not be able to claim support. Beatrice's grandchild Jessica could claim an award and would probably be given between \$18,750 and \$30,000. Beatrice's father, Gustav, would be able to make a claim and could be awarded a lump sum. There are too few reported cases to say with confidence how large the award would be, but it could be as much as \$50,000.

How will the proposed new law work?

Under our proposals, Toni could claim a lump-sum support award to ensure her maintenance and education until she had completed university or reached the age of 25. The judge might award her between \$75,000 and \$100,000. No provision has been included at this stage which would allow Beatrice's father Gustav, or her grandchild Jessica, to make a claim.

PROPOSED LAW



PROPOSED NEW LAW

- Courts may permit a child who is not the will-maker's child to make a financial support claim if the will-maker assumed, in an enduring way, the responsibilities of a parent of that child; but
- no other relative would be able to make a claim.

Contributors' claims



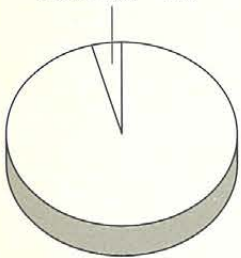
People may have contributed to the will-maker's estate in various ways and at various times during the will-maker's lifetime. Sometimes this is done under an agreement which courts will enforce (a contract), in which case it will have been paid for in the normal way. But often those close to a will-maker make no definite arrangements for payment. Under present law, these people may claim under the Law Reform (Testamentary Promises) Act 1949, if the will-maker promised to reward them by will.

Alternatively, contributors can make claims through other legal means. We propose one simple claim based on the principles of ordinary legal claims for benefits given in the hope of reward.

TAKE THIS EXAMPLE

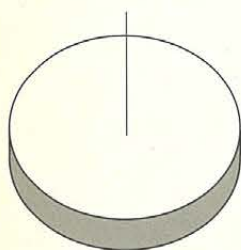
Rebekah, now aged 64 and never married, had lived with her widowed mother, Mrs Goldsmith, since her father's death 34 years earlier. In addition to her full-time job as a nurse, Rebekah had increasingly run the household single-handedly: cooking meals, shopping, cleaning and maintaining the house and grounds. When Mrs Goldsmith's health seriously declined in the last four years of her life, Rebekah (now a superannuitant) devoted herself full-time to caring for her mother. Rebekah's care enabled her mother to stay happily in her own home in considerable comfort until she died at age 86. Rebekah had, at least until she retired, paid weekly rent and board to her mother.

Rebekah's \$10,000
under will = 4%



PRESENT LAW

Rebekah's
contribution
claim is 100%
= \$250,000



PROPOSED LAW

Mrs Goldsmith's will left Rebekah only \$10,000 of her \$250,000 estate. Without more, Rebekah could not stay in her mother's home. Rebekah believed that she would be better looked after in the will. At no time did Mrs Goldsmith request the work or services, nor did she promise her daughter any reward in her will. But nor did she tell Rebekah that she would not be able to remain in the house when she died.

How does the present law work?

Under the law now, Rebekah could not make a testamentary claim because she could not show that her mother promised to reward her. A claim for property under a trust might fail because Rebekah could not show that she had contributed to particular property.

How will the proposed new law work?

Under our proposals, Rebekah would be entitled to an award (perhaps as much as the entire estate) for the unpaid care she provided to her mother over more than 20 years. In the circumstances, it would be unfair for the estate not to reward Rebekah more fully for the benefit she provided.

PROPOSED NEW LAW

People who contribute something of significant value to a will-maker and have not been paid for it may make a contributor's claim based on:

- the will-maker's promise to reward the benefit provided, or
- the will-maker's estate retaining the benefit provided where it is unjust for the estate to do so.

Binding agreements for property on death

A binding agreement is a contract between a will-maker and a potential claimant. These are agreements that a court will enforce. People who would be able to make testamentary claims could, for a fair price, agree with willmakers not to make (or to “waive”) their claims. Claimants could also agree to a lesser settlement to avoid the costs of a court case (or to “compromise” their claims). Under our proposals these agreements would be binding without the need for a court to approve them. Although the present law does not allow this, there seems no good reason why adult claimants should not be able to give up, for a fair price, a potential property division, support award or contributors’ award if they so wish.

There is one exception to these principles – the financial support claims of children under 25 years of age. These should continue to be approved by the court before they become binding. Normally, of course, when people reach the age of 20, they are fully capable of looking after their own affairs and should be able to waive or compromise their rights should they wish to do so. The question is whether children under 25 should continue to require the court’s consent to waive or compromise their support claims.

We believe that they should for the following reasons:

- the child’s need for maintenance and support is vital;
- the child may find it difficult to assess a promise of immediate advantage against the need to provide for their longer-term future;
- there is a risk of parents and their adolescent children unduly influencing one another; and
- the State has a continuing interest in seeing that the child is provided for by its parents and does not have to rely on the Department of Social Welfare.

The main law should allow agreements to waive or compromise testamentary claims but also impose safeguards.

Agreements to waive or compromise a testamentary claim should be:

- in writing
- signed with a witness to the signing, and
- made after taking independent legal advice on what the agreement says and does.

In some situations, courts will also uphold unwritten agreements. Courts will enforce written or oral agreements which were not made in the way described above when satisfied that the agreements:

- were actually made
- represent the true wishes of the parties, and
- were not obtained in an unfair way.

However, the court would in any case have the power to refuse to enforce an agreement. The present law accepts that courts should be able to refuse to enforce matrimonial property agreements between living spouses who divorce, which are unfair, or which have become unfair with the passage of time. We propose the same principle should apply to all testamentary claims given that, like living spouses who divorce, will-makers and claimants will often have had a close relationship. This will also be a change from current law.

Effect of proposals on support for the elderly

Current support



The main features of present State support for the elderly are:

- New Zealand Superannuation (currently \$249.50 gross per week for a single person, \$368.86 per week for a married couple), and
- Two subsidies for older people living in long-stay continuing care:
 - Subsidy 1: meets any costs of care over a “cap” of \$636 per week, and
 - Subsidy 2: in cases of financial need only, meets all or part of the remaining costs.

Superannuation, and subsidy 2 above, are affected by the levels of an older person’s income and assets. The first subsidy (meeting the costs of long-stay care above the “cap”) is paid at the same level, even if the income and assets the older person has change.

New Zealand Superannuation

On the death of a spouse or de facto partner, the will changes the way the couple’s property is owned. These changes in ownership can affect the survivor’s superannuation rights.

While both partners are alive and receive New Zealand Superannuation, they will pay a special tax surcharge of 25 percent of their additional combined income over \$135 per week, or \$67.50 per week for each partner.

When one partner in a couple dies, the surviving partner usually acquires all of the couple’s property. The levels of New Zealand Superannuation payments and Surcharge-exempt income also become higher. A married person whose spouse is also receiving superannuation is entitled to \$184.33 before tax each week, whereas a person living alone is entitled to \$249.50.

The couple can organise their affairs on death any way they like. The surviving partner is not required to make a testamentary claim even if it is available.

It follows that neither the present testamentary claims law, nor our proposals, can or should affect this state of affairs. The courts, like will-makers, should be able to take into account the benefits from superannuation that surviving partners will receive.

TAKE THIS EXAMPLE

Te Kuru and Moana are married. All the assets are held in Te Kuru's name. They are worth \$100,000 on Te Kuru's death. Te Kuru leaves only \$30,000 to Moana and the rest to a trust which could provide her with income and lump sums; what is left of the estate when Moana dies will be paid to Te Kuru's niece. Moana does not seek a lump sum from her trust, nor does she make a testamentary claim.

▼
Moana's superannuation surtax is levied only on income (if any) derived from investing the \$30,000 she actually receives, after her exemption has been deducted.

▼
Our proposals will continue to allow couples to arrange their affairs so that they can rely on receiving New Zealand superannuation to the greatest extent possible.

Subsidy for long stay residential care (below the cap)

If a surviving partner becomes eligible to make a testamentary claim, that partner's right to the residential care subsidy can be affected. There are three main differences between New Zealand Superannuation and the residential care subsidy:

- the subsidy is directly means-tested (the amount paid depends not on the income and assets surviving partners have in fact, but on what the test says they should have);
- the surviving partner must devote all their assets (except their last \$6,500) and income to the cost of their care; and
- the surviving partner must remain able to meet the costs of their care by:
 - not making gifts or trusts; and
 - making any testamentary claim for support open to them under present law.

Spouses – benefits and claims

If a surviving partner is in care, any property which passes to him or her will be included in the asset-testing assessment. Knowing this, will-makers may leave less or no property at all to a surviving partner. But the authorities who administer the asset-testing regime will want to ensure that surviving partners make any testamentary claims open to them. They may pay less or none of the subsidy until the partner makes the claim and uses up the property they get from it.

We propose that spouses' and de facto partners' property divisions should be treated as a claim as of right, and should automatically be included in the asset-testing regime. The practical effect would be that the surviving partner is credited with one-half of the couple's combined assets, unless it can be shown that he or she was entitled to a lesser sum. However, the welfare authorities should not be able to include the possibility of a larger

claim as an asset of the person in care. Nor should they be able to put pressure on the surviving partner to take steps to enforce a support claim.

This means that if a person is in care when their partner dies, half the couple's assets can be preserved for the deceased partner to dispose of to people with testamentary claims and others. This is fair because the State should not interfere in the family relationship, once a known reasonable proportion of the estate is passed over to the surviving partner.

TAKE THIS EXAMPLE

Jack and Diana are married. The couple's assets, worth \$300,000, are again in Jack's name alone. Jack goes into long-stay residential care and for over two years Jack pays \$30,000 each year for his care. This reduces the couple's assets to \$240,000. Jack then dies, leaving Diana a right of income until she dies, with what then remains of the estate going to their children. Shortly after, Diana herself goes into long-stay residential care.

In this example, Diana has a property division of \$120,000 against Jack's estate.

The Department of Social Welfare may count this property division as part of the property Diana should have to meet the costs of her long-stay residential care. But Diana's support claim is not to be taken into account unless she chooses to make it. Diana will receive no subsidy from the RHA towards the cost of long-stay residential care until four years after Jack's death (when the \$120,000 will have been used up).

Other carers and dependants – benefits and claims

An older person in care may be responsible for supporting minor or disabled children. The older person may also have obligations to others (often children) who looked after them at home before they went into care.

Some administrative arrangements have been introduced to reduce some of the harsh effects of asset testing on people who may have been living with, caring for or dependent on the older person before they entered care. These arrangements have recently been extended in these ways:

- Where a dependant of the older person was living in their house, the house need not be sold as long as the dependant continues to live there. The amount which would otherwise have been contributed by the older person is secured by an interest-free mortgage on the house. This now applies after the death of the older person as well as before.
- The older person may make gifts totalling \$5,000 per year before going into care without being treated as having left themselves less able to pay the costs of care.
- The older person, after entering into care, may now give up to \$25,000 to a person who has cared for them during the previous five-year period. This is by way of recognition from the State for having saved the taxpayer the expense of residential care during that period.

Our proposals would allow carers or dependants to make testamentary claims against property of the older person which is exempted from asset testing by these administrative arrangements if:

- they have contributed to the person's estate, or have been promised a testamentary gift as recognition of benefits given to the person in care, or
- they are the person's children who:
 - are under the age of 20, or
 - are under 25 and undertaking education or training, or
 - have a disability that arose before they reached 25.

In other cases, carers or dependants who might have received property exempted from asset testing under these administrative arrangements would not be able to make a testamentary claim. These carers and dependants would have to rely on the goodwill of the older person while he or she is in care, or, failing that, the people entitled under the will.

TAKE THIS EXAMPLE

Kees, who is elderly, has been cared for over the last 15 years by his daughter Brigitte. Brigitte lives with him, receiving only a welfare benefit. Kees has a house worth \$75,000, and a bank deposit of \$30,000. He goes into long-stay residential care for a year before his death, during which time Brigitte remains in the house. On his death the house is security for a debt of \$30,000 (the cost of the care Kees has received) which Kees' estate then owes to the Department of Social Welfare. In his will, Kees leaves all his property to Brigitte and his 5 other children equally. Kees' other children cannot agree on what is to be done.

▼
Brigitte brings a contributor's claim against Kees' estate, which the court values at \$75,000. The sum of \$25,000 is taken from the bank account and applied to Brigitte's claim. This sum is allowed as the \$25,000 gift exemption, which recognises that Brigitte's contribution to her father's care saved the taxpayer money. Brigitte requires another \$50,000 to meet her claim in full. The estate's duty to pay Brigitte this sum is converted by the court into a specific award giving Brigitte the right to live in the house for (say) the next 10 years. At the end of the 10 years, the Department of Social Welfare gets the house to meet the rest of its claim, and what is then left of the estate is paid (as the will says) to Kees' 6 children in equal shares.

Effect of claims between living partners

Our proposals will not change the law for living partners.

Property between husbands and wives

Our proposals for widows' and widowers' property divisions are based on the present property law between living husbands and wives: the Matrimonial Property Act 1976. The Minister of Justice has stated publicly that he has asked his Ministry to consider and recommend:

- changes to the Matrimonial Property Act 1976, and
- legislation for property disputes between de facto couples.

We do not know what these changes will be, though some issues and possible reforms were considered in the report of a working group in 1988. We will consider any changes the Ministry recommends to see whether they would need to be carried over to our proposals.

We also need to discuss our proposals for widows and widowers further with the Ministry of Justice to decide whether they should be part of:

- a new Matrimonial Property Act, or
- a new Succession Act.

De facto partners' property and support

We recognise that if our proposals for property division and support between de facto partners became law now, there would be a great difference between the law which applies:

- during both partners' lifetimes, and
- after one of them dies.

This may not be easy to justify. However, we tend to think that the law should be more favourable to claimants against the estates of dead partners than it is to claimants who, on divorce, claim against living partners.

Our tentative view is that the relevant matrimonial property rules could readily be applied to de facto partners' situations, with few changes. We hope that our proposals, based on this tentative view, will be useful in any public debate there may be on this issue.