



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Preliminary Paper 24

SUCCESSION LAW
TESTAMENTARY CLAIMS

A discussion paper

The Law Commission welcomes your comments on this paper

These should be forwarded to:
The Director, Law Commission, PO Box 2590,
DX SP 23534, Wellington
by Thursday 14 November 1996

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The Law Commission is an independent, publicly funded, central 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.

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Preface

IN 1993 THE LAW COMMISSION, with the approval of the Minister of Justice, undertook the succession project.

The purpose of the project is to review, reform and develop

- the Wills Act 1837 (UK)
- the Law Reform (Testamentary Promises) Act 1949
- the Family Protection Act 1955
- the Matrimonial Property Act 1963, and
- the Administration Act 1969.

The ultimate aim is to have a new Succession Act drafted in plain language which will

- provide for all these succession laws in one statute
- simplify the law
- enable better effect to be given to the intentions of will-makers, and
- take account of the diversity of New Zealand families.

The project has three main aspects: these are reviews of the law relating to

- TESTAMENTARY CLAIMS – The subject of this discussion paper. The Draft Testamentary Claims Act 199– proposed in this paper is the first part of a new Succession Act.
- SUCCESSION AS IT APPLIES TO MĀORI FAMILIES – This is an area of intense interest to Māori. The Commission has engaged Professor Pat Hohepa and Dr David Williams as consultants to advise on this aspect of the project, and is consulting with Māori at regional and national levels.
- WILLS AND ADMINISTRATION (INCLUDING THE LAW OF INTESTACY) – The Commission is giving further consideration to this aspect of the project with a view to proposing necessary reforms. Work on this aspect of the project will proceed in conjunction with the Queensland Law Reform Commission reference (from the Standing Committee of Attorneys-General of Australia, SCAG) to make more uniform the succession laws of Australian States and Territories.

Our work on testamentary claims has been greatly helped by consultation with legal practitioners, legal academics, judges, social scientists and other specialists. We particularly appreciate the efforts of those who have provided internal papers for the Commission (see Appendix E). A complete list of those to whom we are indebted would be an impossibly large one. But we would further acknowledge the help we have received from these leaders of legal practitioner groups: J Champion, J Goodwin, J Grigg, R Perry, P Straubel and K Weatherall. We are also grateful to all members of these advisory groups. We emphasise nevertheless that the views expressed in this paper are those of the Commission and not necessarily those of the people who have helped us. The Draft Act provisions were prepared by Mr G C Thornton QC, Legislative Counsel. Finally, the Commission acknowledges the work of Ross Carter, a member of the research staff, who was largely responsible for drafting this paper.

This paper does more than discuss the issues and pose questions. It includes the Commission's provisional conclusions following extensive research and considerable preliminary consultation. It also includes complete draft provisions for a Testamentary Claims Act and a commentary on them. The intention is to enable detailed and practical examination of our proposals. We emphasise that we are not committed to the views indicated, and our provisional conclusions should not be taken as precluding further consideration of the issues.

This is especially true of claims by children who can reasonably be independent. In this paper the Commission expresses no provisional conclusion on reform of adult children's claims. Instead the Commission presents some reform options for comment and evaluation, and invites others' views on what should be done.

Submissions or comments on this paper should be sent to the Director, Law Commission, PO Box 2590, Wellington, if possible, by Thursday 14 November 1996.

Any initial inquiries or informal comments can be directed to Ross Carter (Telephone: (04) 473 3453. E-mail: RCarter@lawcom.govt.nz)

1

Introduction

1 THE LAW OF SUCCESSION is a system of rules which says what must happen to people's property when they die. The Law Commission's Succession Project will review this system of rules as a whole. This is the first discussion paper issued on the law of succession. It deals with one central aspect: the law of testamentary claims.

2 The law of testamentary claims, and changes to it, will be controversial. The Commission has tried to resolve difficulties in the present law and to bring it more into line with the values and views of New Zealanders today. But it welcomes critical comment and the expression of other views.

What are testamentary claims?

3 Normally a dead person's property (or "estate") is handed on to the people named in the person's will (or "testament"). 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 go to someone not named in the will.

4 The present law allows three main kinds of testamentary claims:

- MATRIMONIAL AND DE FACTO PROPERTY – A husband, wife or de facto partner of the will-maker may claim a share in the will-maker's estate (relying on the Matrimonial Property Act 1963, or the law of "constructive trusts").
- FAMILY PROTECTION – Certain 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" (relying on the Family Protection Act 1955).
- TESTAMENTARY PROMISES – People who have conferred benefits on a will-maker may have the will changed in their favour, if the will-maker promised to leave them something in the will (relying on the Law Reform (Testamentary Promises) Act 1949).

5 Usually these claims attack the provisions of a will. But claims can also be made where the 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" or "partially intestate". In these cases the provisions of the Administration Act 1969 Part III say who takes the benefit of all or part of the estate.

6 The intestacy provisions of the Administration Act offer a relatively simple and standardised distribution, which does not meet all potential claims. The Commission considers that intestate distribution, like wills, should continue

to be open to challenge. For the sake of simplicity, however, this paper refers to challenges to *wills*, and not to intestacies. These references are meant to apply also to claims made against intestate estates.

The need for review

- 7 The law of testamentary claims is in urgent need of review. The law governing widows' and widowers' claims has frequently been criticised for not having kept up with the matrimonial property law which applies to spouses during their lifetime. Conversely, as regards adult children's claims, courts apply the legislation very differently from the way they did when Parliament last endorsed it thirty or forty years ago. Yet here too the law often differs from that which applies during will-makers' lifetimes. For example, no-one making a gift to one of their adult children is legally required to consider whether they are being fair to their other children. But when applying the Family Protection Act 1955, courts often question the fairness of wills as between two or more children.
- 8 The practice of the courts has been well-intended and in some ways beneficial. It has helped to prevent abuses of power in family relationships. Either partner of a couple, or a parent or children, can be in a position of power. But the policies which now lie behind the law are unclear. It frequently operates in an uncertain and unpredictable way.
- 9 The courts' present powers are broad and discretionary. This might have been acceptable when people had a common (if gendered and monocultural) vision of the family. But we now accept that families are different and should not be treated all in the same way. They differ in their ethnic and cultural backgrounds (eg, Pacific Islands, Chinese, Indian). They differ in their structure (eg, second marriages, single-parent households). We now believe that the value systems of a prevailing culture or a particular type of family should not be applied indiscriminately to others who do not share that system (this issue is discussed further in chapter 2, paras 29–33).
- 10 The law also needs to be reviewed for technical reasons. This applies particularly to the law of testamentary promises. Since the Law Reform (Testamentary Promises) Act was passed in 1949, the courts have expanded the general law which applies if people provide will-makers with benefits (eg, work or services) in the hope of reward by will. Lawyers will be well aware of the growing number of legal claims based on *constructive trusts* (rights in property imposed by the courts) and the *law of restitution* (legal duties imposed on those who have acquired a benefit at another's expense). These are new ways of establishing testamentary claims. The 1949 legislation has not kept up with these changes.

Testamentary claims and Māori

- 11 Testamentary claims by Māori families are of special concern. This is an area of intense interest for Māori. *Te Tiriti o Waitangi* (the Treaty of Waitangi) confirms and guarantees to Māori *te tino rangatiratanga* (unqualified exercise of chieftainship). The Crown must respect Māori control over the inheritance of property. Laws affecting succession to Māori property should recognise that the fundamental principles of *tikanga* (custom law) apply amongst Māori people.¹

¹ The United Nations Draft Declaration on the Rights of Indigenous Peoples may also bear on Māori succession.

- 12 In recent years, courts have dealt with a number of claims involving tikanga Māori.² Regrettably, these decisions raise questions about whether the courts can adequately find out and apply Māori values. The Commission, with the assistance of consultants, is still exploring this aspect of its reference. It is consulting with Māori at regional and national levels. What is said in this preliminary paper still needs to be brought into line with the advice the Commission receives through consulting with Māori.

Nothing in this preliminary paper will apply to Māori freehold land, Māori incorporation shares, or trusts under Te Ture Whenua Māori/Māori Land Act 1993.³

Other taonga, such as cloaks, greenstone or property handed back as a result of Treaty of Waitangi claims, are under separate consideration by the Commission.

- 13 The Commission welcomes comment also from other ethnic and cultural groups and from people who consider they are disadvantaged by received views on gender and family structure.

What this paper does

- 14 In this paper we propose a new legislative scheme. We offer a view of the grounds on which testamentary claims ought to be brought, and of what the courts should try and achieve in making testamentary awards:
- For those who live with or who are dependent upon the will-maker, we propose extending and clarifying their right to claim. We also aim to remove unfair distinctions based on earlier, restricted views of family structure.
 - For those who are not living with the will-maker in a close family relationship (eg, independent adult children), we raise the question whether their right to claim should be more limited and defined, or even taken away altogether. This would allow greater scope for the interplay of family relationships (and, incidentally, for the power relationships particular to families).
- 15 In chapter 2, we describe in more detail the policy reasoning on the basis of which we seek to justify our proposals. In chapter 3, we briefly summarise the proposed reforms and offer an example of how our legislation will work. We then look in detail at the rights proposed for each class of claimant:
- husbands and wives (chapter 4)
 - de facto partners (chapter 5)
 - children (chapter 6)
 - adult children (chapter 7)
 - other relatives (chapter 8)
 - claims based on testamentary promises (chapter 9).

² See, for example, *Re Tatana* (unreported, High Court, Whangarei, 18 November 1982, A34/81); *Re Wakarua* (1988) 4 FRNZ 650; *Re Stubbing* [1990] 1 NZLR 428, (1988) 4 FRNZ 392; *Re Ham* (1990) 6 FRNZ 158; *Re Smith* (1991) 8 FRNZ 459; *Re Harvey* (unreported, District Court, Christchurch, 23 July 1993, M 57/90); *Rangi Kaata or Cotter Deceased* (unreported, Māori Land Court, Gisborne, 28 October 1993, 135 Gisborne MB); *Re Green* [1995] NZFLR 330; *Brown v Pourau* [1995] 1 NZLR 352, 356.

³ As in the present law: Te Ture Whenua Māori Act 1993 s 106.

In chapter 10 we consider the consequences of our proposals in more detail. We are concerned here with such matters as family agreements, time limits and priorities amongst claimants.

- 16 Our specific proposals are highlighted in the text, and there is a set of draft statutory provisions, with commentary (para C1). **Matters that the Commission particularly welcomes comment on are printed in bold type (see paras 13, 224, 268, 337 and 364).** Appendices set out more detailed material, referred to in various parts of the text (eg, a statistical picture of New Zealand families now: Appendix A). A proposed scheme of priorities between all claims against estates is included in Appendix B. Appendix C discusses family relationships in State support and tax law; and we consider how our proposals affect State support for the elderly in Appendix D. After receiving submissions on the proposals in this paper, we will settle the terms of a Draft Testamentary Claims Act and recommend to the Government that it be passed into law.
 - 17 One last comment. We have prepared a number of internal papers which look closely at the existing law, and also at a wide range of alternative possible rules. Some of this material is discussed in this paper, but much of the detail and a number of the alternatives are not. Those who wish to explore further the issues raised in this paper are welcome to copies of any of the internal documents listed in Appendix E.
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2 Criteria for good laws of succession

INTRODUCTION

- 18 **G**OOD LAWS OF SUCCESSION should be designed to
- promote the cohesion of New Zealand families (paras 24–33),
 - sustain property rights and expectations (paras 34–39), and
 - assist efficient estate administration and dispute resolution (paras 40–45).
- 19 It is questionable whether laws of succession should be designed to
- enforce will-makers' "moral duties" to family (paras 47–51), or
 - protect the welfare purse (paras 52–57).

Some statistics

- 20 We begin with a brief review of the situation. Each year in New Zealand some 27 000 people die.⁴ This number is less than 1% of New Zealand's population.⁵ A significant proportion of those who die leave assets. The principal form of wealth (for "middle" earners) is the family home,⁶ which represents, on average, nearly half of what they own. Each year the courts make around 13 000 grants of administration in respect of the estates of dead people.⁷ In the remaining cases a grant of administration is not sought as the estate is small or the principal assets are not passed on by will (eg, in a joint tenancy the will-maker's interest passes directly to the surviving joint tenant).⁸
- 21 Estate sizes vary. Such figures as there are confirm that a grant of administration is not always sought. From work done in the 1980s, it appears that around 65% of estates will be worth \$40 000 or less in March 1996 terms, and 90%

⁴ Statistics New Zealand, *Demographic Trends 1995* (Statistics New Zealand, Wellington, 1995), hereafter *Stats 1995*, 72–74; Statistics New Zealand, *Demographic Trends 1994* (Statistics New Zealand, Wellington, 1994), hereafter *Stats 1994*, 65.

⁵ *Stats 1995*, 31; *Stats 1994*, 25.

⁶ Thorns, "Inheritance and Family Change" (1995) 5 *Social Policy Journal of New Zealand* 30, 31, 35–36. 72% of the population are owner/occupiers of a home: "this rises to 86% for the over-60s".

⁷ See Department for Courts, *Annual Returns* (1994). "Grant of Administration" includes probate and letters of administration.

⁸ For more complete details, see chapter 10, paras 338–341.

worth \$168 196 or less.⁹ Of course, the pattern of values in cases where claims have been worth pursuing is different. A study was made of 235 cases from 1984–1995 where children claimed against their parent’s estates under the Family Protection Act 1955. Of these 235 cases, 52.7% (124) of the estates were worth less than \$150 000.¹⁰

- 22 It is not surprising that most of the people who die in New Zealand each year are older people, but significant numbers of younger people also die in New Zealand each year.¹¹ The move to an older society should see changes in these patterns and a longer period of time during which people will not be members of a family with growing children.¹² Yet throughout their lives these people will have had relationships with a wide range of communities, friends and family.

⁹ In the estate duty returns for 1984–1985, 65% of estates were worth \$24 000 or less; and 90% of estates were worth \$100 000 or less: New Zealand Planning Council, *For Richer or Poorer* (New Zealand Planning Council, Wellington, 1988) Table 5.3, 73–75. There are a number of significant limitations on these returns which tend to make the figures underestimate the value of estates. In 1985, 47% of estates were not included since they were not liable for duty and did not require a grant of administration. Duty attached only to estates worth more than \$450 000. Smaller estates were included if they required a grant of administration. (A grant was required if estate assets not requiring formal transfer of ownership exceeded \$20 000 in value, or if there were assets which required formal transfer of ownership). Estate duty was not assessed on all assets, and the method of valuation may have understated the value of included assets. Increasingly effective estate planning to avoid duty also probably resulted in an underestimation of the larger estates. However, in real terms today (according to the CPI: December 1985 = 632; March 1996 = 1063), the 1985 estate duty return figures correspond to 65% of estates being worth \$40 367.09 or less, and 90% being worth \$168 196.20 or less.

¹⁰ Peart, “Awards for Children under the Family Protection Act 1955” (1995) 1 BFLJ 224, 225. In all:

- 3.0% of the judgments did not disclose the estate size;
- 34.4% of estates (81) were under \$100 000;
- 10.6% (25) from \$100 000–\$125 000;
- 6.8% (16) from \$125 000–\$150 000;
- 7.2% (17) from \$150 000–\$175 000;
- 4.6% (11) from \$175 000–\$200 000;
- 7.2% (17) from \$200 000–\$250 000;
- 4.3% (10) from \$250 000–\$300 000;
- 7.7% (18) from \$300 000–\$400 000;
- 3.4% (8) from \$400 000–\$500 000; and
- 10.6% (25) from \$500 000–\$1 675 000.

This may be compared with our survey of 50 judgments applying the Matrimonial Property Act 1963 from 1985–1995. In 4% (2) of the judgments the size of the estate was not disclosed. 70% of these estates were worth less than \$700 000, and 90% less than \$1 300 000. See also footnotes 50 and 51.

¹¹ In 1994, for example, 11% of those who died were under 50. 14% were aged between 50 and 64. 37% were aged between 65 and 79. 38% were aged 80 or more; *Stats 1995*, Table 4.3, 31, 72–74. The total population 65 and over was 417 630, of whom 4% died during the course of the year.

¹² “The changing age structure of New Zealand’s population has had and will continue to have a substantial impact on the nature and structure of the family. The most fundamental change is the movement towards an older society. In the 20 years between 1971 and 1991, the median age of New Zealand’s population increased from 26 to 32 years.”: Statistics New Zealand, *New Zealand Now: Families* (Statistics New Zealand, Wellington, December 1994), 22–23.

- 23 Statistically, women reach older ages than men, and so have a greater chance of becoming the surviving partner in a couple. In 1994, those 80 years of age and above comprised 34% men, 62% women; those aged 70–79, 43% men, 57% women; those aged 65–69, 49% men, 51% women.¹³ This means that there may be gender implications in any law which governs the passing of property from one partner to another, even if it is formally neutral as between men and women.

PROMOTING FAMILY COHESION

- 24 An important aim of good laws of succession is to promote family cohesion. By “cohesion” we mean strong social relationships which lend themselves to voluntary co-operation and mutual support amongst family members. “Family” is a difficult term to define, especially as pakeha may have less extensive kinship systems than Māori or Pacific Islands cultures. We include in the term “family” not only couples, a parent or parents and children, but also those whose association with each other may be more occasional, or “latent” rather than “patent”.
- 25 Rules which state who should inherit a person’s property may or may not promote family cohesion. The values which best promote cohesion are normally those of the family itself, as long as it is functioning well. In many cases the best person to judge who is family and what duties are owed to family is the will-maker. A right to dispose of property on death allows will-makers freedom to identify and provide for their families as they see them. This right is guaranteed by article 17 of the International Covenant on Civil and Political Rights (1966). It provides for freedom from arbitrary interference with privacy, family, home and correspondence. New Zealand, as a party to this Covenant, is obliged to ensure that New Zealand law protects the rights the Covenant confers.
- 26 Good laws of succession nevertheless seek to achieve a proper balance between family autonomy and State intervention. Family autonomy is limited, of course, by such national and international human rights laws as the International Convention on the Elimination of All Forms of Discrimination against Women (1979), the United Nations Convention on the Rights of the Child (1989) and the New Zealand Bill of Rights Act 1990 (as amended by the Human Rights Act 1993).¹⁴ And states can interfere to protect other legitimate social interests.
- 27 The law can promote family cohesion in various ways. It can, for example, directly enforce a responsibility (eg, that between parent and child: see chapter 6). It can promote positive ways of thinking about relationships and their consequences (eg, recognising and presuming each partner’s contributions to a partnership to be of equal value: see chapters 4–5). The law may also presume or declare a person to be a member of a family (eg, where will-makers accept

¹³ In 1991, 11.2% of all women aged 55–59 years were widows; 18.8% of those aged 60–64; 29.0% of those aged 65–69; 42.5% of those aged 70–74; and 65.8% of those 75 years and older: Statistics New Zealand, *All About Women in New Zealand* (Statistics New Zealand, Wellington, 1993), Table A9, 197.

¹⁴ See “Human Rights and the Family” (1995) 1 BFLJ 156 for relevant international instruments; for example, article 23 of the International Covenant on Civil and Political Rights (1966) requires the State to protect the family as the natural and fundamental unit group of society.

parental responsibility for a child on an enduring basis: see chapter 8). And it may provide a sound set of values which operate “in default”; that is, where will-makers have not arranged with their families the status or ultimate destination of property.¹⁵ Finally, the law may create an enclave within which the identity and values of will-makers’ many and varied families, friends and communities can be best expressed and respected, untouched by provisions of law (see chapter 7, option 4).

- 28 In cases where, because of separation or death, it is necessary to have a law about what happens to family property, that law should in our view promote family cohesion by advancing a vision of the family which is widely shared in society. Any attempt to articulate such a vision is perilous. We nevertheless venture this vision for the family as the one most relevant to the law of succession to property in late 20th century New Zealand. It is a family in which women and men partners share equally in the wealth they have created and growing children are properly cared for and have their needs fulfilled. While in earlier times society may have stressed the importance of handing wealth down from one generation to another, in modern times the emphasis in family law¹⁶ has been on the nurture and education of younger children. The law should recognise the demands that emphasis places on those responsible for the nurturing process, and the residual effects on carers once nurture and education are complete.

Differences

- 29 Not all New Zealand families are the same ethnically, socially or culturally. Within recognised divisions in society, particular families will see themselves in different ways. Different members of the same family may hold sharply 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.
- 30 Even our views on how families are constituted are changing. In the first half of this century, when the laws governing testamentary claims were framed, people had a clearer view of the family than they do now. The family was defined by legal marriage and biology (departures from that – eg, adoption – required strict formalities). Consider the position now:¹⁷
- CULTURE AND ETHNICITY – There are Māori perspectives on family structures.¹⁸ 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

¹⁵ See chapter 10, paras 356–361, for discussion of agreements.

¹⁶ The Commission acknowledges that in the case of Māori there is, by contrast, a legitimate emphasis on handing on land and other taonga to subsequent generations, and retaining them within the hands of the same hapū or whānau: Te Ture Whenua Māori/Māori Land Act 1993 s 108: see para 12.

¹⁷ For information on New Zealanders and their family arrangements, see Appendix A.

¹⁸ See, for example, Metge, *New Growth from Old: The Whānau in the Modern World* (Victoria University Press, Wellington, 1995); Durie-Hall and Metge, “Kua Tutū Te Puehu, Kia Mau” in Henaghan and Atkin (eds), *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992), 54–82.

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 (see paras 131–133 and Appendix A).

- PARENT-CHILD AND FOSTERING RELATIONSHIPS – More of New Zealand's children are born to de facto partners. More children are also living with one parent and a step-parent. Informal adoptions and the fostering of children are not uncommon.
- ADOPTION AND ART – The secrecy which formerly surrounded adoption is lifting. Adopted children may well have relationships with both adoptive and biological parents (the Adult Adoption Information Act 1985 envisages this). Children born following the use of assisted reproductive technologies (ART) may be in a similar position (here again, a child's genetic parents may not be the same as the child's legal parents: see Status of Children Amendment Act 1987).

31 In these and other ways the nature of family life in New Zealand is changing. The present law of family protection is confined by a narrow view of the family. De facto partners cannot claim support under the Family Protection Act 1955, and the claims of stepchildren are much more limited than those of children. The Commission has taken a wider view of what constitutes the family.

32 In theory, the present law enables courts to take into account cultural differences.¹⁹ But courts are unsure how far they should go in treating cultural expectations as a decisive answer to a Family Protection Act 1955 claim. Reference has already been made to the position with Māori. People of other cultures are also likely to find that it is difficult for their values to be recognised. The following passage comes from a recent High Court judgment:

It appears to be common ground that an explanation for the deceased's provision for his daughters was [that,] in accordance with Chinese custom and tradition, it was the obligation of the husbands of the daughters to provide for them, not their father. The affidavits referred to this approach as being consistent with Chinese cultural attitudes. Whilst the court should always take appropriate heed of different cultural attitudes and give effect to them wherever it properly can, in the end the court is properly bound to assess the issue of whether the deceased adopted the standards of a wise and just testator by having regard to the moral standards of the New Zealand community. By those standards the approach the deceased adopted, if indeed that was the reason for his making the dispositions he did, cannot be accepted.²⁰

33 The Commission considers that the law of succession should allow more room for ethnic and cultural values in will-making, and the recognition of gender differences.²¹ Freedom of disposition provides a sphere of respect and protection for the values held by will-makers and their families. Where the law cannot achieve a clear purpose (eg, in resolving intergenerational conflicts), we need

¹⁹ See, for example, *Grace v Grace* [1995] 1 NZLR 1, (1994) 12 FRNZ 614.

²⁰ *In the estate of Y* (unreported, High Court, Auckland, 16 May 1995, M 1732/88). See also *C and K v K* [1988] BCL 185. In this and following examples the Commission means no criticism of the particular decision, which is advanced only as an illustration of the current practice.

²¹ For a useful discussion (in a different context), see Jackson, "Economic Justice in Divorce" (1995) 2 *Cardozo Women's LJ* 23, 25.

to ask whether it is useful to retain the law. Where it is useful to intervene, the law should do so by applying articulate and well-known principles. If families know the principles, they should be able to vary them by well-informed and fairly obtained agreement.

SUSTAINING PROPERTY RIGHTS

- 34 In most modern societies, property ownership brings with it the power to dispose of at least part of the owner's assets at death. This power is often referred to as freedom of testation (or will-making), but the principle is wider than this because it extends to transferring property on death by means other than a will. Many mechanisms other than wills may be used for this purpose (see chapter 10).
- 35 Where there is a right to dispose of property on death, people can bargain for goods and services and pay for them at death. This benefits will-makers who receive the services, because they retain the use of their assets during their lifetime. It also benefits service providers, who may receive a premium for postponing receipt of payment. The fact that the will-maker carefully selected a preferred beneficiary adds a symbolic value and meaning which is not present if the person succeeds by means only of the order of a court. Further, where charities and community organisations are allowed to be beneficiaries, free testation benefits the community collectively.
- 36 A widely held view in our society is that, because in many cases a person has accumulated property through hard work and effort, they deserve to have an absolute right to dispose of their property. That right may be exercised without reference to the claims of the will-maker's family. However the Commission considers, for the reasons elaborated in chapters 4–9, that there must be some restraints on the will-maker's freedom of choice, where they are supported by clear policy reasons and are reasonably consistent with the legal duties on will-makers during their lifetimes.
- 37 Where services have been provided to the will-maker, there is a clear case for legislative intervention. People close to the will-maker sometimes provide services expecting recompense for them in the will. The will-maker may not wish to be tied down by legally binding arrangements. Yet, if the expectation is reasonable, it is now well accepted that the will-maker should not be permitted to accept a benefit and give nothing in return. With married couples, the expectations are even clearer. It has been accepted at least since 1976 that partners' contributions to partnership property, whether in the form of earnings and money, or work or services in the home (including care of children), are of comparable worth.²² Will provisions which deny any such comparability should not be allowed to stand.
- 38 Despite all of that, wills are an exercise of a will-maker's personal autonomy. Except when responding to just claims against will-makers, a court should not decide that a will is wrong merely because the court would have done things differently.

²² *Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975* (1975) AJHR E.6, 10.

- 39 The present law of family protection, particularly as it applies to children's claims, clashes with the principle of will-maker autonomy. It also makes it more difficult for the will-maker to give effect to family expectations. While courts say that their function is not to remake the will for the will-maker, in fact their powers to do so are extensive. They are often exercised. For example, Peart's study suggests that as many as 91.5% of children's claims are successful when contested in court.²³ This can hamper will-makers who want to make lifetime arrangements which can be followed through when they die. For example, a retiring farmer, who intends one of his or her children to take over a farm, may be unable to leave that child enough of his or her estate by will to ensure that the farm is an economic unit.²⁴

ALLOWING EFFICIENT ESTATE ADMINISTRATION

- 40 Good laws of succession allow people to administer estates efficiently and resolve disputes quickly. Clear and simple law helps. It should be reasonably clear to will-makers what they must do, and what proportion of their estates they can dispose of according to their own wishes. It should also be clear to those administering the estate what is to be done with the property and what claims might be properly admitted. In many cases there will be no claims, and the estate can be quickly administered. Where there is a claim, it should be able to be made and determined within a reasonable time.
- 41 When disputes arise and the law is clear, parties can quickly ascertain the relevant facts, and efficiently explore the possibility of resolving the dispute out of court. Courts should strongly encourage claimants to test what mediation can do for them before bringing disputes before the court.²⁵ Testamentary claimants and beneficiaries should have the benefit of dispute resolution services. Where a family is close-knit, members often have an interest in taking a wider view of the dispute and preserving close ties. Families may successfully mediate grievances even where claimants have no legal rights at all.

²³ Peart (1995) 1 BFLJ 224, 225. The survey analyses 235 cases from 1984–1995 where children claimed against their deceased parents' estates under the Family Protection Act 1955.

²⁴ Farm transfers are often begun (and sometimes completed) during will-makers' lifetimes, but the objective is similar to that of a will. A successful transfer of a farm "includes continuity of the business so that the next generation is able to receive a farm that is a 'going concern'": Keating and Little, *Retirement and Succession in Farm Families in New Zealand (South Island)* (MAF Policy Technical Paper 94/7, Report to MAF Policy, February 1994), 69. Of the 59 farms Keating and Little surveyed, 33% were held under trust or private company structures during the will-maker's lifetime, and 70% were held under these or other arrangements by two or more generations. An important study was undertaken by Eaton: *Farm Succession, Viability and Retirement* (MAF Policy Technical Paper 93/16, A Report for the Rural Resources Unit, Ministry of Agriculture and Fisheries, November 1993). It showed that, in all of 10 Canterbury farms studied, it was necessary to balance the objective of the continuing viability of the farm with the objectives of supporting parents in retirement and of fairness to other family members.

²⁵ See, for example, Corbin, "Consider the 'Win-Win' of Mediation in Estate Disputes" (1995) 14 E & TJ 365; Harris, "The Mediation of Testamentary Disputes" (1994) 5 Australian Disputes Resolution J 222; Carden, "Family Protection and Mediation" (1986) 1 FLB 66; National Working Party on Mediation, *Guidelines for Family Mediation – Developing Services for Aotearoa/New Zealand* (Butterworths, Wellington, 1996).

- 42 It is sometimes suggested that the threat of legal proceedings whose outcome is uncertain helps families to mediate agreed solutions to disputes. No doubt this threat plays an informal part in current practice. But it is doubtful whether extensive judicial powers and an uncertain law of testamentary claims are useful here. Where the family is close-knit, there may be little need to use the law as a bargaining lever. Where, on the other hand, the family is distant, parties may more readily disagree on who has a legal claim to what, and there will be less incentive to resolve disputes amicably.²⁶ In such cases it is better that the law is clear, so that the scope of the dispute is reduced.
- 43 If a dispute is taken to court, there is room to improve existing procedures. All related disputes should be commenced and heard in one process.²⁷ Embittering and inflammatory adversarial aspects of adjudication could be reduced. For example, proceedings might begin with a simple notice of the basis of the claim. The notice would allege no specific complaints, permitting the parties, before the matter is taken further, to agree on what facts should be put before the court.²⁸ Liability for the costs of unsuccessful claims is also an important issue. Currently, courts often order that legal costs be paid out of the estate.²⁹ This can reduce the perceived risks of litigation and parties' inclination to settle out of court. By contrast, orders that unsuccessful parties pay court costs would encourage claimants to investigate mediation, and discourage weak claims.³⁰
- 44 The present law of testamentary claims does not meet efficiency criteria in a number of respects. It is not certain in its application. It can result in slower administration even for straightforward estates.³¹ No provision is made for mediation services, and such negotiation as there is appears to be in the hands of lawyers. Not all lawyers are skilled in the art of mediation amongst family members. It is also known that when proceedings are issued, they take a form which can increase ill-feeling within the family.
- 45 Some of these procedural matters can be dealt with in the detail of new legislation, regulations and court rules.³² But the Commission considers that

²⁶ For courts' proposed powers in relation to orders of costs, see Draft Act, paras C210–C213.

²⁷ Strengthening the present practice of joinder and consolidation: DCR 446–447, HCR 453–454.

²⁸ The parties may under present practice give evidence by means of an agreed statement of facts, if the court has not ordered otherwise: DCRR 448(1)(a), 500; HCRR 455(1)(a), 502. Yet we are told that the service of affidavits in support of statements of claim (DCRR 449, HCRR 456) at present makes agreed statements of facts unlikely. See, generally: *Trapski's Family Law* vol 2 (Brooker's, Wellington, 1992); Patterson, *Family Protection and Testamentary Promises in New Zealand* (2nd ed, Butterworths, Wellington, 1994) chapters 8–10; Knight, "Claims against Deceased Estates" (NZLS Family Law Conference Papers, October 1995, vol 2), 65.

²⁹ Although see, for example, *Re Hyde* (unreported, Family Court, Fielding, 2 September 1994, FP 015/199/93); *Re Cooke (No 2)* (unreported, High Court, Hamilton, 28 September 1994, CP 116/90).

³⁰ See Corbin (1995) 14 E & TJ 365, 366.

³¹ Presently the administrator may be personally liable if the estate is distributed earlier than 6 months after the administration is granted: Administration Act 1969 s 47(4); see footnote 54.

³² The Commission understands that work has begun on the development of specialist mediation services and court rules for Family Court proceedings.

the problem has more fundamental causes. These are best dealt with by providing clearer rules about what testamentary claims will succeed.

QUESTIONABLE OBJECTIVES OF LAWS OF SUCCESSION

- 46 In the previous section we set out the main objectives of good laws of succession and commented on whether the present law meets those objectives. We now consider two objectives which in our view are suspect but which influence the shape of the present law.

Enforcing will-makers' "moral duties" to family

- 47 Enforcing "moral duties" that will-makers owe to family is not a good objective of laws of succession. These "duties" vary according to the views of individual judges. Judicial practice then ceases to be transparent. Yet such an approach has traditionally been given high priority by the courts. In *Allen v Manchester* [1922] NZLR 218, 220–221 the court said that

[t]he provision which the court may properly make in default of testamentary provision is that which a just and wise father would have thought it his *moral duty* to make in the interests of his widow and children had he been fully aware of all the relevant circumstances.³³

- 48 "Moral duties" are, moreover, personal to each will-maker and difficult to generalise. Although most people do want to pass their assets to members of their family, a research study undertaken in New Zealand suggests that older people value their freedom of disposition and the right to decide who their beneficiaries will be.³⁴

- 49 The legislature has never used the language of "moral duty" to describe what family protection legislation is about; nor have the courts, where the issue is crucial to the decision of a particular case. Even where it is accepted that a will-maker has acted unfairly, a claimant will need to establish more than that to justify a testamentary claim:

Even in many cases where the court comes to a decision that the will is most unjust from a moral point of view, that is not enough to make the court alter the testator's disposition of his property.³⁵

It was not until 1967 that a New Zealand family protection statute contained the term "moral duty" (and then only as a shorthand description of courts' deliberations concerning one class of eligible claimant).³⁶

³³ The emphasis is added. The first, and also often cited formulation of this test was in *Allardice v Allardice* (1910) 29 NZLR 959, 972–973, affirmed on appeal to the Judicial Committee of the Privy Council [1911] AC 730, 734. The test probably originated in the "moral" language in *Re Rush* (1901) 20 NZLR 249, 253; *Laird v Laird and others* (1903) 5 GLR 466, 467; *Plimmer* (1906) 9 GLR 10, 24; *Rowe v Lewis* (1907) 24 NZLR 769, 772. See too reference to "moral responsibility" in *Banks v Goodfellow* (1870) 5 LR QB 549, 563–565.

³⁴ Thorns (1995) 5 Social Policy Journal of New Zealand 30, 38.

³⁵ *Allardice v Allardice* (1910) 29 NZLR 959, 970, approved *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463, 478; *Mudford v Mudford* [1947] NZLR 837, 839.

³⁶ Family Protection Act 1955 s 3(2) (inserted by Family Protection Amendment Act 1967) provides for two matters which courts assessing a will-maker's "moral duty" to a grandchild must consider.

- 50 The concept of a “moral duty” to family is too vague to ensure that the purpose, meaning and effect of the law are clearly communicated.³⁷ Reverting to the language of “moral duty” avoids the need to express uniform and certain reasons why freedom of testation should be restricted. Courts become uncertain about who should get an award and how much they should be awarded. Will-makers are unable to ascertain and comply with their duties.
- 51 The term “moral duty” might be acceptable (but unnecessary) if it were merely a code for a coherent, precise and widely accepted set of criteria. In the case of widows and widowers, dealt with in chapter 4, there are now reasonably clear and accepted criteria (although they are not used in applying the present legislation). But in the case of children, the problem is intractable (see chapter 7).

Protecting the welfare purse

- 52 In earliest times, family protection legislation was designed to save the State the cost of social welfare claims. If other family members could meet that cost, they should.³⁸ A wider view of testamentary claims legislation prevails today. But social welfare considerations are still important (especially in view of the changing pattern of State support for older persons: see Appendix D). They can be seen at work in two different types of legislative provision:
- provisions which provide for a discretion to refuse to grant, or to terminate or reduce welfare payments or subsidies to people who fail to make testamentary claims;³⁹ and
 - provisions which direct the court, when dealing with a testamentary claim, to ignore any welfare payments claimants will receive,⁴⁰ resulting in awards for welfare beneficiaries being larger than they otherwise would be.
- 53 Protecting the welfare purse should not, however, be the first objective of laws of succession. Good laws of succession, as we have already said, will recognise family responsibilities which are widely accepted within the community and will respond to changes in the community's view of the family (para 28). They will also allow for the expression of a variety of family values (para 33). These objectives may conflict with the State's concern to limit public expenditure on welfare.
- 54 For example, where an elderly parent in residential care is being supported voluntarily by her son, the State has an interest in ensuring that the support continues even after the son's death. It does not follow that the parent ought to have a testamentary claim against the son. Society no longer requires children

³⁷ For criticism of the “moral duty” test in Australian courts, see, for example: *Coates v National Trustees Executors and Agency Company Ltd* (1956) 95 CLR 494, 512, 522; *Hughes v National Trustees and Executors Co of Australasia Ltd* (1979) 143 CLR 134, 158; *Goodman v Windeyer & Ors* (1980) 144 CLR 490, 544; *Singer v Berghouse* (1994) 123 ALR 481, 487; *Permanent Trustee Company Ltd v Fraser* (1995) 36 NSWLR 24.

³⁸ Atherton, “New Zealand's Testators' Family Maintenance Act 1900 – The Stouts, the Women's Movement and Political Compromise” (1990) 7 Otago LR 202, 216–217.

³⁹ Social Security Amendment Act 1950 s 18(1) (repealed); Social Security Act 1964 s 73. Compare Social Security Act 1964 s 74(e).

⁴⁰ Social Security Amendment Act 1950 s 18(3) (repealed); Family Protection Act 1955 s 13. Compare Family Proceedings Act 1980 s 62.

by law to support their parents, but leaves that to individual choice and family arrangement.⁴¹ Yet in the case of *Re Covich*⁴² the judge said:

It is entirely appropriate that a testator in the position of the deceased whose estate benefits substantially by the abolition of death duties should apply the savings from that source towards ensuring that the plaintiff does not become a charge on the State. This is entirely consistent with the modern policy brought about by an ageing population and the urgent need of any Government to reduce State expenditure. It is also consistent with the change in social policy which I have referred to earlier.

- 55 This is certainly consistent with the intentions of the original Act. But it is not a sufficient answer to those who would otherwise have benefited under a will. Justice as between family members depends on the nature of the family relationship. If it is widely accepted in the community that particular ties and family obligations justify a duty of support, the State too can rely on that in framing its own welfare provisions. But fiscal considerations should not influence the existence and extent of these obligations. Otherwise, the social welfare system will be designed around support networks which do not exist, or which are overridden by other obligations; for example, to a spouse, partner or child.
- 56 The relationship between family policy and social welfare policy therefore has to be handled very carefully. Not all testamentary claims are the same. Some depend on property rights which are no different from any other form of wealth received by a welfare beneficiary (see, eg, partners' property entitlements: chapters 3–5). Others do not (see, eg, support claims: chapters 3, 5 and 8). Nor do all welfare benefits raise the same issues. These questions need to be asked about each particular benefit:
- Is the particular benefit means-tested or not?
 - If it is means-tested, should the testamentary claim be seen as a way of ensuring that the claimant obtains his or her own assets, or rather as provision for the claimant's support out of the will-maker's assets?
 - If the latter, should the will-maker or the State provide the claimant's primary support?
- 57 The last question causes the most difficulty. While frequently the State considers itself the provider of last resort, it does not always follow that family members of a welfare beneficiary should be asked to meet the costs of support. As regards will-makers, it is necessary to consider three things:
- First, was the relationship between the will-maker and claimant one that should give rise to a testamentary claim irrespective of fiscal considerations?
 - Secondly, if, fiscal considerations aside, the relationship does sustain a claim, is the will-maker's support obligation primary and the State's secondary? This

⁴¹ See Family Protection Act 1955 s 3(1)(e): where a child has voluntarily undertaken to support a parent the parent may seek to have this support continued after the child's death (see chapter 8). For the history of children's lifetime obligations to support a parent, see: Destitute Persons Act 1894 ss 2, 4–8; Destitute Persons Act 1910 ss 3–5; Domestic Proceedings Act 1968; Family Proceedings Act 1980. For the history of children's obligations on death to support a parent, see: Destitute Persons Act 1894 ss 2, 4–8; Testator's Family Maintenance Act 1900; Testator's Family Maintenance Act 1906; Family Protection Act 1908; Statutes Amendment Act 1943 s 14(2); Family Protection Act 1955 s 3(e); Family Protection Amendment Act 1967.

⁴² (1994) 12 FRNZ 608, 612, [1995] NZFLR 260, 264; see too the comments in footnote 20.

- can be judged by comparing the practice followed for a wide range of benefits.
- Finally, are there any special concerns which apply to the particular welfare benefit?

CONCLUSION

- 58 Good laws of succession promote family cohesion and, when this objective permits, recognise will-makers' and others' autonomy and freedom to dispose of their own property. Good laws of succession also allow efficient estate administration and dispute resolution. But supposed "moral duties" to family, and protecting the welfare purse, are questionable objectives of good laws of succession. They should not determine the fundamental shape of the legislation.
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3

Summary of proposals

- 59 **T**HIS CHAPTER SETS OUT the Commission's proposals in summary form, with a very brief explanation of each. We discuss the proposals and the reasons for them in the following chapters. The Draft Act and commentary also provide greater detail (para C1).
- 60 We realise that some of these proposals are contentious. This is especially true of our proposals about de facto partners' and adult children's claims. They need full debate before they can reliably be submitted to the Government as recommended legislation. We welcome comments on the policy and detail of all our proposals. But more importantly, we seek advice on whether there are better ways of changing the law which applies to these more contentious testamentary claims.
- 61 The proposals deal with the rights to claim of particular groups of relatives:
- widows and widowers (paras 66–67)
 - de facto partners (paras 68–69)
 - children (paras 70–72)
 - adult children (paras 73–74)
 - other relatives (paras 75–76), and
 - contributors (paras 77–78).
- 62 On balance our proposals are more favourable to claimants than the present law in providing for widows' and widowers' claims. They are considerably more favourable than the present law governing claims made by de facto partners. On the other hand, they may tend to restrict claims made by will-makers' children and other relatives.
- 63 We propose also to set out, in one set of statutory provisions, the rights of people whose actions have contributed to the will-maker's estate (paras 77–78). These people may or may not be family members. Contributions may take the form of services, additions to the will-maker's assets or actions which save the will-maker significant expense.
- 64 Two different types of claim are found in our proposals:
- *property division* and *contribution* claims, where claimants seek the return of benefits they have conferred on the will-maker; and
 - *support* claims, where the will-maker had a special and immediate responsibility for claimants, who seek to be supported for their reasonable needs in life.

The distinction is important, and we will return to it frequently in the following chapters.

- 65 As already indicated, none of these proposals applies to Māori when they succeed to Māori freehold land, Māori incorporation shares, or trust property under Te Ture Whenua Māori/Māori Land Act 1993 (para 12).

The proposed legislation

- 66 WIDOWS AND WIDOWERS – Currently, if the will-maker does not leave their widow or widower enough of the estate, the surviving partner may apply for an award under the Matrimonial Property Act 1963. Usually this award is based on the claimant's contributions to the couple's property. The law, unlike that which applies on divorce, makes no presumption of equal sharing. Widows or widowers may also apply for an award for maintenance and support under the Family Protection Act 1955. The size of each award is fixed by the court in its discretion (paras 87–89).

- 67 Instead, we propose that:

Widows and widowers may

- *apply for a property division* based on the claimant's contribution to the marriage partnership (presumed to be equal in value to the will-maker's); and
- *make a support claim* to permit the claimant to enjoy a reasonable, independent standard of living, until the claimant can reasonably be expected to achieve an independent standard of living, having regard to the financial consequences of the marriage for the claimant. (chapter 4)

- 68 DE FACTO PARTNERS – Under the present law, a de facto partner has no claim against the will-maker's estate by reason only of the de facto relationship. Where the claimant has made contributions to property owned by the will-maker, the court (applying general law) may impose a constructive trust. The partner's rights depend on the particular circumstances of the case. There is no presumption of equal sharing, nor does the surviving partner have a support claim (para 138).

- 69 Instead, we propose that:

De facto partners (including de facto partners of the same sex) may make both

- *a property division claim, and*
- *a support claim, on the same basis as widows and widowers.* (chapter 5)

- 70 CHILDREN – Under the Family Protection Act 1955, the will-maker's children have substantial claims against the estate, if they are disinherited or given only a small share of the estate. This applies as much to mature sons and daughters (eg, in their 60s) as it does to infant children. A study done for the Commission showed that claims often result in each child being awarded 1/8th to 1/5th of the estate. A child without siblings can receive more than half of the estate (paras 173–176).

71 We propose to recognise a clear right to claim in three cases:

Children may make a support claim only if they are

- minors; or
- under 25 and are undertaking educational or vocational training; or
- unable to earn a reasonable, independent livelihood because of a physical, intellectual or mental disability which occurred before the child reached 25. (chapter 6)

72 There are serious questions to be asked about whether adult, independent children should have any claim at all. For children who believe that they have been arbitrarily disinherited, this may appear hard, especially since they are well protected under existing law. But that law is open to criticism. It would be possible to devise a system which deals with arbitrary will-making and children's need without going to the full extent of the present family protection law. The Commission explores such systems later (paras 233–266). We conclude, however, that any such provisions would be complex, clarity and precision would be lost, and, if the system were applied strictly, few claims would succeed.

73 The Commission sets out the issues and arguments fully in chapter 7. It prefers at this stage, however, not to express a concluded view on which of the following options should be selected:

Adult children might

- claim further provision where the will-maker, by making inadequate provision for their child's proper maintenance and support, has not performed his or her moral duty (as under the present law);
- claim further provision where the will-maker has made inadequate provision to meet their child's known and demonstrable financial need;
- claim further provision where the provision (if any) that the will-maker made for their child was arbitrary, vindictive, mistaken or frustrated;
- claim further provision where the will-maker has declined to make adequate provision for their child without reasonable grounds; or
- have no claim to further provision at all. (chapter 7)

74 We welcome discussion and suggestions on what might be done. The Commission nevertheless proposes at least one significant change to the present law governing adult children's claims. If they are retained, they will be no more than "second-tier" claims, which will only be considered after all other testamentary claims have been fully satisfied.

75 OTHER RELATIVES – Grandchildren, stepchildren and parents are currently permitted to make claims under the Family Protection Act 1955. The grandchild's claim is often used where a child is dead or irresponsible; the court passes part of the child's entitlement down to the child's children. There are restrictions on claiming in some cases. Stepchildren, for example, may claim only if they are currently being, or are legally entitled to be, supported by the will-maker (paras 269–271).

- 76 Instead we propose that support claims should depend on establishing a direct responsibility between the will-maker and claimant. In particular:

A child who is not a child of a will-maker, but for whom the will-maker has assumed, in an enduring way, the responsibilities of a parent, may be permitted by the court to make a child's support claim.

But no other relative should be able to make a claim. (chapter 7)

- 77 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 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. 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 (paras 293–298). Alternatively, there are various common law rights (paras 291–292).

- 78 We propose that there should be a statutory provision following the general principles of the common law. Broadly stated, it would provide that:

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

- an express *promise* to make provision for the claimant; or, where there is no such promise,
- the estate *retaining the benefit* of the services in circumstances *where it is not just* for the estate to do so. (chapter 8)

Example of how the proposals would work

- 79 This example (like those in later chapters) is designed to show the effect of our proposals.

Example 1:

The will-maker died in advanced old age. He had been divorced, and he was estranged from both his former wife and the two children of their marriage. One of these was a son who had 4 children of his own. For the last 20 years of his life the will-maker lived in his own house with a de facto partner. The de facto partner had worked without pay in the will-maker's business from 1964 on, and nursed the will-maker in his last illness. Apart from her, the only family members who kept in touch with the will-maker were his son's estranged wife and their 4 children.

The last will was made early in the will-maker's relationship with his partner. In it, he left \$10 000 to her and the remainder to a charity. But later on, according to the de facto partner, the will-maker promised her several times that he would leave her his property. This assertion was corroborated.

When he died, the will-maker left an estate of \$239 000.⁴³ Claims were brought

⁴³ In this, and several later examples, the Commission shows men as having earned more and having accumulated greater assets in their own name, than women. That does not imply that the Commission approves of gender inequality, or, conversely, that its proposals favour women and not men. The examples do reflect, however, what happens in claims which frequently come before the courts.

by the de facto partner (then aged 76), the will-maker's daughter (then aged 50), and his son's 4 children. It was not alleged that any of the claimants were in poor financial circumstances.⁴⁴

- 80 Under our proposals the claims would be dealt with in the following way. The de facto partner, without needing to prove the promise, would get one half of the property accumulated during the relationship. (It would be different if the will-maker and the de facto partner had intended some other sharing method.) The judge would need to look for property in the partner's own name. This might be drawn into the sharing regime, in which case she would have to give credit for it. As well as her property entitlement, she might receive a support award. That would give her an additional sum (probably as capital) from the will-maker's estate.⁴⁵ She would receive an even larger amount if the court upheld the promise in the terms alleged.
- 81 The rest of the estate might go to the charity named in the will. Under our proposals as they currently stand, we have left it open whether the adult daughter would have a claim. In this instance, where the daughter had little to do with the will-maker for many years, we consider that it is doubtful whether she should have a claim (and she would not have one if any but the first option in para 73 were adopted as the law). The grandchildren would have no claim, because the grandfather had not accepted the responsibility of being their parent on an enduring basis while alive.
- 82 This outcome may be contrasted with what actually happened in *Example 1*.⁴⁶ The judge reviewed the family relationship. He referred to the parties' very different perceptions of the will-maker (as shown in the affidavits) and the "strained and fractured relationships between the parties". He looked at the financial circumstances of the daughter and grandchildren, though he did not find any of them to be experiencing acute financial hardship.
- 83 Dealing first with the de facto partner's claim, he accepted that the promise had been made. He held that it meant that she should be well provided for, particularly in respect of accommodation. He rejected any extra or alternative claim for a beneficial interest in the estate by way of constructive trust. She was awarded \$95 000. Though her claim was successful, she was expected to bear all her own legal costs.
- 84 The daughter was awarded \$45 000 under the Family Protection Act 1955. Each of the grandchildren was awarded \$16 500 under that Act. The judge pointed out that the grandchildren were estranged from their father and could get no support from him, at a time when they were beginning to establish themselves and "would be assisted in achieving reasonable goals by a lump sum injection of funds now."
- 85 This example shows that the Commission's proposals could make a considerable difference to the way in which the law of testamentary claims is applied. The

⁴⁴ Eligible claimants' financial circumstances are at present relevant to whether the will-maker made "adequate provision . . . [for the claimant's] . . . proper maintenance and support": Family Protection Act 1955 s 4.

⁴⁵ Had the will-maker intended to benefit his children or grandchildren, provision could be made for the de facto partner to have outright ownership during her lifetime, and then for the will-maker's beneficiaries to have a right to claim on her death (see paras 106–110).

⁴⁶ *Re B* (unreported, High Court, Wellington, 9 August 1995, CP 228/93); see too footnote 20.

Commission intends no criticism of the particular judgment, which was well within established patterns of decision. But it is useful to consider where that tradition has led:

- The de facto partner's claim had to depend, not on the clear merits of her relationship with the will-maker and the work she had done for him, but on the existence of the will-maker's informal promise, which was uncertain in its terms.
- No enquiry needed to be made into the couple's affairs as a whole, even though the claimant had property in her own name which perhaps in fairness should have been brought into account.
- The will-maker was obliged to leave a substantial sum to a daughter whom he had seen only twice in the last eighteen years.
- To justify that result the court had to look into strained family relationships over a long period, and try to assess where responsibility might lie for the difficulties.
- The will-maker was also obliged to leave a similar sum, in total, to support his four grandchildren even though he had not been under any obligation to support them in his lifetime, nor had he in fact done so.

- 86 A will-maker may well have to grapple with these issues. Whether the law should require the courts to do so, however, is doubtful. It does not seem helpful for the courts to revisit the will-maker's family relationships, unless the task is undertaken with a clearly defined objective, and the relevant principles are well articulated.
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4 Widows' and widowers' claims

Present law and purposes of reform

- 87 **W**IDOWS AND WIDOWERS may now make a property claim under the Matrimonial Property Act 1963⁴⁷ and a claim for maintenance and support under the Family Protection Act 1955. We propose that the rights of surviving spouses be extended. The principles which determine the size of these awards should be clearer. They should also be made generally consistent with the principles which apply to property and maintenance disputes between spouses whose marriages end by divorce.

*Proposal in outline*⁴⁸

Widows and widowers may

- *apply for a property division* based on the claimant's contribution to the marriage partnership (presumed to be equal in value to the will-maker's); and
- *make a support claim* to compensate for any financial disadvantage which results from the marriage relationship, preventing the claimant from enjoying a reasonable, independent standard of living.

Example 2:

Husband and Wife have been married for 25 years. Wife works part-time as a shop assistant. When Husband dies they own assets worth \$300 000, all acquired during the marriage. The assets are all in Husband's name. The couple have 3 children, the eldest of whom is 20 years of age when Husband dies. Husband leaves \$30 000 to Wife. The rest is left to trustees, and Wife has only a life interest in the estate. When she dies or remarries, the children will have the estate. Wife makes a testamentary claim because she wishes to have greater control of the capital held by the trustees.⁴⁹

⁴⁷ Preserved by the Matrimonial Property Act 1976 s 57(4).

⁴⁸ In substance, the Commission's proposal accords with the recommendations in the *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, Wellington, 1988).

⁴⁹ This example, and those that follow in this paper, are not based on any specific case, unless otherwise stated. They have features, however, which appear in a great number of cases coming before the courts.

- 88 Under the Commission's proposals (assuming equal contributions to the partnership), Wife 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 is determined by the judge (for the amount, see para 113). The children may claim personal awards to meet educational and support needs (see chapter 6). The 20 year-old child may make his or her own claim. Wife, caring for the minor children, may make claims on their behalf.
- 89 By comparison, under the present law, Wife gets a property division award which the judge will decide. (On past experience, this will be approximately 30–45% of the value of the property.) The judge may or may not order that Wife's life interest in the rest of the property be cancelled or reduced.⁵⁰

Alternatives

- 90 The proposal is preferable to these alternatives:
- *Complete discretion (either in one combined award for property division and support or in two separate awards):* This option is flexible. Awards can vary according to the circumstances of the surviving spouse and social values as the courts perceive them. But this can lead to inconsistent decisions which are difficult to predict.⁵¹ Widows' and widowers' financial security and independence is then put in doubt.
 - *Fixed share of will-maker's property to widow or widower and wide discretion for support award:* By splitting the support claim from the property division claim this option gives better direction to the courts. But with regard to the property claim, it takes no account of the survivor's assets, major differences in contribution to the marriage partnership and the duration of the marriage. It can lead to arbitrary results depending on how much of the matrimonial property happens to be held by the will-maker. With regard to the support

⁵⁰ The present practice is variable. We surveyed 50 judgments applying the Matrimonial Property Act 1963 for the period 1985–1995. In only 33 was it possible to be sure whether an award was made additional to or in the place of property received from the will-maker's estate. In 48% of these 33 cases the award was additional to the property received, and in 39% the award was made in place of the property received. In the rest of the 33 cases either no order was made (6%), or the claim was made by a will-maker's estate (6%). This variable practice is partly explained by the fact that in the past claims were sometimes brought only to equalise property holding in order to minimise death duty, and were limited to what was necessary for that purpose. But if the claimants' legal rights had been clear, these proceedings would not have been necessary.

⁵¹ In 49 of the 50 Matrimonial Property Act 1963 judgments referred to in footnote 50, it was possible to tell the monetary value of an award made. The following factors were related to the size of awards (whether considered as a percentage of the defendant's estate or as a percentage of the combined estates): the duration of the marriage; the defendant's age when married; whether the marriage was a first or subsequent marriage; whether there were children of a previous marriage and whether they supported the claim; whether the claim was made by a survivor or a will-maker's estate; how much of the property accumulated during the relationship the claimant held; how much (if any) property the will-maker left to the claimant; and the size of any Family Protection Act 1955 award the court made to the claimant from the will-maker's estate. We could rarely discern any consistent relationship. For a comparable 48-case survey between mid-1988 and 1990, see: [1991] 14 TCL 6/7–9; [1991] 14 TCL 7/7–9; [1991] 14 TCL 8/7–8. See too: Hodder (ed), "Matrimonial Property on Death" [1985] 8 TCL 46/1; *West v West* (1985) 2 FRNZ 1, 3 (18-case survey).

claim, it gives no clear direction about the amount of the support award and when it should be ordered.

- *No discretion: Widow or widower automatically takes all of will-maker's estate:* This option is very simple and certain and helps to make surviving spouses financially self-sufficient. But it takes no account of the interests of children and others whose interests may differ from those of the surviving spouse. The survivor may be adequately provided for from their own resources or from what the will-maker has already given in the will. This option therefore goes beyond what is necessary to give effect to the shared vision of the family already referred to (para 28).

All of these alternative options are inconsistent with the law which applies to spouses whose marriages end by divorce.

Reasons for the proposal

- 91 PROPERTY DIVISION – Our proposal will make the law conform with well-accepted principles of matrimonial property between living spouses. In particular,
- it divides property equally, except where a case for unequal sharing is demonstrated;
 - it brings into account property owned by both parties to the marriage;
 - it assures a surviving spouse a share of capital at the end of the marriage; and
 - it will be reasonably predictable in its operation, because when it departs from principles of equality it relies on established matrimonial property law.
- 92 SUPPORT CLAIM – Our proposal is based on a principle which will state explicitly when an award will be made, and if so, how much it will be. That principle will be discussed in more detail presently. It allows the court to take account of differences in economic circumstances and in the nature and consequences of each relationship.

Proposal in detail

- 93 THE CLAIMS ARE ELECTIVE

Widows and widowers

- may elect to initiate a property division alone, or to seek a combination of a property division and a support claim,
- must choose, on obtaining a division, between their division entitlement and the provision the will-maker made for them in the will, and
- must initiate a division and claim a support award within 3 years of the will-maker's death.

- 94 Widows or widowers, when making a claim, must challenge the entire will. They should not be allowed to attribute what is given to them under the will to (let us say) their property division, and then seek a further support award. Nor should they be able to make a support claim without first allowing the court to assess whether the underlying property-sharing arrangement is fair. However, if they make a claim, and the total amount the court orders for them is less than they expected, they may then drop the claim and keep what is given to them in the will.

- 95 The present law, by contrast, does not require the spouse to choose between a court property order and the provision already made by the will-maker. The courts' practice in applying the law is varied. Sometimes surviving spouses are required to give up benefits received under the will in return for an award of capital. Sometimes they are not. This results in unpredictable differences in the value of awards.⁵²
- 96 A surviving spouse will have 3 years to seek a property division and make a support claim.⁵³ This is ample time for the survivor to find out how the will-maker's provision for them operates and to take advice on what to do about it. But the administrator of the will-maker's estate will not be legally obliged to defer distribution during this election period.⁵⁴ It is assumed that the tracing powers (Administration Act 1969 ss 47–50) will be adequate to protect the interests of surviving spouses even after the distribution of the estate (see chapter 10, paras 349–355).
- 97 The time period for bringing the claim will run from the date of the will-maker's death. Under the present law, the time limits on claims usually run from the date of the grant of administration.⁵⁵ The reason is probably that there is no obvious defendant for claims against the estate until a grant has been made.
- 98 A time limit running from the date of death is generally to be preferred. When administration is granted, it relates back to the date of the will-maker's death,⁵⁶ with the result that the estate has effectively been owner of the property and its income since that time. Sometimes property will pass directly to a new owner without the need for an administration. An example is where the deceased owns property jointly with another, who takes the whole property by survivorship.⁵⁷ Sometimes the estate can be administered under the will without the need for a formal grant.⁵⁸ If an executor neglects or does not wish to seek a

⁵² See footnotes 50 and 51.

⁵³ Compare the present law. Applications must be made before the expiration of "a period of 12 months after the date of the grant in New Zealand of administration in the estate of the party to the marriage against whose estate the application is made": Matrimonial Property Act 1963 ss 5A(1)(b), 5A(2)(b). This period is increased in our proposals to bring it into line with our general recommendations for limitation defences: *Limitation Defences in Civil Proceedings* (1988, NZLC R6).

⁵⁴ Compare the present law. The Administration Act 1969 s 47 protects administrators for:

- distributions within 6 months from the date of the grant of administration necessary for the purpose of providing for the maintenance, support, or education of any person who was totally or partially dependent on the deceased immediately before the death of the deceased, and
- distributions after 6 months from the date of the grant where no application has been made and served, and no-one has given notice that they intend to make a claim, and
- distributions at any time where everyone who can make a claim consents (they must be adults with full capacity).

Administrators making these distributions are protected against claims under the Family Protection Act 1955; Law Reform (Testamentary Promises) Act 1949; Matrimonial Property Act 1963; Family Proceedings Act 1980 ss 26(2), 70, 99 and 180(2); Child Support Act 1991 Part VII; and also against claims under contracts relating to wills.

⁵⁵ Matrimonial Property Act 1963 s 5A(2)(b); Family Protection Act 1955 s 9(2); Law Reform (Testamentary Promises) Act 1949 s 6.

⁵⁶ Administration Act 1969 s 24(2).

⁵⁷ See chapter 10, paras 338–341.

⁵⁸ Administration Act 1969 ss 64–67.

grant, another may be appointed in their place at any time after 3 months from the date of death.⁵⁹ If no-one seeks a grant and there is no will at all, there appears, admittedly, to be no statutory mechanism for having an administrator appointed within 3 months from the death. But the court has inherent power to make an order for administration. There is statutory power to do so if the estate is insolvent.⁶⁰

99 PROPERTY DIVISION

The property division will be governed by the principles of the law of matrimonial property, as they apply to spouses whose marriage ends by divorce.

- 100 The basic principles of the matrimonial property regime between living spouses will apply. They need very little adaptation, despite the fact that there are some differences where the marriage ends on death. The basic principles are still valid:
- the partnership home and chattels will be divided equally unless there are strong “extraordinary circumstances”, or the partnership is of short duration;
 - other partnership property is divided equally unless one partner’s contribution to the marriage partnership is clearly greater than the other’s; and
 - separate property is not divided, but is retained by the partner who owns it.
- 101 The Minister of Justice has asked his Ministry to progress reform of the Matrimonial Property Act 1976 and also legislation governing de facto couples’ property. The Commission does not yet know what these reforms will be. Property division between husbands and wives in the Draft Testamentary Claims Act is therefore based on the provisions of the Matrimonial Property Act 1976. Any changes in the principles governing property division would need to be reflected in these Draft Act provisions (see Draft Act, Subparts 1–3, paras C25–C29).
- 102 The Commission is not yet committed to any view on whether the married partners’ property division provisions, presently in the Draft Act, should ultimately appear in the Matrimonial Property Act 1976, or in a new Testamentary Claims Act. This is a matter the Commission will resolve in discussion with the Ministry of Justice (see paras C25–C29).
- 103 THE FORM OF THE PROPERTY DIVISION

A property division may take the form of a specific division of assets, payment of a lump sum or (exceptionally) periodic payments.

⁵⁹ Administration Act 1969 s 19.

⁶⁰ There is provision for a person to be appointed to administer an estate as an insolvent deceased’s estate pursuant to the Insolvency Act 1967, Part XVII, ss 153–163, the appointee being in effect a statutory agent. Any creditor or beneficiary is entitled to apply. Statutory claimants should be included. The court also has jurisdiction to appoint an Official Assignee or the Public Trustee as administrator of an insolvent deceased’s estate. See, for example, *Re Oldfield (A Bankrupt)* [1995] 3 NZLR 100.

- 104 Property can be shared out specifically, or the estate may retain the property and make cash payments instead. Where money is paid, this may take the form of one lump sum payment; or a series of payments over a period of time (as in the case of a life-interest). Once the lump sum value of the property division is settled, it is usually not difficult to determine what an equivalent payment would be, say until death or remarriage.
- 105 But courts should generally prefer lump sum divisions. They give claimants greater control over their shares of property, and make administration of the estate quicker and less expensive. Nevertheless, there may be cases where, in accordance with the wishes and interests of the widow or widower, the court should order periodic payments in satisfaction of a property division. Surviving spouses may sometimes think it is to their advantage to convert a capital sum into an income stream, though normally it will be the other way around.
- 106 THE PROPERTY DIVISION SHOULD BE RECIPROCAL

A property division may be initiated either by the surviving spouse or else by the will-maker's administrator.

- 107 In theory, if property is held unequally between husband and wife, either should be able to reclaim their own property. It does not matter who dies first. In practice, however, the survivor will have a support claim. The survivor may advance this support claim in response to the administrator of the deceased spouse's estate initiating the recovery of the estate's share of the matrimonial property. The principle that division should be reciprocal is likely to be of greater practical value when both partners are dead.
- 108 Under the present law there have been a number of cases where this has been a convenient procedure for both estates. Although most of these cases arose from estate duty problems (estate duty has now been reduced to zero),⁶¹ the Commission sees no need to change the existing law on this point. It also provides a facility which may well prove useful to deal with future fiscal measures which cannot now be foreseen.
- 109 More importantly, it can give a spouse who dies first a greater opportunity than he or she has now to have a say in what happens to the common property.

Example 3:

Wife has children by an earlier marriage. She dies before her (second) Husband. She leaves her property to her children. However, 80% of the property acquired during the marriage is in Husband's name. Wife's estate is administered as regards what she owns. No claim is brought against Husband during his lifetime. On his death, he leaves all his estate to his own children. Wife's estate can now make a claim to equalise the matrimonial property as at the date of her death. This enlarges the amount available to her children.

⁶¹ For estates of people dying on or after 17 December 1992: Estate Duty Abolition Act 1993 s 3.

Wife's estate must apply for the division within three years of Husband's death.⁶² No time limit runs from the date of Wife's death, because of the possibility of the application being countered by a support claim by Husband.

- 110 The Commission notes the decision of *In re Anderson, Public Trustee v Pile* (unreported, Court of Appeal, 10 November 1995, CA 116/94). The Court of Appeal expressed concern that in cases such as this the partner who died first may not appreciate the fact that she is disposing of what she thinks of as her property. This concern is reasonable in a context where little is generally known about what is likely to happen to matrimonial property on death. If (as we propose) the law is clearer, it will be much better known, especially since it accords with the division of property on divorce. This will require lawyers to take the property division into account when drafting wills. They may even take advantage of it to achieve additional protection for children of earlier marriages. For example, Wife in *Example 3* (para 109) might leave her children "any rights I may have to a property division under the Testamentary Claims Act 199–, provided that they are not to be exercised until the death of my Husband, who until his death has power to dispose of any part of our property to meet his own personal needs".

111 THE RELATIVE PRIORITY OF THE PROPERTY DIVISION ENTITLEMENT

The court should have power, when it considers it just, to permit partners to make proprietary or tracing claims against specific assets or property comprised in the estate.

- 112 This is a technical rule which can be applied, under the present law, to ensure that particular items are protected from the claims of creditors and others who are interested in the estate. This rule is discussed in Appendix B, which sets out proposals for resolving the relative priorities of claims when they compete with other claims and those of creditors.

113 SUPPORT CLAIM FOR WIDOWS AND WIDOWERS

The support claim will be permitted where the claimant does not have the financial resources to enjoy a reasonable, independent standard of living (taking into account any property division).

Support may be claimed for the period until the claimant can reasonably be expected to achieve an independent standard of living, having regard to the financial consequences of the marriage for the claimant.

⁶² The Commission proposes that all claims against an estate under the Draft Act must be brought within three years of a will-maker's death: see chapter 10, paras 349–355. This allows Wife's estate to apply for a property division at any time before three years after the death of Husband. Wife's children may be required to indemnify the administrator of Wife's estate for the costs of making this claim, whether made before or after Husband's death: see Draft Act s 58, para C195.

The amount of the award will be the amount required to achieve a reasonable, independent standard of living during the period for which the claimant is entitled to claim.

The award may take the form of a lump sum or periodic payments.

- 114 The basic principle of support is *just sharing of the financial consequences of the marriage partnership*. This is not a new concept. The Family Proceedings Act 1980 recognises it where separated spouses are both alive. But it is not often used there, largely because both living spouses require financial support during the period immediately after separation. It is of greater value where a marriage is ended by the death of a spouse. It can be stated as follows:

The price of enjoying the advantages of unity in a marriage partnership is the just sharing of the financial burdens for each spouse when the partnership ends. Often the united lifestyle of spouses during a marriage partnership will be achieved at the expense of a surviving spouse's ability to achieve a reasonable, independent standard of living. The will-maker's estate should carry these burdens for the survivor until it is reasonable to expect the survivor to support herself or himself.

- 115 This principle can be applied flexibly to surviving partners whose circumstances are widely different. If the marriage is of a shorter duration and its ascertainable financial consequences for the surviving spouse are less significant, support of a transitional nature only may be appropriate. In cases where the marriage is of a longer duration, and its ascertainable financial consequences for the surviving spouse are more significant, support for longer periods, perhaps for the rest of the survivor's life, will be appropriate. In any case the court will make clear to the surviving spouse the period during which he or she can rely on support from the estate.

- 116 The following are examples of how the principle operates:

- Husband, a trained artist, provides child care for the three children of the 12-year marriage. Husband also manages the home, making a little income through his work, and having to rely predominantly on Wife's income. After Wife's death Husband is unable to maintain a reasonable, independent standard of living. The financial consequences of the marriage for Husband are significant. His immediate custodial responsibilities for the children, and his work history, make it unreasonable for him to support himself through suitable and rewarding paid employment. He can claim support from Wife's estate.
- Both spouses are at the time of marriage retired superannuitants whose previous marriages ended on the death of their spouses. Throughout their 10-year marriage both spouses receive New Zealand Superannuation and draw on their independent savings, each contributing to household management. The financial consequences of the marriage for the surviving spouse are less significant. When the other dies, each spouse can reasonably be expected to sustain a reasonable, independent standard of living. Only a transitional support award need be made.
- Wife cares for two children of the marriage and manages the household. The financial consequences of the 40-year marriage are significant. When Husband dies it is, and will probably always be, unreasonable for Wife to return to paid work as a nurse. One reason for this is that Wife is increasingly

affected by a medical condition. Another is that Wife's paid employment is disrupted by changes in Husband's employers and workplaces. Wife is 59 years of age. Wife may claim support.

- Husband, an alcoholic who is not in paid employment during the 20-year marriage, does not work or contribute significantly to household management or child care. The family income comes from State welfare benefits and Wife's part-time, and later full-time, paid work. The administrator of her estate shows that the financial consequences of the marriage for Husband were insignificant. Husband does nothing to reduce his need for support. It is reasonable to expect Husband to support himself immediately.

117 The financial consequences of the marriage will often be significant. One example is that of the retired couple who after a long marriage live off their accumulated savings. Both earner and non-earner spouse will have lost opportunities to acquire and keep financial assets. During the marriage their resources will have been used to support the family and the couple's lifestyle. Another common example is where the surviving partner is left with minor children to look after.

118 TIME LIMIT ON SUPPORT CLAIMS – Widows and widowers must make support claims within the period of three years from the date of death of the will-maker. (For discussion of the standard three-year time period within which all claims must be made, see paras 349–355).

119 RELATIVE PRIORITY OF PROPERTY DIVISION AND SUPPORT CLAIMS – Appendix B sets out proposals for resolving the relative priority of creditors' claims, contributors' claims, property division claims and support claims. (See chapter 5, paras 158–171, for priorities as between competing marriages and de facto partnerships).

120 WELFARE AND SUPPORT

When testing surviving spouses' income and assets for benefit purposes, the law of social welfare should

- include a possible contribution-based marriage property division, and
- presumptively fix the division at 50% of the combined assets of husband and wife, and
- not include a possible support award unless, and only to the extent that, the actual property division falls below 50% of the combined assets of husband and wife.

121 We are concerned here only with State-funded welfare which is means-tested. When the State provides a benefit "universally" (irrespective of the claimant's financial position), a will-maker should always be able to rely on the claimant continuing to receive that benefit, and to make provision accordingly (as the present law provides: Family Protection Act 1955 s 13).

122 The property division is based on contributions made by the partners. The resulting matrimonial property belongs to both. When a person applying for means-tested welfare can make a contribution-based testamentary claim (either a property division or the contributors' claim in chapter 9), the amount of this claim should be taken into account, even if not actually sought, in any welfare

test of that person's financial position. The argument can be made, persuasively in the Commission's view, that the accumulation of assets by couples has been the product of a variety of factors external to a couple, including State welfare, housing, labour and taxation policies. Over a lifetime these factors may assist, for example, in the acquisition of a privately owned family home. At least part of this accumulation can reasonably be expected to support the couple in the last stages of their life, rather than going to the couple's children, who will already have enjoyed the benefits of these factors as income spent rather than saved.⁶³

- 123 The support claim, however, is different. There appear to be no strong policy reasons for including a surviving partner's support claim in any welfare test of his or her financial position. Once a surviving partner is treated as having received a property division, anything that remains in the will-maker's estate is not the property of the surviving spouse and should not be counted as such.
- 124 The support claim by its nature is an elective claim: the surviving partner chooses whether or not to bring it against the estate. Surviving partners should not be compelled to make support claims when they choose not to do so. They may in many cases prefer to respect the will-maker's wishes. That choice may leave them dependent on other family members or on welfare. But to require them to make the claim intrudes unfairly on family life. In the absence of compelling policy reasons the support claim should be included in welfare tests of the survivor's financial position only when he or she chooses to make it.⁶⁴
- 125 If, however, the survivor's property claim award falls below 50% of the combined property of the husband and wife, different considerations apply. Except in unusual cases, one would expect that the addition of a support claim will bring the survivor's entitlement up to 50% of the property, and probably higher. A general rule that fixes the survivor's share presumptively at 50% is helpful. For that amount is taken as the value of the survivor's entitlements for welfare processes. Similarly, where (as in the case of a marriage of short duration) it can be shown that the survivor's total entitlement will be less than 50%, the 50% entitlement will also be taken as the value. Generally, the Department of Social Welfare should be able to operate on presumptive values. In this way minimal pressure is put on the survivor to make a claim, and to settle a claim on terms more favourable to the survivor than he or she wishes to obtain.
- 126 The practical effect of these proposals is that a ceiling of half the couple's property would be the maximum available to reduce social welfare benefits and subsidies, unless the couple themselves make more favourable arrangements for the survivor, or the court orders that the wife receive more than 50% of the estate.

Example 4:

Husband dies, leaving an estate comprising a house worth \$200 000 and \$100 000 cash. He is survived by his widow and their adult son. All Husband's property is left to the son. The widow has no property in her own name. She makes no claim against the estate, and goes to live with her son. She claims the widow's benefit.

⁶³ Thorns (1995) 5 Social Policy Journal of New Zealand 30, 41.

⁶⁴ See Family Proceedings Act 1980 s 62 (when a spouse chooses to make a claim "the liability to maintain any person is not extinguished by reason of the fact that the person's reasonable needs are being met by a domestic benefit"). Compare Social Security Act 1964 s 74(e).

She can be assessed as having received a notional income of \$150 000 so that her widow's benefit will be reduced accordingly.

This method of assessment is particularly important when the couple are elderly and there is a possibility that the survivor will be financially assessed with a view to entering long-stay residential care. It is described in more detail in Appendix D.

- 127 The Commission considers that only a proportion of the couple's assets should be compulsorily assessed in this way. This is supported by referring to current practice in taxation and welfare matters. There appears to be no compelling reason of policy, and no general principle of fairness, which requires that a poor, unwell or disabled person who requires professional care or welfare support should be primarily supported by their spouse out of both income and assets. If there is, it is not generally evident in the present social welfare and taxation legislation.
- 128 It is true that welfare support often diminishes when a beneficiary is in a marriage relationship. Yet when partners are living apart, the State seldom expects one partner to exhaust income or assets before the other partner seeks State welfare (see Appendix C). The position on death is confused, and the law has not kept up with current testamentary claims legislation. But it would not fit in with the general pattern of welfare law to expect the entire estate of a dead partner to be applied in payment of the support costs. To require that would make it impossible for partners to recognise other testamentary obligations.
- 129 These proposals, in the Commission's view, will make the survivor's rights on the death of a husband or wife much clearer and more predictable than they are now. They will protect the survivor in their dealings with the estate, by providing a clear indication of what will be achieved if proceedings are brought. They will also establish a firm basis on which the survivor can deal with the Government in welfare and other fiscal matters in which the amount of the survivor's entitlement needs to be investigated.

5

De facto partners' claims

Present law and purposes of reform

- 130 **W**HERE, DURING A DE FACTO RELATIONSHIP, one partner has contributed towards the value of the other's property, he or she may claim that value. But there is no support claim. The Commission's proposals are designed to eliminate the uncertainty which now surrounds the way contribution is assessed, and to allow a de facto partner to make a support claim as well. The Commission's proposed reforms, however, will apply only after one of the partners dies. Claims made between living partners are not within our terms of reference.⁶⁵
- 131 De facto partners' property and support are issues of growing concern. There is an upward trend in de facto relationships (see Appendix A). At the 1991 census, 161 856 identified themselves as de facto partners, up 40.7% on the number recorded in 1986.⁶⁶ Over 40% of de facto couples have children – compared to 60% of married couples.⁶⁷ Between 1981–1991 the proportion of women over 15 years of age in de facto relationships increased from 4% to 6% (11% for Māori women), and it is increasingly likely that women will be in a de facto relationship at some time in their life.⁶⁸ While almost half (46%) of people living in de facto relationships in 1991 were aged in their 20s, and this age group increased by the greatest number in the 1980s, the incidence of de facto unions in other age groups has also risen.⁶⁹ New law should recognise the “important legal, public policy and demographic implications” of this increase.⁷⁰
- 132 The Minister of Justice has publicly announced that his Ministry has this matter under consideration, and that a Bill dealing with the rights of de facto couples who separate may soon be introduced into the House of Representatives. Any change to the rights of de facto couples during their lifetime is outside our own terms of reference. When that legislation is prepared, therefore, it will be necessary to look carefully at our own proposals to ensure that any difference in principle between any legislation is justifiable. However, in the meantime

⁶⁵ See Note on Part 2 of Draft Act, paras C25–C29.

⁶⁶ Statistics New Zealand, *New Zealand Now: Families* (Statistics NZ, Wellington, 1994), 25–37. “De facto relationship” is defined for census purposes as “an arrangement where two persons who are not legally married to each other live together in a relationship as a couple.”

⁶⁷ Statistics New Zealand, *New Zealand Now: Children* (Statistics NZ, Wellington, 1995), 18–19.

⁶⁸ Statistics New Zealand, *All About Women in New Zealand* (Statistics NZ, Wellington, December 1993), 42–43.

⁶⁹ Statistics New Zealand, *New Zealand Now: Families* (Statistics NZ, Wellington, December 1994), Figure 3.1, 25.

⁷⁰ Statistics New Zealand, *New Zealand Now: Families* (Statistics NZ, Wellington, December 1994), 25–26.

we will proceed on the assumption that the criteria in each regime are going to be comparable, although the provisions for lifetime rights could well involve more qualifications, and a greater degree of judicial discretion, than do our own.⁷¹

- 133 We recognise that this case for reform appears less pressing as regards claims made after one partner dies. At present, according to the statistics, the number of people aged 45 years and above who have been in de facto relationships is statistically small.⁷² But the numbers each year are not insignificant. 26 474 people over 15 years of age died in 1994.⁷³ Of those, some 6%, or 1 588, might be expected to be people who were in a de facto relationship.⁷⁴ Moreover, statistics may not give the full picture. For instance, it is possible that de facto partnerships amongst older age groups are significantly under-reported.⁷⁵ Our proposals anticipate greater future need, given the growing social acceptance of de facto partnerships amongst all age groups.
- 134 The general tendency in Australia and Canada has been to make provision for de facto partners in legislation dealing with lifetime claims, testamentary claims, or both.⁷⁶ More recently, the English legislature conferred on surviving de facto partners the same protection as is given to widows under the Inheritance (Provision for Family and Dependants) Act 1975 (UK).⁷⁷ The Commission

⁷¹ See footnote 80.

⁷² At the last (1991) census, only 15.4% of male de facto partners were aged 45 years or older. Only 10.5% of women de facto partners were 45 or older: Statistics New Zealand, *New Zealand Official Yearbook 1995* (98th ed, Statistics NZ, Wellington, 1995), Table 6.21, 142.

⁷³ *Stats 95*, Table 4.3, 72–74. The number of people aged 15 and over who died in 1994 amounts to less than 1% (0.96%) of the total 1994 population aged 15 years and older. For a breakdown of the ages of those who died in 1994, see footnote 11.

⁷⁴ “At the 1991 census, 6% of New Zealanders over the age of 15 were living with de facto partners”: Statistics New Zealand, *New Zealand Now: Families* (Statistics NZ, Wellington, December 1994), 25.

⁷⁵ While the numbers of census-recorded de facto partners in older age brackets are small, they have grown at the fastest rate. Between 1986 and 1991 the number of male de facto partners aged 55–64 increased 33.6%, those aged from 65–74 increased 55.6%, and those 75 and over increased 56.1%. Also, between 1986 and 1991, the number of women de facto partners aged 55–64 increased 35.6%, those aged 65–74 increased 45.5%, and those 75 and over increased 66.7%: Statistics New Zealand, *New Zealand Official Yearbook 1995* (98th ed, Statistics NZ, Wellington, 1995), Table 6.21, 142.

⁷⁶ For testamentary claims, see, for example: Family Provision Act 1970 (Northern Territory); Inheritance (Family and Dependants Provision) Act 1972 (Western Australia); Dependants Relief Act 1974 (Northwest Territories); Family Relationships Act 1975 (South Australia); Family Provision Act 1982 (New South Wales); Succession Law Reform Act 1980 c 488 (Ontario); Succession Act 1981 (Queensland); Dependants Relief Act 1986 (Yukon Territory); Dependants of a Deceased Person Relief Act 1988 (Prince Edward Island); Dependants Relief Act 1989–1990 c 42 (Manitoba).
For lifetime claims, see, for example: De Facto Relationships Act 1984 (New South Wales); Property Law Act 1958 (Victoria); De Facto Relationships Act 1991 (Northern Territory); Domestic Relationships Act 1994 (Australian Capital Territory).

⁷⁷ Inheritance (Provision for Family and Dependants) Act 1975 c 63 (UK) ss 1(1)(ba), 1(1A), 3(2A). These provisions permit de facto partners who lived with a will-maker for two or more years immediately before the will-maker died to claim against the estates of people dying on or after 1 January 1996. They were inserted by the Law Reform (Succession) Act 1995 c 41 (UK) s 2, following the recommendations in The Law Commission (England and Wales), *Family Law: Distribution on Intestacy* (1989) Report No 187, 15–16.

considers that equivalent protection should be given to surviving de facto partners in New Zealand.

- 135 Concerns have been expressed about conferring categorical property rights on de facto partners. But these concerns are much reduced when one of the partners is dead. It is much more likely that the dead de facto partner would have wished to pass on property to the other partner on death, than in the case of separation. On the death of one partner any property which remains can be applied for the support of the survivor, and not for both partners, which is the case on separation. Where partners do not pass property to one another by will, it may well be because it has been neglected, or as a result of ignorance of the law.⁷⁸ It is a common misconception that the equal-sharing regime applies to couples who have been in a relationship for two years or more.

Proposal in outline

De facto partners (including de facto partners of the same sex) may make

- a property division and
- a support claim,

on the same basis as widows and widowers.

Example 5:

Male partner lives with Female partner in a de facto relationship for 25 years. They have 2 minor children. Before the children were born Female partner 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 Male's name. Male's will leaves Female \$50 000 and a life-interest in a further \$50 000. The rest of the estate goes to the children of the relationship and to a charitable cause. Female initiates a property division to allow her greater control over the capital.

- 136 Under the Commission's proposals, Female 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 Female's actual income, the effect of Female's past and anticipated absences from the workforce and the effect of these absences on her earning capacity. The children will also have a claim (see chapter 6).
- 137 The same principles that apply under the matrimonial property regime during lifetime will be carried over into our proposals (para 99). This still allows de facto partners some flexibility in applying these rules, to take into account the

⁷⁸ The Legal Services Board in 1994 said that failed attempts to have the Matrimonial Property Act 1976 apply to de facto relationships created "[a] degree of mythology [which] . . . developed to the point where seriously incorrect perceptions of the state of the law were being retailed in the community": *Report of the Legal Services Board/Te Poari Ratonga Ture for the Year Ended 30 June 1994* (1994) AJHR E.7, 24–26. The Board mounted a media campaign to counter the widely-held misconceptions or lack of knowledge about property rights arising within de facto relationships.

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 (paras 356–361). Agreements (whether or not they are in writing) will be given effect as long as they are not unfair, or procured unfairly. Property which has been kept separate will not be subject to the equal-sharing regime. Partners who have worked throughout their relationship and suffered no financial disadvantage will have no support claims (paras 113–117).

- 138 How does this compare with the present law? To return to *Example 5*, under the present law, Female gets an award of only part of Male's property. The judge will decide how large this is, taking into account Female's contributions to that property.⁷⁹
- 139 In contrast, the Commission's proposals (particularly as regards the support award) would (unless there is statutory modification of the present law)⁸⁰ result in different laws applying depending on whether the relationship ends because of death. The Commission accepts that there would be reservations about passing the proposals (regarding deceased estates) if the lifetime law is significantly different. However, a partial improvement in the law may be better than nothing. The advantages of the equal-sharing regime are discussed further in para 142. In most cases these advantages apply equally to de facto partners who separate during the lifetime of both partners.

⁷⁹ The courts have indicated that this award will usually be somewhat less than 50% of the property accumulated during the relationship: see, for example, *Gillies v Keogh* [1989] 2 NZLR 327, 348, 349; (1989) 5 FRNZ 490, 510, 511; *Lankow v Rose* [1995] 1 NZLR 277, 280–281, 286, 293, (1994) 12 FRNZ 682, 684, 690, 701. Claimant partners regularly obtain interests of between 15–40% of property in the defendant partner's name: Cull, "De Facto Couples and Family Law – What Protection?" (New Zealand Suffrage Centennial Women's Law Conference Paper, 1993), 259; Hughes and Ivory, "De Facto Property" (NZLS Seminar Paper, September–October 1992), Appendix 2. Discretionary de facto property division under the De Facto Relationships Act 1984 (New South Wales) has also tended to result in lower and more unpredictable awards than those for spouses under the Family Law Act 1975 (Commonwealth): Queensland Law Reform Commission, *De Facto Relationships* (1992), Working Paper No 40, Appendix D, 192; Bailey-Harris, "Financial Rights in Relationships Outside Marriage: A Decade of Reforms in Australia" (1995) 9 Int J Law and the Fam 233, 250–253.

⁸⁰ The Minister of Justice has foreshadowed legislation in these terms:

a *Heterosexual de facto partners* who separate in their joint lifetimes

- (1) will have a property claim
 - (a) only if their relationship has subsisted for a fixed period of 2–3 years, and
 - (b) only for an award in the court's discretion, without some or all of the presumptions which apply to spouses' property divisions under the Matrimonial Property Act 1976; and
- (2) will have no separate statutory support claim; and

b *Same sex de facto partners* who separate in their joint lifetimes will have neither. See, for example, "The Minister of Justice's Opening Speech" (1995) 25 VUWLR 3 (4 November 1994); "De Facto Property", *Insight Documentary*, National Radio, 26 February 1995; Family Property Reform segment on *Assignment*, TV1, September 1995; Linda Dodge interview with Minister of Justice, *Morning Report*, National Radio, 17 January 1996; Kim Hill interview with Minister of Justice; *9.00–Noon*, National Radio, 27 February 1996.

Alternatives

140 The Commission considers the proposal to be preferable to the following alternatives:

- *De facto partners confined to property claims under the present law:* Commentators have criticised uncertainty in the level of awards under the present law and the extent to which (especially women) partners' contributions to relationship property are taken into account.⁸¹ This uncertainty makes it more likely that the growing numbers of de facto partners in New Zealand will not understand or be protected by the law. Certainly they will have inferior protection (or none at all) against loss of earning power resulting from the relationship. Moreover, under the present law, courts cannot consider the interests of children when dividing property between de facto partners (especially their interest in being able to remain in a family home).⁸² Judges have acknowledged that the legislature might more properly assess and express social expectations in this field, and do so in a more definite and comprehensive way.⁸³
- *Only de facto partners who formally register their relationships can make the claims:* This is a curious option as it is unclear why any person who is unwilling to contract a marriage would be prepared to adopt this alternative method of having their relationship recognised. Partners may already be reluctant to enter into contracts, not having the forethought or means to consult a lawyer, or a formal arrangement may be inconsistent with their culture or beliefs. A partner with greater influence in the relationship may be unwilling to be tied by formal obligations. This option does not address these deficiencies any more than the present law which says that heterosexual partners can enter into enforceable formal contracts.⁸⁴ There is room to doubt

⁸¹ For examples and criticism of the variation in awards, see Howman, "Critique of Justice Hardie Boys' Paper" (1995) 25 VUWLR 43, 45; Parker, "De Facto Property Rights: time for change?" (1995) 1 BFLJ 179; Cull (New Zealand Suffrage Centennial Women's Law Conference Paper, 1993), 259; Hughes and Ivory, (NZLS Seminar Paper, September–October 1992), Appendix 2.

⁸² Compare Matrimonial Property Act 1976 ss 26–27.

⁸³ *Gillies v Keogh* [1989] 2 NZLR 327, 348, 349, (1989) 5 FRNZ 490, 510, 511; Harvey, "The Property Rights of De Facto Partners – Some Proposals for Legislative Reform" [1989] NZLJ 167; *Lankow v Rose* [1995] 1 NZLR 277, 280–281, 286, 293, (1994) 12 FRNZ 682, 684, 690, 701; Hardie Boys, "Judicial Attitudes to Family Property" (1995) 25 VUWLR 31, 41; See *Barclays Bank Plc v O'Brien* [1994] 1 AC 180, 198: "The 'tenderness' shown by the law to married women is not based on the marriage ceremony but reflects the underlying risk of one cohabitee exploiting the emotional involvement and trust of the other. Now that unmarried cohabitation, whether heterosexual or homosexual, is widespread in our society, the law should recognise this. Legal wives are not the only group which are now exposed to the emotional pressure of cohabitation." See too *Midland Bank Plc v Cooke* [1995] 4 All ER 562, 565: "The economic and social significance of home-ownership in modern society, and the frequency with which cases involving disputes as to the property rights of home-sharers (married or unmarried) are coming before the courts, suggest that the [English] Law Commission's intervention [*Sixth Programme of Law Reform* (1995) Report No 234, Item 8] is well-timed and has the potential to save a lot of human heartache as well as public expense."

⁸⁴ See Property Law Act 1952 s 40A. The Commission has already recommended that this section be amended so that it also apply to same-sex partners: *A New Property Law Act* (1994, NZLC R29), para 789; *The Property Law Act 1952 – A Discussion Paper* (1991, NZLC PP16), paras 159–161, Q23.

how many de facto partners today protect themselves through these contracts, though perhaps this is changing: lawyers in various parts of the country have told us that they are being asked to prepare contracts more frequently.⁸⁵ In any case the law concerning de facto partners' claims for property interests already holds that in default of any positive statement otherwise "the ordinary features of a shared life" will automatically give rise to property sharing.⁸⁶

- *A statutory discretion to divide property and make support awards:* De facto partners by definition (see paras 146–155) have been involved in relationships which have many of the qualities of a marriage relationship. If there is a clear intention that property be divided unequally, that will be done (paras 356–361). But where de facto partners share in a permanent, intimate relationship, an approach based solely on what each partner has contributed to the partnership property (whether item by item, or as a whole) does not seem appropriate. This has been recognised, to a degree, by the courts. While the courts have been reluctant to treat de facto partners in the same manner as spouses without Parliament's sanction, they have acknowledged the case for doing so by comparing de facto partners' rights and obligations with those of spouses.⁸⁷ Parliament has considered and enacted comparable proposals before. Proposals over 20 years ago envisaged applying the same property division legislation to de facto partners.⁸⁸ De facto partners have been treated in the same manner as spouses for a number of other purposes.⁸⁹

Reasons for the proposal

- 141 The Commission considers the proposal preferable to the alternatives because the proposal
- provides greater certainty and just resolutions of property division and support issues for the growing numbers of de facto partners in New Zealand,
 - balances the freedom of individuals and fairness between de facto partners by making the consequences of a de facto relationship reasonably clear and allowing de facto partners freedom to make different arrangements (see paras 356–361),

⁸⁵ See, for example, discussion and precedents in Harrison and Maze, "Family Law Agreements" (NZLS Seminar Paper, June 1996); O'Regan and Slatter, "Current Issues in Shared Ownership" (NZLS Seminar Paper, November 1995), 58–64, 100–102; Atkin, *Living Together Without Marriage* (Butterworths, Wellington, 1991), 155–160; Fisher, *Matrimonial Property* (2nd ed, Butterworths, Wellington, 1984), 694–695.

⁸⁶ *Gillies v Keogh* [1989] 2 NZLR 327, (1989) 5 FRNZ 490, (1989) 5 NZFLR 549; *Lankow v Rose* [1995] 1 NZLR 277, (1994) 12 FRNZ 682, [1995] NZFLR 1.

⁸⁷ See, for example, recognition of a will-maker's obligations to support and divide relationship property in *Re Z* [1979] 2 NZLR 495; *Re Sutton* [1980] 2 NZLR 50; *Re Mclean* (1991) 8 FRNZ 321; *Vaney v Bright* [1993] NZFLR 761; *Thwaites v Keruse* (1993) 11 FRNZ 19; *Wright v Holland* (1995) 14 FRNZ 87, [1995] NZFLR 951, [1996] 1 NZLR 213. Compare *Ball v Newey* (1988) 13 NSWLR 489.

⁸⁸ See the Matrimonial Property Bill 1975, as introduced containing cl 49.

⁸⁹ See, for example: Domestic Violence Act 1995; Child Support Act 1991; Accident and Rehabilitation Compensation Insurance Act 1992; Domestic Protection Act 1982; Social Security Act 1964.

- simplifies and rationalises the law, reconciling it with the law which applies to married people and allowing courts to address property division and support issues more clearly and consistently,
- reduces the ability of either partner or their estates to draw matters out and obtain an unduly favourable settlement by means of protracted and expensive litigation, and
- recognises that determining de facto partners' property division and support affects the position of their children.⁹⁰

142 We are aware that there is a significant body of opinion which opposes any such measure. One reason often given for doing so is that de facto couples' expectations are not as uniform or clear as those of married couples. Indeed, some people deliberately choose an unmarried state so as to avoid the consequences of the Matrimonial Property Act 1976. However, the Commission does not accept that this reasoning requires it to abandon the proposal. In particular:

- The equal-sharing rule should cover those who drift into an enduring relationship, as much as those who formally commit themselves to it at the start.
- If the relationship has been a short one, and each partner's assets and income have been kept separate, the provisions of the Matrimonial Property Act 1976 itself can apply, and are sufficiently flexible to deal with the situation adequately.⁹¹
- Given that so many de facto couples are caring for children, the safer "default" rule is one which protects the unprotected de facto partner, rather than one which makes claims problematical.
- If it is apparent that the couple desire a different and fairer method of sharing property, and have fairly agreed to it, their intentions will be respected (see paras 356–361).
- If one partner is propertied and the other is not, it is more likely that the propertied partner will have greater knowledge and access to advice: if the agreed property division is to be preferred to one which is governed by general rules of law, it makes sense to give the propertied partner the incentive to propose a property agreement.

143 The proposal also complies with section 19 of the New Zealand Bill of Rights Act 1990, which prohibits discrimination on the grounds of marital status and sexual orientation.⁹² At present, the law on its face draws these distinctions by confining some family claims to married spouses. As we read it, s 19 is breached if an unjustified distinction is drawn between the rights of people who are

⁹⁰ Compare Matrimonial Property Act 1976 ss 26–27; and chapter 6.

⁹¹ Draft Act s 14, paras C44–C47. See, for example, *Nuthall v Heslop* [1995] NZFLR 755.

⁹² For discussion, see Parker, "De Facto Property: A Matter of Human Rights" (1995) 1 BFLJ 280. See too Atkin, "Family Property Law Reform" (1995) 25 VUWLR 77, 83, "... there is much greater awareness that same sex relationships cannot be ignored." Compare Domestic Relationships Act 1994 (Australian Capital Territory); Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (1993); Queensland Law Reform Commission, *Intestacy Rules* (1993) Report No 42. In April and May of 1996 the Australian Capital Territory amended intestacy and family provision statutes to include de facto partners (of the same sex or otherwise): see Family Provision Amendment Act 1996; Administration and Probate Amendment Act 1996; "Gay Couples Recognised in Australian Territory Probate Law", *Agence France Presse*, Canberra, 22 April 1996.

married and people who live together as part of an intimate domestic relationship, whether heterosexual or same-sex. Each couple has an equal right of access to the fairest system of justice which can be devised to deal with the consequences of the mingling of their assets and efforts and the long-term financial disadvantage that a relationship may cause.

- 144 Any such distinction in proposed new law has to satisfy s 5 as demonstrably justified in a free and democratic society. The distinction satisfies s 5 only if it has a legitimate aim, can rationally be seen as supporting that aim, and is a proportionate means of achieving that aim, taking into account the importance of the right.⁹³
- 145 This would be a difficult test for a legislature to satisfy as regards de facto partners, whether of the same or different sexes. In the Commission's view a general policy of preferring marriage (as distinct from other relationships) or of preferring heterosexual couples (as opposed to gay or lesbian couples) cannot be a legitimate aim as these are the very arbitrary distinctions which are specifically forbidden by s 19 of the Bill of Rights Act itself.

Proposals in detail

- 146 DEFINITION – The Commission proposes that property division and support claim provisions apply to de facto partners whether of the same or opposite sex. But what is a “de facto relationship”?
- 147 Various efforts have been made to define the term. Clause 49 of the Matrimonial Property Bill 1975 and the majority recommendation in the 1988 *Report of the Working Group on Matrimonial Property and Family Protection* proposed that reformed property division law for de facto relationships ended by separation should generally apply only to *relationships of 2 years standing*. Yet the Group also recognised that without a discretion to shorten this time there might be injustice; for example “where a relationship, intended to be of some permanence, was terminated by the sudden death of one partner”.⁹⁴ These proposals also contained a second test of eligibility to claim: “that it was ‘just’ that the principles of the Matrimonial Property Act 1976 apply”. Atkin criticises this test as containing undisclosed standards.⁹⁵ The Commission agrees. Principles laid down for estate claims should be clearly articulated.
- 148 Definitions by reference to the nature of the relationship are preferable. But not all models are suitable. Australian state legislation (Northern Territory, Queensland, South Australia and Western Australia) use defined statutory criteria: living together for a specified period, membership of the household at the time of death, being maintained by the deceased (dependency) at the time of death. Criteria such as these have the potential to create arbitrary and anomalous distinctions between those protected and those unprotected, without making it significantly clearer which relationships the legislation is intended to apply to.

⁹³ *Reference Re Public Service Employee Relations Act (Alta)* [1987] 1 SCR 313; *Ministry of Transport v Noort* [1992] 3 NZLR 260; *Solicitor-General v Radio NZ* [1994] 1 NZLR 48; *Zdrahal v Wellington City Council* [1995] 1 NZLR 700.

⁹⁴ *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, Wellington, 1988), 67.

⁹⁵ Atkin (Butterworths, Wellington, 1991), para 10.5, 197–198.

- 149 In particular, the proposed minimum time period for a de facto relationship to have existed is misconceived. It is advanced as the only way of telling whether there is a genuine de facto relationship. Let us assume that the relationship during the specified period of cohabitation must itself be one that is “in the nature of marriage” (eg, not a flatting or an intermittent relationship). There is, logically, an infinite regression. One cannot tell whether a relationship is “in the nature of marriage” until it has lasted for a certain period of time. The same question must therefore be asked of the relationship at the beginning of the period as is asked at the end.
- 150 There is a simple answer to this dilemma. If the parties to a relationship have mixed their assets and incomes and committed themselves to financial disadvantage as a result of the relationship, then the law should resolve their situation fairly, without regard to the time period involved. To specify a prior time period before such a law can apply, deprives people of the fairest way of resolving the dispute.
- 151 A much better definition, therefore, is found in cl 5 of the Queensland Law Reform Commission’s De Facto Relationships Bill. This Bill defines a “de facto relationship” as
- [t]he relationship between 2 persons (whether of the same or a different gender) who, although they are not legally married to each other, live in a relationship like the relationship between a married couple.⁹⁶
- 152 This follows almost all the New Zealand legislation that applies to de facto partners. New Zealand legislation is usually applied to de facto partners by reference to the concept of legal marriage. The wording “in the nature of marriage” is most commonly used (11 references in the statute book), even when the legislation includes same sex relationships (see, eg, the Electricity Act 1992 s 111(2)(e)). Courts and tribunals have discussed “relationships in the nature of marriage” in a number of cases.⁹⁷
- 153 No other form of words effectively describes how close the relationship must be, in terms of emotional and financial co-dependence. In the *Personal Injury* report,⁹⁸ cl 61(2)(b) of the Commission’s Draft Safety, Rehabilitation and Compensation Act referred to “a settled relationship in the nature of marriage.” The Commission’s preliminary paper *Evidence Law: Privilege*⁹⁹ adopted the following definition:

⁹⁶ *Report on De Facto Relationships* (1993) Report No 44. Compare Family Provision Act 1982 (NSW) definition of *eligible person*, which includes a de facto partner, as a person who, when the deceased person died, “was living with the deceased person as his wife [or as her husband] on a bona fide domestic basis.”

⁹⁷ *Furmage v Social Security Commission* (1978) 2 NZAR 75, (1977) 1 NZAR 218; *Mauri v Department of Social Welfare* (1987) 4 NZFLR 481; *Lichtenstein v Lichtenstein* (1986) 2 FRNZ 58; *Excell v Director-General of Social Welfare* (1991) 7 FRNZ 239; *Ireland v Hepburn* (unreported, High Court, Palmerston North, 19 April 1991, CP 221/89); *Shand v Smith* (unreported, High Court, Blenheim, 17 July 1992, CP 28/90); *Wech v Linnell* (1993) 11 FRNZ 569; *Thompson v Department of Social Welfare* [1994] 2 NZLR 369, (1993) 11 FRNZ 402; *L v P* (unreported, High Court, Auckland, 29 November 1994, CP 81/93); *Decision 29/95* [1995] NZAR 458; *Decision 111/95* [1995] NZAR 559; *Ruka v Department of Social Welfare* [1995] 3 NZLR 635; *Bradley-Collins v Department of Social Welfare* (unreported, High Court, Whangarei, 10 May 1996, AP 36/95).

⁹⁸ (1988, NZLC R4), 136.

⁹⁹ (1994, NZLC PP23), paras 240–241 and C25.

A de facto partner is a person living in a relationship in the nature of marriage (including a relationship between two persons of the same sex).

- 154 Drawing on case law and previous legislative attempts at a definition, the Commission suggested in the *Privilege* paper that the key factors relevant to whether a relationship was “marriage-like” included the living arrangements of the couple, their emotional and sexual relationship and any pooling of financial resources.
- 155 The Commission concluded that these factors were in large part common sense. In the majority of cases, it should be readily apparent whether the relationship is covered. A list of factors relevant to determining whether a person is living in such a relationship is neither necessary nor desirable. The same applies in the law of succession.
- 156 SAME-SEX COUPLES – The Commission accepts that the proposal to link same-sex couples with the concept of a “de facto relationship”, through the terms “in the nature of marriage”, will be controversial. This controversy is sometimes linked with the perception that same-sex couples are more likely to have temporary relationships with no long-term commitment. But the courts will take the temporary nature of the relationship into account in deciding whether it is “in the nature of marriage”. Courts will also take into account whether there has been commingling of property and whether any financial disadvantage has resulted from the relationship. This is unlikely to occur if the relationship is a temporary and uncommitted relationship (as has already been pointed out, para 149).
- 157 Putting to one side the issue of long-term commitment, the issue is about descriptions and symbols. It raises a question about the effects of acknowledging in a statute that the two types of relationships are comparable, and of the linking of gay and lesbian relationships with those “in the nature of marriage”. But in the Commission’s view, considerations of simplicity and precision of drafting are decisive. We could perhaps devise a separate provision for same-sex couples, not linked explicitly with the concept of marriage. This would serve the same purpose without offending those people who object to the use of the term “marriage” in this context. But it would draw on exactly the same criteria as do the words “in the nature of marriage” (eg, companionship, property sharing, lawful intimacy, financial and other reliance, commitment, and so on). It would be difficult to capture in any other form of words the required intensity of the relationship. In any event, Parliament has recently accepted a very similar wording as the proper one in a related context.¹⁰⁰

¹⁰⁰ The Domestic Violence Act 1995 s 2 (read by the House of Representatives for the third time on 12 December 1995: *Parliamentary Bulletin*, 96.06, 22 April 1996, 29) reads
“Partner”, in relation to a person, means—
(a) Any other person to whom the person is or has been legally married:
(b) Any other person (whether the same or the opposite gender) with whom the person lives or has lived in a relationship in the nature of marriage (although those persons are not, or were not, or are not or were not able to be, legally married to each other): . . .

- 158 PRIORITY OF PROPERTY DIVISION CLAIMS WHERE THERE ARE TWO OR MORE RELATIONSHIPS – There is a question about people who enter two or more de facto relationships (or a de facto relationship and a legal marriage). These seldom if ever arise in the case of married people (though the present law¹⁰¹ may be difficult to apply where one partner believes the couple have married, when the marriage is in fact bigamous).¹⁰²
- 159 Yet it would be surprising if these issues could not be resolved by applying present matrimonial property law principles. Relationships that are sufficiently “marriage-like” will usually be exclusive or monogamous: one to one at any given time. Sometimes at the time of death a will-maker who is legally married will also be involved in a post-marriage de facto relationship. In these cases the property division claims will be met in the order of the relationships. This is because the will-maker could not have brought property to the second relationship if it was already affected by unresolved claims arising out of the first. The de facto partner, whose relationship began after the will-maker left the marriage, can claim only from the property remaining after the legal spouse’s entitlement is settled.
- 160 This suggests a general principle:

If a will-maker has two or more *successive* relationships, the property division claim of the partner in the first relationship in time will have priority over the property division claims of partners in later marriage relationships.

Example 6:

Husband is married to Wife for 15 years. When they separate, a large part of the property accumulated during the marriage is held in Husband’s name. Six months after the separation Husband establishes a relationship in the nature of marriage with Partner. The de facto relationship ends on his death 2 years later. Wife does not claim a property division during Husband’s life.

The court would first deal with Wife’s property division (for her share of the property accumulated during the marriage which Husband and Wife held at the date of separation). The court would determine what part of the property Husband brought to the de facto relationship was subject to Wife’s first property division. Then it would consider Partner’s division of the property accumulated during the de facto relationship. Partner could have no right to share property which Husband brought to the de facto relationship but which was subject to Wife’s earlier right.

- 161 This principle alone is insufficient to deal with contemporaneous relationships. The Commission proposes that:

If a will-maker has two or more *contemporaneous* relationships, the court should first decide which parts of the estate of the deceased person are attributable to which partnership. For parts of the deceased person’s estate which the court

¹⁰¹ Matrimonial Property Act 1976 ss 2, 4(4); Matrimonial Property Act 1963 ss 2, 5.

¹⁰² Crimes Act 1961 ss 205–206. See, for example, *Le Gale* (1979) 2 MPC 108, though here there was no competing claim by the legal wife.

cannot practically attribute to a partnership, entitlements should be proportionate to the contribution of each partnership to the whole estate.

- 162 Contemporaneous de facto relationships are not, as far as we can tell, frequent. But they can occur, for example, where a married will-maker establishes a long-term intimate relationship with a de facto partner at the same time as continuing a marriage. Neither spouse nor partner may know anything of the other relationship. In principle there will be a separate pool of property attributable to each relationship, but in practice it may be difficult to identify all the property as attributable to a relationship. Although some assets are clearly identifiable as connected with one household, others will not be connected to any particular household. Neither partner may know that they exist.
- 163 Where it is impractical to divide estate property into pools attributable to each of two relationships, each property division claim should be satisfied proportionately to the contributions each relationship made to the whole of the estate.
- 164 The principle of equal sharing, by contrast, would operate unfairly. While there may be equality between the two people concerned in each relationship, it by no means follows that each relationship contributes equally to the acquisition and improvement of property which has to be divided between the three (or more) people concerned. Admittedly, by rejecting the equal sharing principle, we are departing from the Matrimonial Property Act 1976, which presumes that
- partners' contributions of all kinds are equal; and
 - partners contribute to the partnership, not the property.
- However, when there are two or more relationships, different principles must apply. It cannot simply be presumed that property is attributable equally where one relationship may have little to do with property acquisition. Nor can the law erect, contrary to the fact, a combined three (or more) person partnership to which each partner is taken to have contributed.
- 165 The Commission's proposed rule will operate in this way:

Example 7:

Husband and wife have been married for 35 years when Husband dies. For the last 10 years of the marriage Husband, whose work took him to another town for half of each week, was also in a relationship in the nature of marriage with Partner. Neither Wife nor Partner were aware of Husband's relationship with the other. Husband and Wife lived together in a large home and had significant assets after 35 years of marriage. For the last 10 years of the marriage Husband and Partner lived together in a small flat, and had accumulated some property together during this time.

The court would first divide the property of Husband, Wife and Partner into 2 separate pools, with all the property identifiably linked to each household attaching to the pool to be divided between the couple in that household. Some of Husband's property would not be identifiably linked to either household. To attribute this unidentifiable property to 1 of the 2 pools, the court would assess the relative contributions of each partnership to the estate of the deceased as a whole (this might be influenced by the sizes of the pools of identifiable property, but that consideration would not be decisive).

166 PRIORITY OF SUPPORT CLAIMS WHERE THERE ARE TWO OR MORE RELATIONSHIPS¹⁰³

Will-makers' former partners who have not claimed support within 5 years of their most recent separation from the will-maker may not make a support claim.

- 167 Where a marriage dissolves during spouses' joint lifetimes, spousal support claims under the Family Proceedings Act 1980 Part VI are not time-barred after a fixed period (eg, two or three years) from separation. Instead they are constrained by a duty on each partner to assume responsibility, within a time that is reasonable in all the circumstances of the particular case, for meeting that partner's own needs. On the expiry of that period of time neither partner is liable to maintain the other: s 64(2).¹⁰⁴
- 168 Rather than a provision like this, the Commission proposes a fixed time period within which former partners must make a support claim. This is much simpler from the point of view of an estate administrator. It also prevents the opening up of issues out of long abandoned relationships, based solely on the fact that the estate may be in a better position to support the claimant than was the living will-maker.
- 169 Former partners must make a support claim within five years of their most recent separation from the will-maker. If they do not, they will be barred from making a support claim against the will-maker's estate. (This period is based on two years pre-dissolution separation time, plus a standard three years limitation period).
- 170 Further:

There would be a presumption that any property settlement includes within it a settlement of the support claim, if no contrary intention is expressed in the settlement.

This is a useful provision to eliminate stale claims. It deals with the interpretation of property division agreements on separation. Property division settlements on or after separation comprise any potential support claim on the will-maker's death, unless the contrary is specified in the agreement.

- 171 Unless one of the support claims is barred by the above rules, this general rule would apply:

¹⁰³ See Appendix B for proposals for resolving the relative priorities of claims generally.

¹⁰⁴ At present, if Family Proceedings Act 1980 support proceedings are initiated after a dissolution is granted, but not determined when one partner dies, the survivor may continue the proceedings against the personal representative of the deceased partner: s 70(1). In these circumstances the court may make a 1980 Act support order against the deceased partner's estate within 12 months of the date of the grant of administration in New Zealand of that estate: s 71. Family Proceedings Act 1980 support proceedings in these circumstances should be treated as proceedings under the Draft Act: see s 68, para C215.

If two or more support claims are made against the will-maker's estate by partners, these claims will be borne proportionately to the amount of the support award the court makes for each claimant.

Example 8:

Will-maker is survived by Wife (his former spouse) and Partner (his former de facto partner). Both survivors make a support claim against will-maker's estate. The court makes a support award to Wife of \$75 000. The financial consequences for Wife of a 25-year marriage are very significant. The court also makes a support award to Partner of \$25 000. Partner is more readily able to support herself after an 8-year relationship.

There is insufficient property to meet both support awards in full. The court will divide the available property between the 2 support awards in accordance with the size of each award. The court will attribute the available property to the awards according to the ratio 3:1 (Wife's award \$75 000:\$25 000 Partner's award). The court therefore attributes 3/4 of the available property to Wife's award and 1/4 to Partner's award.

Conclusion

- 172 The Commission's proposals would put de facto relationships in a similar legal position, as regards property division and support claims, to marriages. There could, of course, be differences in application of the relevant principles, if that is appropriate to the particular relationship.

6 Children's claims

Present law and purpose of reform

- 173 CHILDREN MAY CURRENTLY MAKE A CLAIM for “adequate provision for their proper maintenance and support.”¹⁰⁵ This applies to children of any age. Sons and daughters in their 50s and 60s can succeed in obtaining substantial awards against the estates of parents who have disinherited them, or have left property amongst the children in proportions which the courts regard as unjustified.
- 174 The purpose of the Commission's proposals is to define the right of children to claim in more precise terms than the present law does. Those children whom will-makers have the responsibility of supporting at the time of death must clearly have a support claim. In the case of young children, young adults in training and disabled children, we think that the parent's responsibility is generally accepted in the community. Our proposals for these children are contained in this chapter. The parent's responsibility for mature children is much less clear and will be considered in the next chapter.

Proposal in outline

A child of the will-maker should be able to claim a support award to ensure the child's maintenance and education while the child is

- under 20 years of age, or
- under 25 years of age and undertaking education or vocational training, or
- unable to earn an independent livelihood by reason of a physical, intellectual or mental disability that developed when the child was under 25 years of age.

Example 9:

Will-maker was married twice. Child1 is the only child of his first marriage. There are 2 children of his marriage to Wife: Child2 and Child3. Will-maker's estate is worth \$270 000 on his death. Under the will Wife receives \$50 000 from will-maker's estate, Child3 and Child2 (aged 10 and 19 years respectively) receive \$5 000 each. Child1, now aged 34 and in full-time employment, also receives \$5 000 from will-maker's estate.

Wife brings property division and support claims against will-maker's estate, and is awarded (under our proposed law – see chapter 3) a total of \$200 000. This represents her contributions to the marriage relationship (\$135 000) together with a \$65 000 lump sum support award which allows her to enjoy a reasonable, independent standard of living.

¹⁰⁵ Family Protection Act 1955 ss 2–4.

- 175 Applying our proposed legislation, the judge now comes to the children's claims, which are directed at the balance of \$70 000. A lump sum support award amounting to \$40 000 might (depending on the circumstances) be made for Child3, as she must complete her secondary schooling (and perhaps tertiary education) before she can reasonably be financially independent. Child2 might be awarded \$25 000, slightly less, because she has begun tertiary education and has part-time employment. At this point we leave open the question whether Child1, as an adult child without a disability, is entitled to claim under this provision. In any event, as the estate is large enough, Child1 can retain the \$5 000 will-maker left to him under the will.
- 176 By comparison, under the present law, each child might perhaps be awarded between \$33 750 and \$54 000 each. There would be no separate, priority award for children who are still dependent on the will-maker, though the capital sum awarded to these children would probably be larger than that awarded to their adult siblings.

Reasons for the proposal

- 177 The Commission considers that separating out the claims of children who are likely to be dependent on the will-maker has these advantages:
- it is clear and specific;
 - it eliminates the confusion which exists in the present law;
 - it complies with expectations held within the community and with the principles of support law (Child Support Act 1991 s 4);
 - it complies with international obligations (International Covenant on Civil and Political Rights 1966 articles 23(4) and 24 and United Nations Convention on the Rights of the Child 1989 articles 18(1), 23, 27 and 28); and
 - it limits children's claims so that more significant claims (eg, spouses,¹⁰⁶ young children's, de facto partners' and contributors' claims) can be given full effect, and the less clear adult child's claim relegated to a lower rank.

Proposal in detail

178 THE PURPOSE AND AMOUNT OF SUPPORT

The purpose of support is to ensure that the will-maker's child is reasonably maintained and educated for the period in respect of which the child may claim.

The amount of the claim is limited to what is reasonably necessary for this purpose.

¹⁰⁶ A recent illustration of an application which appears to be inconsistent with good policy (though it succeeded, and ultimately resulted in depriving a widow of 20% of a small estate) is *Denson v Reid* (1995) 14 FRNZ 8. See also the High Court order reversed by the Court of Appeal in *Clements v Clements* [1995] NZFLR 544. In 235 Family Protection Act 1955 cases from 1985–1994 "a common award in those [66.5% of] cases [where the estate was worth over \$100 000] was between 1/5th and 1/8th of the estate . . . [t]he courts endeavour to protect the interests of children of former relationships even if is at the expense of the surviving spouse": Peart (1995) 1 BFLJ 224, 225–226. See also *Example 1*, para 79 and footnote 132.

- 179 There are three categories of claimant.
- 180 CHILDREN UNDER 20 YEARS OF AGE – This generally accords with child support law during a will-maker’s lifetime. But that law allows custodians of children to claim support from their parent only when children are under 19 years, unmarried, and not in full employment or a Government-assisted work scheme, nor receiving a tertiary student allowance or social security benefit. The Commission’s proposals dispense with these additional requirements. It is enough that the claimant be a minor child. That is to say, a child under 20.¹⁰⁷
- 181 CHILDREN UNDER 25 YEARS OF AGE WHO ARE UNDERTAKING OR WISH TO UNDERTAKE EDUCATION OR TECHNICAL OR VOCATIONAL TRAINING – Article 28(1)(c) of the United Nations Convention on the Rights of the Child (1989) provides that states which are parties to that Convention recognise the right of the child to education, and shall make higher education accessible to all on the basis of capacity by every appropriate means. Higher tertiary education course costs and reduced allowance entitlements presuppose a greater degree of parental support for single students under 25 years of age.¹⁰⁸
- 182 Support through a period of tertiary education or technical or vocational training is very important in enabling a child to achieve financial independence. As Grainer says, “[i]t is possible that today one’s education and resultant earning capacity is one’s most valuable asset” and that the provision of educational opportunities for children is today “a crucial wealth transfer within families.”¹⁰⁹ It is unreasonable to expect all children in this category to be completely financially independent until their training is complete.
- 183 It is not proposed, however, that children who have returned to education after a prolonged period of independence should be able to claim under this head. There is therefore a limit of 25 years of age. Although expressed as an age limit, its basic purpose is to establish the longest period during which a parent’s clear legal obligation of support should exist. This limit also acts to put a ceiling on the amount which should be awarded. But intervening periods during which a child has been employed will not disqualify the child.
- 184 DISABLED CHILDREN – This category includes children who are unable to earn a reasonable livelihood by reason of a mental, intellectual or physical disability which developed when the children were under 25 years of age. Children disabled at an early age may require more extensive support in quantity and duration if they are to enjoy similar opportunities to develop independently. Children whose disability developed when they were over 25 years of age may have had some real opportunity to develop financial independence. Children over 25 years of age may also enjoy greater disability support from public resources.¹¹⁰

¹⁰⁷ The Age of Majority Act 1970 s 4(1) provides that “[f]or all the purposes of the law of New Zealand a person shall attain full age on attaining the age of 20 years.”

¹⁰⁸ Student Allowances Notice SR 1995/70, Table 1; Education Act 1989 s 303(2)(b).

¹⁰⁹ Langbein, “The Twentieth-Century Revolution in Family Wealth Transmission” (1988) 86 Mich LR 722, 724–739; Grainer, “Is Family Protection a Question of Moral Duty?” (1994) 24 VUWLR 141, 159; Estin, “Love and Obligation: Family Law and the Romance of Economics” (1995) 36 William and Mary LR 989, 1071.

¹¹⁰ For example, compensation under the Accident and Rehabilitation Compensation Insurance Act 1992.

185 We have defined this third category in clear-cut terms. This may be seen as unfair to those who suffer a continuing disability arising out of childhood, but who do not quite fit within the criteria laid down. For example, a child's disability might not become fully apparent until the child is aged 26 or 30, and the child may not then have a reasonable opportunity to achieve financial independence. There may be a need for some discretionary power so that the court can extend the age limits. Whether this is necessary depends in part on what is decided for adult children generally: see chapter 7.

186 AMOUNT OF SUPPORT

The measure of support should be sufficient

- to ensure that the child is reasonably maintained, educated and advanced towards financial independence,
- for the remaining period of eligibility, but no longer.

Courts should determine "reasonable" support considering (at the time that the will-maker died) each child's

- age and stage of development, including level of education or vocational training,
- other actual and potential sources of support, including child support from a surviving parent or a support award from the estate of another deceased parent,
- total support received from the deceased parent,
- reasonable ongoing needs, and
- actual and potential capacity to meet their own reasonable needs.

187 FORM AND PAYMENT OF SUPPORT – Awards should usually be lump sum payments, although courts should be able to order periodic payments if the child's circumstances require. In some circumstances it will be appropriate for awards to be paid or transferred direct to the child. In other cases awards would be better made to custodians: those who are the sole or principal providers of (or who share substantially in the provision of) the child's ongoing daily care.

Support awards may take the form of lump sums or periodic payments.

Support awards may be made to a child direct or to a custodian on behalf of the child.

188 PRIORITY OF CHILDREN'S SUPPORT CLAIM – Appendix B sets out proposals for resolving the relative priority of support claims competing with other claims and one another.

189 WELFARE AND SUPPORT

Will-makers should have primary responsibility for supporting children under 25 years of age and should not be able to rely on the State providing primary support: courts making support awards should not take into account any means-tested benefit available to a child under 25 years of age.

Will-makers should not have primary responsibility for supporting disabled children of 25 years of age or older. If welfare support is available, the will-maker's duty is to supplement that support.

- 190 Because will-makers have a special and immediate responsibility for support during the period when their children are under 25 years of age, parental resources will meet the needs of children under 25 years of age before taxpayers' resources. This accords with the express or implied policy of welfare and support law.¹¹¹ The policy of the Department of Social Welfare is based on the assumption that, while complete dependence on a parent ceases at an age no later than 18 years, some reliance on the parent's resources may continue up until 25.
- 191 It follows that when making an award in favour of a child under 25 years of age no account should be taken of means-tested benefits payable to the claimant (the present law: Family Protection Act 1955 s 13). It also follows that no claimant should be able to contract out of making a support claim (see chapter 10).
- 192 The position is different with disabled children over 25 years of age. The general policy of welfare and support law (whether express or implied) is that a will-maker during his or her lifetime has a finite responsibility for his or her child. If a child in need is no longer a minor, even if that child has a mental, intellectual or physical disability, the will-maker is not legally responsible for meeting that need.¹¹² The needs of an adult child, especially a child with illness, or a child whose mental, intellectual or physical disability creates special needs, may be very significant. The Department of Social Welfare regards the child as a single person family unit and does not require support from parents. Parents are not legally obliged during their lifetime to devote all their resources to these special needs before and instead of taxpayers' resources.
- 193 Will-makers should be required nevertheless to make provision to supplement state-funded welfare. The care a disabled child aged over 25 receives under the health and welfare systems should be taken into account by courts when considering the child's claim to be supported from the will-maker's estate. The court will also have to consider the effect on the child's means-tested benefits of any provision which may be made from the will-maker's estate, as it will augment the child's own means.

Conclusion

We propose that children be able to claim a support award to ensure the child's maintenance and education while the child is

- under 20 years of age, or

¹¹¹ See, for example, Child Support Act 1991 ss 9, 50; Social Security Act 1964 ss 3, 27B, 28, 29, 60F, 63A, 70A; Student Allowances Notice SR 1995/70 Table 1; Education Act 1989 s 303(2)(b).

¹¹² See, for example, Child Support Act 1991 s 5; Social Security Act 1964 ss 39A–39E, 40, 54, 58.

- under 25 years of age and undertaking education or vocational training, or
- unable to earn a reasonable, independent livelihood by reason of a physical, intellectual or mental disability that developed when the child was under 25 years of age.

194 The claims which other children might have against the estate of a will-maker are discussed in the next chapter.

7

Adult children's claims

195 **I**T IS CLEAR THAT WILL-MAKERS should provide for those children who cannot reasonably be financially independent (see chapter 6). But should children who have had the opportunity to establish themselves in life also have rights if they are disinherited? Children may currently make a claim for "adequate provision for their proper maintenance and support."¹¹³ This applies to children of any age. The basis of such a claim is considered in this chapter. It is a matter which was seldom questioned in the law reform reports of the 1970s and the 1980s.¹¹⁴ But it has proved controversial in our own consultations and deserves detailed attention.

196 Some will-makers can be unfairly discriminatory or vindictive when considering whether to provide for children.

Example 10:

Will-maker separated from his wife a year before he died. After gifts of a motor car (to a car club) and personal effects (to his 3 children), he left all his estate to his unborn grandchildren. The children were at that time aged 16, 13 and 11. The court found that Will-maker acted "not for the legitimate purpose of disposing of his estate with regard to moral duty, but . . . [out of] a sense of spite in relation to his wife and children."¹¹⁵

Example 11:

Will-maker and Wife1 had 3 children: A, B and C. Will-maker and Wife1 separated. Wife1 and the children went to Australia. One year later, child A returned to New Zealand to live with Will-maker, who had entered into a relationship with a woman who became his second wife: Wife2. Wife1 remarried in Australia, and she and her new husband returned to New Zealand with B and C. All of the parties lived in the same household for a while. Will-maker got on well with his son A. By contrast, Will-maker was perhaps upset at B adopting her stepfather's name. Both B and C disliked Will-maker making disparaging remarks about their mother.

¹¹³ Family Protection Act 1955 ss 2–4.

¹¹⁴ For an exception, see the Reservation by Mr Arthur Close in Law Reform Commission of British Columbia, *Statutory Succession Rights* (1983) Report No 70, 152–159. While there is room to doubt that distribution on intestacy is "by definition" the result of would-be will-makers not considering the obligations they owe to others, Mr Close does argue on this basis for a judicial discretion to admit adult children's claims against intestate estates.

¹¹⁵ *In re E* (unreported, High Court, Auckland, 25 February 1992, M 1387/90). In the event, the court decided that all the available estate was required to meet the widow's claim, and no family protection order was made in favour of the children.

Will-maker made several wills. At first, after small bequests, he left everything to the 3 children equally. Later Will-maker cut out B and C from the residue, the biggest part of the estate, which went to A alone. Will-maker felt that B and C exploited him in self-interest and otherwise ignored him. He thought that they were not speaking to him in the street. He also considered B and C to be part of his first wife's family.¹¹⁶

- 197 These are illustrations of ways in which the will-maker may fail to meet ordinary criteria for sensible will-making. Other examples include wills which over-value what a child has done for them, or which ignore children who live in a different city. Other wills symbolise the will-maker's approval or disapproval of a child's help, conduct, manner or lifestyle. There are also wills which fail to acknowledge and make amends for the will-maker's harsh treatment of children during their childhood and adolescence.
- 198 The reasons for provisions like this can be various: for example, 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 distinguished from the standards by which one assesses whether a will is fair or not. Unless those standards are known and articulated, 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 devising the provisions which are to be put in place of those made by the will-maker.
- 199 Under the present law, the courts would find little difficulty in making provision for the adult child in *Examples 10 and 11* (para 196), assuming there were no prior claims. The amount of provision made, and the precise reason for settling that amount, are much more uncertain. This uncertainty is compounded when the courts move beyond the (comparatively small) number of reported and unreported cases where the will-maker has clearly been arbitrary. There are many cases where the will-maker has some reason for not being generous, though it is not always a reason approved of by the court.

WHY DO THE COURTS INTERVENE?

- 200 Courts appear to have before them the following objectives. Any one of them may prove decisive in the particular case.
- *To acknowledge the family relationship.* The objective here is to symbolise the bonds which ought to exist in the ideal family, and to strengthen them by insisting that the will-maker acknowledge them without regard to the real state of affairs between parent and child.
 - *To reward the child's good conduct or compensate the child for the will-maker's bad conduct.* The objective here is to encourage the child to act dutifully to the will-maker, and to compensate the child for defects in its upbringing.
 - *To protect a child who is in need.* The objective here is to help people in need, and to symbolise the family as the source of that help.

¹¹⁶ See *P and L v B* (unreported, High Court, Wellington, 23 February 1996, CP 59/92). Will-maker gave a \$495 000 house to Wife2 and A equally, \$25 000 to Wife2 and all the rest of the estate to A. The court divided the estate valued at around \$900 000 as follows: Wife2 received half of the house and the \$25 000 (a total of around \$250 000); B and C received \$100 000 each; and A received the rest of the estate (around \$450 000).

- 201 Two things may usefully be said about these policy objectives. The first thing is that two of them at least (the first and third) draw on “symbolic” values, there being no suggestion that any specific improvement in family life or in the public welfare is necessarily achieved by an award, beyond saving the State the cost of welfare payments. The social effects of what is being done are likely to be speculative. True, symbolism can be important and useful if it is known and acted upon by the general public in ordinary life. However, it is not clear that the present judicial practice is known and acted upon by the general public in ordinary life.
- 202 The second is that the objectives conflict, even when resolving the most basic family protection issues. Take for example a will-maker who has two children, A and B. A is in need, B is not. Neither has been attentive to the will-maker in the will-maker’s old age. Both have been disinherited. Under the first objective, they would share equally in the estate, or part of it. Under the second objective, neither would get anything. Under the third objective, only A would receive a share. Which of these objectives is to be preferred, according to current practice?

Acknowledging family relationships

- 203 This approach is certain and clear. It reflects the view that “[c]hildren should not be disinherited unless there are exceptional circumstances, not merely because it is hurtful but more especially because it is tantamount to rejection from the family.”¹¹⁷ It is implicit in this view that will-makers should be required to acknowledge their children by leaving them property on death. Not only that, but will-makers should give each child an equal share.
- 204 Nevertheless, it is difficult to support an invariable duty to acknowledge children irrespective of their need and their contributions to the well-being of the will-maker. Such a duty cannot directly promote cohesion amongst family members, since an award would take no account of whether the child has been supportive of the will-maker during the years leading up to the will-maker’s death. There is generally no corresponding legal duty on the child’s part to make surplus assets available to the will-maker by way of comfort or support (but see chapter 8). The imposition of any such duty appears to assume a closeness between will-maker and adult child which, when a child is disinherited, will frequently not exist.
- 205 Not surprisingly, therefore, a child’s need to be acknowledged in a parent’s will has never been endorsed by Parliament.¹¹⁸ The courts also acknowledge that it is not a function of awards under the Family Protection Act to achieve equality.¹¹⁹ No-one with whom we have consulted to date has been prepared

¹¹⁷ Peart (1995) 1 BFLJ 224, 225.

¹¹⁸ Parliament rejected Sir Robert Stout’s two attempts (in the Limitation of Power of Disposition by Will Bills 1896 and 1897) to introduce a limited system of equal fixed shares for children, partly because it was thought fixed shares would inevitably reward some undeserving children and would not discriminate from case to case: Peart, “The Direction of the Family Protection Act 1955” [1994] NZ Rec LR 193, 193–194; Atherton (1990) Otago LR 202, 212, 217; Patterson (2nd ed, Butterworths, Wellington, 1994), para 1.2, 2–3.

¹¹⁹ See, for example, *Re Dobson* [1991] NZFLR 403; *Cooper v Compton* (1987) 2 FRNZ 469, 476; *Re Wilson* [1992] NZLJ 375.

to support an adult child's right to a fixed share of the estate, which seems the logical corollary of the principle of acknowledgement. This is so because if the only entitling criterion is being a child of the will-maker, there can be no ground on which to discriminate between any children. All must share equally in all or part of the estate.

- 206 It has been suggested to us that, even if equal treatment is not always warranted, there is one special situation which calls for it. This is where the will-maker is both a parent and a step-parent, outlives his or her second spouse or partner and succeeds to all the couple's property. The stepchild needs to be able to claim so that the combined assets of the couple can be equally (or at least equitably) distributed between the two families. But deciding whether the stepchild should succeed, and to what amount, would put a great burden on the courts, unless the objectives and method of quantification of awards are made much clearer.
- 207 The Commission's proposals earlier in this paper (paras 106–110) provide, in our view, a better solution to the problem of stepchildren. They allow the surviving step-parent to retain the property in the meantime. But on the death of the step-parent, the stepchildren can claim in their own parent's name a division of the partnership property which remains in the step-parent's estate. Whether they have that right, however, would depend on the terms of their parent's will, not on the court's view on whether they should share in the step-parent's estate.
- 208 In theory, therefore, the courts are not required to make equal provision for all children, nor has a strong case been made that they should be. In the practice of making awards, however, a different picture emerges. In a significant number of cases claimants have succeeded "purely because they were children of the deceased and had done nothing to disentitle them from an appropriate share of the estate."¹²⁰ Even where claimants do not establish "need" (in a very broad sense), courts frequently make awards which tend to be equal. This happens even when it is by no means clear that the financial circumstances of the children are substantially the same.¹²¹
- 209 This is not satisfactory. If acknowledgement of the parent-child relationship is to be the underlying purpose of the new legislation, a system of judicial discretion is not a good way to achieve that purpose. It would be preferable, as has already been pointed out, to allocate a fixed share of the estate to be reserved for children and, if needs be, stepchildren. But it is difficult to give effect to a fixed-share regime in a system in which it is acknowledged that the will-maker's primary duty is to a spouse or de facto partner and infant children, who have first claims. The adult child's share can only be taken from what is left over. This diminishes the appeal of the fixed-share regime as a clear and definite provision for children.
- 210 The best that can be done is to establish a strong presumption that the children of a will-maker are entitled to share equally in what is left over after prior claims have been satisfied. But this would in effect remove any effective testamentary power left to the will-maker. Such an approach would be even more severe than the "legitimate shares" regimes derived from Roman law. It is

¹²⁰ Peart (1995) 1 BFLJ 224, 225, puts the percentage of these cases as high as 27%.

¹²¹ See, for example, *Blyth v Cox* (unreported, High Court, Hamilton, 28 July 1995, M 78/93); *In the estate of Y* (unreported, High Court, Auckland, 16 May 1995, M 1732/88).

not surprising, therefore, that neither a fixed share, nor a presumption of equal sharing, has been much supported in our consultations.

Reward and punishment

- 211 This objective is flexible and corresponds with what many will-makers may wish to do. But whatever the will-maker may (wisely or unwisely) feel on the subject, it has in practice proved very difficult for the court to make the same judgment in the place of the will-maker. When good or bad conduct is identified, it admittedly influences what the courts will do. However, the extent of that influence is unclear.
- 212 With regard to the conduct of the *claimant*, courts have never seen this as the primary ground for making or refusing an award under the Family Protection Act 1955. It will be considered only when relevant to other factors the courts take into account.¹²²
- 213 The courts have often discouraged allegations of wrongful conduct against a claimant. They say it unnecessarily inflames and embitters family relations, sometimes without factual foundation.¹²³ Although a claimant can theoretically be disqualified because of wrongful conduct,¹²⁴ courts have “[b]een reluctant to *refuse* to make orders on this ground, preferring to regard the conduct of the applicant, not as disintitling, but rather as a circumstance to be considered in determining the quantum of provision made.”¹²⁵ More recent authority would suggest that only the gravest of misconduct directed against the will-maker personally is disintitling.¹²⁶

¹²² *Re Worms* [1953] NZLR 924; *Permanent Trustee Co Ltd v Fraser* (1995) 36 NSWLR 24.

¹²³ *Hoffmann v Hoffmann* (1909) 25 NZLR 425, 428; *Re Green* [1951] NZLR 135, 141; *Re Williams* [1953] NZLR 151; *Re Ward* [1964] NZLR 929; *Re Meier* [1976] 1 NZLR 257.

¹²⁴ New Zealand family provision legislation has always empowered the court to order provision for eligible family from the estate of the will-maker, with the proviso that the court “may refuse to make an order in favour of any person whose character or conduct is such as in the opinion of the court to disintitle him or her to the benefit of an order”: Testator’s Family Maintenance Act 1900 s 2; Testator’s Family Maintenance Act 1906 s 3(2); Family Protection Act 1908 s 33(2); Family Protection Act 1955 s 5(1).

¹²⁵ Patterson (2nd ed, Butterworths, Wellington, 1994), para 5.8, 77, emphasis added. Courts have applied this proviso to hold that a will-maker had no duty to make any provision for an applicant who left a wife without any reason at all (*Geen v Geen* (1913) 33 NZLR 81, as explained in *Golightly v Jeffcoate and Others* (1913) 33 NZLR 91); was a chronic drunkard (*Ray v Moncrieff and Another* [1917] NZLR 234; though compare *Re Field* (unreported, High Court, Napier, 29 June 1989, CP 66/87) and *Re Alexander* (unreported, High Court, Dunedin, 12 December 1989, CP 76/89)); lacked industry, financial prudence and thrift (*Sinclair and McKenzie v Sinclair and Sutherland* [1917] NZLR 145); left a husband to have a relationship and child with another man, and later attempted a bigamous marriage with a third man (*Packer v Dorrington and Another* [1941] GLR 337, though compare *Re Z* [1979] 2 NZLR 495, 509; “It is not a question of misconduct or sexual morality”. See too *Re A* (unreported, High Court, Auckland, 17 November 1993, M 711/93) where counsel agreed that sexual preference was irrelevant.

¹²⁶ For example, unlawfully killing the will-maker, as in *Re Royse* [1984] 3 All ER 339; *Troja v Troja* (1994) 35 NSWLR 182, 185–186, and compare the suggested (obiter) effect of domestic violence in *Re Nicholls* [1994] NZFLR 86. In *Re Smith (Deceased)* (1991) 8 FRNZ 459 the court suggested that criminal conduct which did not directly affect a will-maker, and which merely created the “normal disappointment and anguish of a mother at her son’s wrongdoing” would not exclude an applicant from provision or diminish the provision which should be made for an applicant with an otherwise good case.

- 214 The position with regard to rewarding claimants for services is even less clear. With regard to claimants' good conduct, courts have said that a claimant's contribution to the making of the will-maker's estate is not a sufficient ground to make an award under the Family Protection Act 1955. It can, however, be taken into account where there are other factors justifying an award. In practice, once the threshold requirements of the claim are met, the claimant's contributions are frequently taken into account to justify substantial awards.¹²⁷ There seems to be no threshold requirement that services themselves be substantial.
- 215 This approach might perhaps be understandable if there were no adequate statutory right to claim recompense for contributions. But it would still be illogical. If the purpose is to reward someone for services to the will-maker, it is irrelevant whether or not that person is a child, or if they are a child, whether they have fulfilled the other requirements of the Family Protection Act 1955. A better way of dealing with these claims is to provide a separate jurisdiction under which an award can be made to a child or any other person who has contributed to the will-maker's estate. But that could only apply to significant services, not the small and reciprocal services of daily living. This is proposed in chapter 9.
- 216 Coming now to the conduct of the *will-maker*, we can put aside cases where the law already provides legal redress for a parent's abusive conduct which seriously damages a child.¹²⁸ These complaints aside, we are left with complaints of lesser misconduct. Such misconduct may be perceived as hurtful and the source of a grievance but will not usually give rise to any legal remedy because the law does not impose impossibly high legal duties on parents who may be well-meaning but ineffective.
- 217 The reasons which have made courts reluctant to provide general legal remedies apply equally to remedies for testamentary claims. Nevertheless, it is sometimes suggested by the courts in family protection cases that a will-maker had a duty to make provision for a claimant in the will by way of "contrition for past neglect." Similarly, where a parent and child have not been in touch for a very long time, courts have suggested that the parent's own attitudes may have

¹²⁷ Peart (1995) 1 BFLJ 224, 225.

¹²⁸ Admittedly the Accident and Rehabilitation Compensation Insurance Act 1992 s 14 bars "proceedings for damages" arising directly or indirectly out of personal injury covered by the Act, the Accident Compensation Act 1982 or the Accident Compensation Act 1972. But in *Donselaar v Donselaar* [1982] 1 NZLR 97 the Court of Appeal held that an action for exemplary damages following the torts of assault and battery by a relative (brother) could still be brought in New Zealand. The Canadian courts have held that parent-child relationships are fiduciary in nature and may give rise to an action for damages for breach of fiduciary duty when there is incest or sexual assault: see, for example, *KM v HM* (1992) 96 DLR (4th) 289; *J v J* (1993) 102 DLR (4th) 177. For New Zealand examples, see *S v G* [1995] 3 NZLR 681, (1995) PRNZ 465; *H v R* (unreported, High Court, Auckland, 22 November 1995, CP 227/94). Claims may also be made against a tortfeasor's estate after he or she dies, but the limitation requirements of the Law Reform Act 1936 may be restrictive: see, for example, the claim for exemplary damages in respect of sexual abuse in *T v H* [1995] 3 NZLR 37. As between parents and children (and persons in the place of a parent of a child) the Crimes Act 1961 s 59(1) provides that "Every parent of a child . . . is justified in using force by way of correction towards the child, if the force used is reasonable in the circumstances." "Justified" is defined in s 2 as "not guilty of an offence and not liable to any civil proceeding."

contributed to the estrangement. Such assessments go too far in attributing blame. This is an area where what constitutes bad conduct is not generally agreed. The court is unlikely to be able to weigh all the circumstances accurately years after the event and without evidence from the will-maker. Family members will find it hurtful to be required to attack or defend the conduct of a parent.

Need

- 218 This is the usual basis given for family protection laws.¹²⁹ It was also the primary purpose of the original family protection legislation.¹³⁰ But it has proved an elusive concept to define. This is perhaps a consequence of the lack of clearly defined purpose lying behind the jurisdiction. If, for example, the concern of the legislation had been to protect claimants from destitution (or to protect the State from having to meet the cost of supporting them), the term could have been defined in the same way as it is for welfare eligibility.
- 219 But the purposes are much more diffuse than that. The concept of “need” has been considerably relaxed. Will-makers are now presumptively required to make wills not only to support close family, but also to provide for family inheritance.¹³¹ In a number of cases where claims have been successful, moreover, it seems that the claimant does not “need” support in any economic sense of the word, in fact they may be in a better financial position than the will-maker. Adult children of an earlier marriage may receive substantial capital awards, even though they are less needy than the widow.¹³² Such cases suggest that the courts have extended the jurisdiction far beyond its original purpose.
- 220 Provision to meet “need” might of course be limited to those persons who were actually receiving support from the will-maker at the time of death.¹³³ During his or her lifetime, however, a will-maker may undertake to provide support for a wide range of people at different times for different reasons. The will-maker may, for example, undertake to support someone as a matter of charity, convenience or friendship to another. It is not safe to infer from the fact that the will-maker is providing support for someone while they are alive that they would want to continue to support that person after death. Nor does the fact

¹²⁹ Compare Law Commission (England and Wales), *Family Law: Second Report on Family Property: Family Provision on Death* (1974) Report No 61; Ontario Law Reform Commission, *Report on Family Law: Part IV: Family Property Law* (1974); Alberta Institute of Law Research and Reform, *Family Relief* (1978) Report No 29; Law Reform Commission of British Columbia, *Report on Statutory Succession Rights* (1983) Report No 70, minority reservation; Oughton (ed), *Tyler's Family Provision* (2nd ed, Professional Books, Abingdon, 1984), 91; Manitoba Law Reform Commission, *The Testators Family Maintenance Act* (1985) Report No 63; Hong Kong Law Reform Commission, *Report on the Law of Wills, Intestate Succession and Provision for Deceased Persons' Families and Dependants* (1987) Report on Topic 15; Amighetti, *The Law of Dependant's Relief in British Columbia* (Carswell, Toronto, 1991), 178–180; Attorney-General's Law Reform Advisory Council, *The Desirability of Reforming Aspects of Part IV of the Administration and Probate Act 1958 (Vic)* (1994) Discussion Paper; Grainer (1994) 24 VUWLR 141.

¹³⁰ Atherton (1990) 7 Otago LR 202, 216.

¹³¹ Peart (1995) 1 BFLJ 224, 226–227.

¹³² See, for example, *Re Gordge* (unreported, High Court, Auckland, 19 August 1985, A 734/82); *Re Lawson* (unreported, High Court, Wellington, 20 April 1988, CP 210/86).

¹³³ Compare Inheritance (Provision for Family and Dependants) Act 1975 (England) and Family Provision Act 1982 (New South Wales).

of support provide any certain or uniform reason why the will-maker should be obliged to continue that support after death.

Consequence of analysis

- 221 By considering each alternative objective for the law of family protection, and looking for instances where it is recognised in current judicial practice, we can see that the present law is not based on any consistent view of the matter. Two possible views (acknowledging the child, and rewarding the child for past services) are not, and cannot be relied upon, as the primary objectives of the legislation. Yet they strongly influence the outcomes of cases. A third possible ground (making parents responsible for the needs of their adult children) is given as the principal reason for the jurisdiction. But it is so broadly defined that its effect on the way cases are decided is uncertain. The practice of the jurisdiction is therefore different from any objective which can be advanced for its existence, and is open to the influence of several conflicting considerations.
- 222 This tends to confirm the view that the legislation, as it affects adult children, is not being applied with consistent principles and defined objectives in mind. Rather, it depends upon judicial views of what is fair in the context of the particular case. This makes it difficult, at least in the view of some of those we have consulted, to advise will-makers on what provisions they might make which will clearly comply with their "moral duty".

REFORM OF THE LAW

Why the present law needs review

- 223 Lack of clarity in the underlying objectives of legislation can have serious practical consequences. The present law needs review for the following reasons:
- There are appreciable differences in the awards courts make to adult children.¹³⁴ This makes it difficult to predict what the result of a claim will be.

¹³⁴ Peart's case survey of 235 Family Protection Act 1955 children's claims from 1984–1995 concludes that within the successful claims "the amounts awarded varied considerably": (1995) 1 BFLJ 224, 226. In 24.2% of the cases 57 children without siblings or competition from others were sometimes awarded 1/3 of the estate, but "more often something between one half and three quarters of the estate." In 27.2% of the cases 65 children competed with a beneficiary outside their bloodline (like a surviving step-parent), and of those

who could show financial need:

- 3 received 2/3 of the estate or more
- 7 received 1/2 of the estate
- 6 received 1/3 of the estate
- 4 received 1/4 of the estate
- 2 received 1/5 of the estate
- 4 received 1/6 of the estate, and
- 1 received 1/9 of the estate.

who could show no financial need:

- 4 received the whole estate
- 2 received 4/5 of the estate
- 1 received 3/4 of the estate
- 4 received 2/3 of the estate
- 2 received 3/5 of the estate
- 3 received 1/2 of the estate
- 1 received 2/5 of the estate
- 10 received 1/3 of the estate
- 3 received 1/5 of the estate
- 2 received 1/6 of the estate
- 3 received 1/8 of the estate, and
- 1 received 1/10 of the estate.

It also makes it difficult for conscientious will-makers to know and comply with the requirements of the law.

- Courts are uncertain precisely why they are altering the will-maker's arrangements. This makes it difficult to assess whether the court's distribution of the estate is more commendable than the will-maker's. The present broad discretion has resulted in the courts being able to choose the reasons why they are altering the will-maker's arrangements. But the present law does not require the courts to make clear what choices they have made and why.
- At present a very high percentage of adult children's claims against their parents' estates succeed.¹³⁵ These claims can reduce the amount of the will-maker's property available to meet claims made by:
 - the will-maker's surviving spouse or de facto partner;¹³⁶
 - children who cannot reasonably be financially independent; and
 - adult children and others who have contributed something of value to the will-maker (see chapter 9).

This can occur even though adult children's claims are not as clear or strong as these other claims.

- 224 **All the concerns in the last paragraph make it difficult for the Commission to support a provision which merely carries forward the present law and practice. It is clear, in the Commission's view, that the principles underlying the jurisdiction should be stated more directly. As far as possible, all ambiguities of purpose should be resolved. Unfortunately, however, of the alternatives considered in the remainder of this chapter, no single approach clearly stands out as preferable.**

The alternatives are:

- Adult children may claim awards to relieve *demonstrable financial need*.
- Adult children may claim awards to prevent *capricious or vindictive, mistaken, or accidental* disinheritance.
- Adult children may claim awards where will-makers have *no reasonable grounds* for disinheriting them.
- Adult children may not claim awards and *courts have no power to intervene at all*.

Three limits on options for "second-tier" claims by adult children

- 225 Before considering these alternatives, we make some general points which would apply to any right an adult child might have to seek further provision under the will, contrary to their parent's wishes.
- 226 It is clear, at least, that these claims can seldom if ever have the same force as those of spouses, de facto partners, and young children. Children who have contributed to will-makers' assets have a right to claim anyway (chapter 9). So if adult children are to have a claim by reason solely of their relationship with the will-maker, then it should be provided for separately, with an appropriate indication of its priority. The Commission proposes three important limitations

¹³⁵ Peart's case survey indicates that 91.5% of children's claims succeed: (1995) 1 BFLJ 224, 226.

¹³⁶ See footnotes 106 and 132.

on the adult children's claim options which follow. Each of these limitations would, if adopted, reinforce the view that adult children's claims are "second-tier" claims. Each limitation would also need to be provided for in the Draft Act.

- 227 The first limitation relates to the priority to be accorded to adult children's claims. Whatever the test preferred, a new law should indicate when and to what extent an award on an adult child's claim will be met relative to awards and orders on other claims. What priority should courts accord to awards on adult children's claims?
- 228 It will be recalled (para 199) that children's claims cannot be based on the very precise grounds of policy and principle which support the rights of surviving partners, other contributors to the will-maker's estate, and dependent children. So the will-maker's primary duties are to a spouse or de facto partner, infant children, and those who have contributed something of value to the will-maker. An adult child's award should only be taken from what is left over. Nor is it profitable to look closely at the provision the will-maker has in fact made for first-tier claimants, to see whether it can be cut back to a minimum. There can be no criticism of a will-maker who acts liberally in such matters. So awards for adult children can only operate on the lesser of (a) the award; or (b) the balance after other first-tier claimants/beneficiaries have been provided for by the will-maker or the court.
- 229 The second limitation is similar in nature. It relates to the property available to satisfy awards made on adult children's claims. The Commission proposes that to satisfy awards on first-tier claims, courts have powers to bring back into the estate will-makers' property which is the subject of certain transactions. However, the Commission considers that adult children should not be able to have this property brought back into the estate under these powers to satisfy awards on their second-tier claims. This is because will-makers' lifetime gifts or other donative arrangements are made to meet the perceived needs of particular beneficiaries as they then appear. It is not incumbent on the living to be even-handed or fair amongst all possible beneficiaries at all times. Overall inequalities as between beneficiaries become final and therefore apparent only when a will-maker dies. Bringing in a particular range of pre-death arrangements, to meet a claim which is not based on a clear testamentary duty supportable on appropriate policy grounds, is likely to unreasonably disturb many transactions which were not unfair or poorly motivated at the time they were made.
- 230 The third limitation relates to the time within which adult children must make any claim they have. Unlike other claims, the Commission proposes that any adult child's claim be made within a period of six months from the date of the will-maker's death. The court should have a discretion in exceptional circumstances to extend this period. Further, the Commission proposes that this discretion to extend the time for making a claim not be available after the final distribution of the estate. The adult child's claim to fair treatment can result in very substantial amendments to the will provisions. These cannot necessarily be anticipated by the trustees and the beneficiaries, in the same way as a partner's or a minor child's claim can. In this context, therefore, the existing law (which forbids claims made after a year from the date of administration, if the estate has been distributed) appears well justified. Indeed,

given the simplified procedure that we envisage for making claims (see paras 349–355), we propose even tighter time limits for claims of this kind, so that the possibility of a claim will disrupt the ordinary processes of administration as little as possible.

- 231 The position as regards the social welfare system needs to be mentioned briefly. If a claim is to be recognised principally on the grounds of financial need, it may be appropriate to allow the Department of Social Welfare to insist that potential claimants take action to enforce the claim or have their benefit refused, reduced or terminated. But otherwise, the reasons stated with respect to partners' claims (chapter 4, paras 120–129) apply equally strongly here, and the Commission's initial view is that it should not be compulsory to take legal proceedings. If proceedings are taken successfully, any award would, of course, be treated as an asset or income of the child for welfare purposes.
- 232 The major options for dealing with adult children's claims are now considered. Each represents a different way of dealing with the problem of defining the ambit of the legislation:

- OPTION 1 – ADULT CHILDREN MAY CLAIM AWARDS TO RELIEVE DEMONSTRABLE FINANCIAL NEED – Approaches the problem by selecting one of the three objectives of family protection legislation (the alleviation of need) as the principal criterion. (One of the other two objectives discussed in paras 200–222 might have been selected, but for reasons already given these are less likely candidates.)
- OPTION 2 – ADULT CHILDREN MAY CLAIM AWARDS TO PREVENT CAPRICIOUS OR VINDICTIVE, MISTAKEN OR ACCIDENTAL DISINHERITANCE – Leaves all three objectives open, but tightens the present law by raising the threshold of concern. It looks for something more than “unfairness” or “breach of moral duty”. The court intervenes where the will-maker has only the most unsatisfactory reasons for the will-dispositions, almost amounting to a conscious abuse of power, or has not revised the will to take into account important changes in the will-maker's property or the circumstances of beneficiaries under the will.
- OPTION 3 – ADULT CHILDREN MAY CLAIM AWARDS TO PREVENT DISINHERITANCE ON NO REASONABLE GROUNDS – Also leaves all three objectives open, but identifies the reasons which might justify the will-maker disinheriting the children. A will is open to attack only if none of the assigned reasons is adopted by the will-maker.
- OPTION 4 – NO ADULT CHILDREN MAY CLAIM AWARDS AND NO COURT POWER TO INTERVENE – Concedes that the costs of lawmaking in this area (in terms of irrationality and unpredictable results) are not worth any gains that might accrue from conferring a judicial power to interfere with what are perceived to be unfair or arbitrary wills. The adult child's right to claim is removed altogether.

We have explored these options individually, though it would of course be possible to combine some of them to form a conjoint test to determine the fairness or unfairness of a will. The first three options will be found in legislative form later in this chapter. *Option 4* would be legislated for by making no provision at all on this point, in legislation which would replace the Family Protection Act 1955.

Option 1: Claims to relieve demonstrable financial need

Adult children could claim awards to relieve their demonstrable *financial need*.

- 233 Under this option the general idea is that it is not appropriate to make provision for adult children solely to foster equal sharing, or to ensure that those who merit recognition should be given it. Still less is the object to appease the strong feelings that children are likely to feel at being left out of a parent's will. Rather it is to meet financial need.

Example 12:

The will-maker dies, at age 80, leaving 2 children, A and B. Her estate is worth \$250 000. She leaves it all to her local church. A and her husband are retired, with their own unmortgaged house, motor car and \$20 000 in the bank. B is still working, but is approaching retiring age. He lives in rented accommodation, and has no substantial savings.

Neither A nor B is affluent, but A is reasonably placed while B is not. This suggests that B should be awarded a substantial share of the estate, whereas A should either get nothing, or a much smaller amount.

- 234 A statutory provision giving effect to this first option might be as follows (if adopted, this optional claim would be additional to the proposed claims in chapter 6 now provided for in Part 3 of the Draft Act: ss 27–28):

1 Child's need claims

- (1) A child of a deceased person may make a needs claim against the estate of the deceased if the deceased has not made adequate provision either in his or her lifetime or on death for that child's support.
- (2) A deceased person has not made adequate provision for the purposes of subsection (1) if the child proves that
 - (a) the child was in financial need at the time of the deceased's death and is in financial need when the claim is heard by the court; and
 - (b) the deceased knew or ought to have known at the time of his or her death of the child's need at that time; and
 - (c) the deceased made no provision or inadequate provision to meet the child's need either in his or her lifetime or on death; and
 - (d) the child's need must be met if the child is to have the basic requisites of life.
- (3) When assessing what is essential to ensure the child has the basic requisites of life, the court must have regard to
 - (a) the needs of a person who is in a similar family situation to the child in a family which has access to an average income; and
 - (b) any special needs of the child, in particular needs relating to health, housing, education and provision of the amenities of life; and
 - (c) any other resources available, or likely to become available, to the child; and
 - (d) any other matters the court considers relevant.

- (4) The court may make a needs award in favour of a child of the deceased against the deceased's estate of such amount as the court thinks proper to meet the needs of the child for support.
- (5) In subsection (3), **family income** includes, in the case of a family that includes husband and wife or 2 de facto partners, the income of both husband and wife or both de facto partners.

- 235 There are difficulties, however, with this approach. A phrase such as "financial need" leaves unanswered the important question, "need for what purpose?". A variety of purposes might be proposed. The need might be extreme; for example, to ward off destitution. Or it might be significant but not peremptory; for example, a need to find a more suitable house to live in, or to have an operation in a private hospital, or to provide for a comfortable retirement. Or it might be inessential but nevertheless entirely appropriate for a person in the claimant's position; for example, a need to take an overseas holiday, buy a second motor car or pay for children's private school education.
- 236 The provision above can only go a certain distance in defining what kind of need must be established. But it is by no means clear what is the appropriate test to determine whether there is need. As *Example 12* shows, it is much easier to compare need between two or more children of the will-maker than it is to apply an abstract standard of need. Moreover, even if one took the strictest test (destitution), it would not follow that the law would be any more logical or better justified. The objective is to prevent people becoming destitute. But it might then be argued, for example, that it is much more efficient for a claimant to seek a welfare benefit and for the State to take the taxation payable by the beneficiaries named in the will (who are presumably more wealthy). This would be preferable to going through an elaborate legal process to get the amount of money required to ward off destitution.
- 237 If, on the other hand, one proposes a test which covers a wider range of needs, it becomes more difficult to meet the argument that what is being done is something which is optional for the will-maker, rather than something which is a moral (or legal) duty. It is very doubtful, for example, whether a will-maker should be obliged to provide a retirement benefit for children who have had ample opportunity, during a working lifetime, to provide it for themselves but have given priority to other things.
- 238 This points, it may be suggested, to the nub of the problem. If there are ethical duties owed by a will-maker, they are complex and not confined to any particular degree of need. Will-makers are of course often prepared to support children with needs well beyond the time they became independent. Will-makers may well expect, however, to provide this support on their own terms, and to be able, if they wish, to satisfy more immediate legal and other claims first.¹³⁷

¹³⁷ See, for example, Finch and Masson, *Negotiating Family Responsibilities* (Tavistock/Routledge, London, 1993) who conclude that in England there is no clear consensus amongst people on the responsibilities that people should perform for their relatives, so that it is inappropriate to think about family life in terms of duty. The authors maintain that there are no externally imposed rules of obligation between family members, but rather that family members negotiate commitments over time which are carried out within the family.

Some may wish to respond to the expectations of their own cultural or ethnic group, which may place less emphasis on individual need, and more on the ability of a successor to use the will-maker's property to the good of the whole family.

- 239 A claim based primarily on economic need would no doubt limit the number of claims and make the present system more manageable. But it would not address the fundamental difficulties which are found within the system and it would cause some anomalies: for example, where there are two claimants, one of whom is marginally below the maximum asset level (wherever that is set) and the other is marginally above it.
- 240 There is also a real risk of anomaly because of the way in which children change their situation during the will-maker's lifetime. So, in *Example 12*, if the will-maker had died ten years earlier, it might have been that A's husband was redundant, with a mortgaged house and little prospect of work. Or, had the will-maker survived another ten years, it might be that A and her husband have serious illnesses and they need live-in help to manage in their home. So how much A and B get respectively will vary considerably according to their particular circumstances at the time when the will-maker died, a matter of chance.

Option 2: Claims to prevent "capricious or vindictive", mistaken or accidental disinheritance

Adult children could claim an award to prevent the will-maker from disinheriting a child in a way that is:

- manifestly *capricious or vindictive*;
- vitiated by a *serious mistake of fact* about
 - the size of the estate at the time the will-maker died,
 - the size of the provision made for the child (if any) at the time the will-maker died, or
 - the child's circumstances or conduct; or
- manifestly *inconsistent with the will-maker's wishes*, by reason of
 - the will-maker's failure to make a new will in circumstances which have substantially changed since the will-maker's last will, or
 - the will-maker's unsuccessful attempt to make a new will.

- 241 This approach is better justified than one based on need. It acknowledges that, once obligations to first-tier testamentary claimants have been met, it is for the will-maker to decide who benefits under his or her will, and in what proportions those people benefit. Excluding children is justified only when the will-maker has, at the time of their death, some reasonable ground for doing so. Even so, the courts should not interfere unless a claimant can cross a high threshold test of unreasonableness, or show that the will departs substantially from the will-maker's own intentions.
- 242 *The first limb of the test* fills an apparent gap within the proposed new legislation. If the Family Protection Act 1955 is repealed and not replaced by some provision protecting adult children, there will be nothing to prevent people making wills which dispose of this part of their estates in a manner which is

arbitrary or capricious. They must, of course, have the mental capacity to make a will and not be unduly influenced by others (para 362). But the laws of capacity and undue influence do not require will-makers to meet very rigorous standards of responsible will-making.¹³⁸

- 243 It might be argued that all these restrictions are an undue fetter on will-makers' uncontrolled power of ownership of this part of their estates. But the mere fact of ownership does not reasonably carry with it an absolute power to dispose of property on death by will. It has been suggested earlier in the paper that another, and equally valid, justification for that power, is the fact that the will-maker is usually in the best position to judge who of his or her "family" or other associates should receive his or her property. Will-makers who, having met obligations to first-tier testamentary claimants, then exclude a child arbitrarily, may be said not to have exercised the decision-making power in a justifiable and effective way. In this very limited sense, it might be argued that the property "belongs", in a moral sense, to the family as a whole and cannot be dealt with irrationally.
- 244 From a different perspective some might argue that to develop a law based on such criteria is to permit the very type of family protection claims – by adult children, other relatives or others – that the Commission has earlier criticised. That is not necessarily so. The purpose of the law would be to ensure that will-makers meet a minimum standard of responsible action before their decisions on passing property to their chosen beneficiaries are given effect.
- 245 But *the first limb of the test* presents some concerns. "Capricious" suggests that something was done as a matter of opinion or random choice, rather than in a measured and reasoned manner. As with the language "moral duty", "capricious" might not be an unsatisfactory criterion in itself if it were shorthand for other well known and understood criteria (paras 47–51). But again here it is not clear that this is so. "Vindictive" dispositions are those made by will-makers who intend to have revenge for an actual or perceived wrong done to them. This suggests that a power to set aside "vindictive" dispositions is – like the second objective (paras 211–217) above – designed to punish and deter will-makers' wrongful conduct and should also be rejected for the same reasons. This limb also has a significant practical defect, in that it fails to inform the court what arrangements should be substituted for those of the will-maker which are set aside.
- 246 The words "capricious" or "vindictive" could of course be replaced by others, such as "totally unreasonable" or "without any substantial justification". But this would not remove the underlying causes of concern which are inherent in this method of approach.
- 247 *The second limb of the test* permits the court to deal with cases where the will-maker's exclusion of an adult child is vitiated by a substantial mistake of fact. *The third limb of the test* gives the courts a way of dealing with significant changes in the will-maker's circumstances or intentions since his or her last will was executed. For example, suppose a child is born to the will-maker after a last will was executed. If that was not expected, the will may be worded so that the child is excluded. The child could be included by court order.

¹³⁸ See, for example, Broaden, "Undue Influence as a Basis for Opposing a Grant of Probate is a Particularly Difficult Ground to Prove" (1994) 68 Law Institute J 57.

- 248 *The second and third limbs* are open to the objection that they facilitate provision for adult children only when the will-maker wishes to benefit those children. While useful, on this basis they might be better addressed more generally in a review of the law of wills. Clearly the will-maker's frustrated intentions, when ascertainable, are the touchstone that will guide the court in making further provision for the child under *the third limb*. But when the will-provision is vitiated by the will-maker's serious mistake, *the second limb* is not necessarily helpful when deciding what provision should be substituted for that made in the will, and the matter cannot be remitted to the will-maker.
- 249 We have already said that *the first and second limbs* do not spell out the consequences of will-makers not meeting the minimum standard of responsible action. The result need not be that the court makes its own selection of appropriate beneficiaries (as it does under the Family Protection Act 1955). Instead, any child might on application receive a share of the estate remaining. Like a child's share on intestacy, it would be (usually) based on equal treatment of all children (failing all else, equity is equality). That share would be based on a proportion of the estate set by the court in each case. The will-maker's intentions concerning who should benefit from the estate, and in what proportions, would otherwise be followed or preserved as closely as practicable.
- 250 Statutory provisions to give effect to this second option might state (again if adopted, this optional claim would be additional to the proposed claims in chapter 6 now provided for in Part 3 of the Draft Act: ss 27–28):

2 Claims for provision for children wrongly disinherited

- (1) A child of a deceased person may claim provision from the estate of the deceased if the deceased has wrongly disinherited the child.
- (2) A child is wrongly disinherited for the purposes of this section if the child proves that provision or lack of provision made for that child by the deceased, whether in his or her lifetime or on death, is
- (a) manifestly capricious or vindictive; or
 - (b) vitiated by a serious mistake of fact made by the deceased about
 - (i) the nature and value of the deceased's estate at the time of death; or
 - (ii) the nature and value of the provision (if any) made by the deceased for the child before death; or
 - (iii) the child's financial circumstances or conduct; or
 - (c) manifestly inconsistent with the deceased's expressed intentions as to the distribution of his or her estate because of
 - (i) the deceased's failure to make a new testamentary disposition in circumstances which have substantially changed since the deceased last made a testamentary disposition; or
 - (ii) the deceased's unsuccessful attempt to make a new testamentary disposition.
- 2A Assessment of provision for wrongly disinherited child**
- (1) The court may make a provision order against the estate of the deceased in respect of a claim made by a child of the deceased under section 2.
- (2) The court is to determine the amount of a provision order under this section in the following manner:

- (a) the court is to set aside such proportion of the deceased's estate as the court thinks appropriate for any child or children of the deceased designated for the purpose by the court;
- (b) if a proportion is designated for more than one child, the provision order is, in the absence of special circumstances, to be an amount calculated by dividing the proportion of the deceased's estate set aside into equal portions for the children for whom that proportion was designated;
- (c) an order may take into account any special circumstances that the court considers relevant;
- (d) if section 2(2)(b) or 2(2)(c) applies, the court must have regard to the nature of the provision that the deceased intended to make for the child, as far as that can be ascertained and is practicable.

Option 3: Criteria of reasonableness

- 251 This option requires that an adult child show that the will-maker was moved to disinherit the adult child for insupportable reasons, or for no valid reason at all. This assumes that there are some reasons for making a will which are valid, and other reasons which are invalid. One or other set of reasons needs to be spelt out in the statute. On the whole it is easier to spell out reasons which are sound. If it is established that the will-maker was motivated by one of the reasons stated below, then the will would stand.

A will-maker may reasonably decline to make provision for an adult child on the grounds of:

- *Higher obligations to others* which must be met instead of providing for the child.
- *Will-maker's dissociation from, or lack of responsibility* for, the child.
- *Established practices or understandings within the family* which preclude provision being made for the child.
- *Provision made by or for others in place* of the will-maker providing for the child, *or provision already made* for the child other than by will.

- 252 Each good reason for declining to make provision could, in a statutory provision, be stated in more detail (in the paragraphs which follow, reasons followed by an * are reasons that the courts have not accepted as sufficient for declining to provide for a child).

- 253 HIGHER OBLIGATIONS – These might include:
- the greater need of other people for whom the will-maker has assumed responsibility or with whom the will-maker associated;
 - contributions made by other persons to the estate or well-being of the will-maker;
 - the desire to donate a reasonable proportion of the estate to charitable and other purposes contributing to the public good (whether or not the will-maker had any personal connection with the cause).*

- 254 WILL-MAKER'S DISSOCIATION FROM, OR LACK OF RESPONSIBILITY FOR, THE CHILD – Reasons for declining to make provision here might include:
- substantial periods of estrangement or lack of family contact between the will-maker and the child, however caused;*
 - the child not having any substantial economic need or having had ample opportunity to provide against it;*
- 255 ESTABLISHED PRACTICES OR UNDERSTANDINGS WITHIN THE FAMILY – Will-makers might also reasonably decline to make provision for a child as a result of:
- arrangements made during the lifetime of the will-maker for the benefit of the will-maker or his or her family, to the extent that these arrangements have implications for provisions in the will;
 - any ethnic or cultural practice of a group to which the will-maker belongs;*
 - any settled understanding amongst members of the will-maker's family (irrespective of whether the child is a party to that understanding);
 - where the will-maker has acquired property by way of gift or inheritance, the origins of the property and any consequent expectations the will-maker or others may have in respect of the property.
- 256 PROVISION MADE BY OR FOR OTHERS IN PLACE OF WILL-PROVISION FOR THE CHILD, OR PROVISION ALREADY MADE FOR THE CHILD OTHER THAN BY WILL – A will-maker may justifiably decline to provide for a child in light of:
- any provision (by will or otherwise) which has been made or which is likely to be made in favour of the child by any other parent or person who has assumed parental responsibility for the claimant;
 - any provision the will-maker has made (by will or otherwise) for his or her child's parent, spouse, de facto partner or child.*
- 257 Requiring will-makers to meet a suggested minimum standard of responsible will-making as judged against these criteria would have advantages. The scheme makes clear that there are a range of reasonable grounds on which conscientious will-makers, having fulfilled their first-tier testamentary obligations, may exclude children from what remains of their estates. It is framed so as to allow limited and consistent intervention to prevent clearly unreasonable or mistaken exercises of will-making power.
- 258 A provision along these lines deserves serious consideration. But the Commission hesitates to advance such a provision as a preferred option. This option would add a second tier of awards which applied only to the estate which remained after the testamentary claims proposed had been satisfied, and would require will-makers to dispose of that part of their estates relying on at least one valid ground. This is complex and not many claimants would benefit from it. Very few will-makers will exclude a child without some reason which is arguably a tenable one.
- 259 The principles on which the court is to interfere with a will may prove too vague to apply consistently from case to case (para 198). The grounds of "reasonableness" mentioned above involve matters of degree. They do not lend themselves to a clear declaration that a particular disposition was arbitrary and unreasonable. At best, such a scheme would amount to a right to know and test the will-maker's reasons for excluding a child. At worst, the scheme would be accepted as an invitation to relitigate the principles on which will-makers

should be required to make provision, and the degree to which they should be proved, in each case where a child is disappointed. Should that occur, the clear set of first-tier obligations imposed on will-makers by the Commission's proposals will be supplemented (and perhaps undermined) by uncertain and very significant second-tier obligations.

- 260 There are problems also where, in the court's opinion, the will-maker had grounds to disinherit the child, but in fact relied on grounds which were unreasonable. It is too late to remit the matter to the will-maker, who is dead. So the court would have to overturn a will which would have been properly made if the will-maker had been better advised or more thoughtful.
- 261 A further problem with this approach is that, while it may help the courts to identify that a child has been unreasonably excluded, it does not give the court much guidance on how the child would have been provided for if the will-maker had acted reasonably. One way of meeting that problem would be to treat the entire will as unreasonably excluding a child and, in respect of a fixed proportion of the estate, to substitute a regime of equal shares for the children affected. But that might result in removing all will-making power, even where the will-maker has good reason for discriminating between the children.
- 262 A provision to give effect to this third option might be as follows (if adopted, this optional claim would be additional to the proposed claims in chapter 6 now provided for in Part 3 of the Draft Act: ss 27–28):

3 Claims for provision for children disinherited without reasonable grounds

- (1) A child of a deceased person may claim provision from the estate of the deceased, and the court may make a provision order, if the child proves that the deceased has without reasonable grounds made no provision or insufficient provision for the child.
- (2) When determining a claim under this section, the court must have regard to any one or more of the following grounds on which a deceased may reasonably decline to make any provision, or such provision as would otherwise be regarded as sufficient, for the child:
- (a) the deceased's higher obligations to other persons than to the child;
 - (b) the deceased's dissociation from, or lack of responsibility for, the child;
 - (c) established practices or understandings within the deceased's family;
 - (d) provision made by or for other persons instead of provision being made by testamentary disposition for the child, including provision made by the deceased for the child's parent, spouse, de facto partner, or child;
 - (e) provision made for the child otherwise than by the deceased's testamentary disposition, including provision made or likely to be made in favour of the child by any other parent or person who has assumed parental responsibility for the child.
- (3) The deceased's obligation to other persons (referred to in subsection 2(a)) may include
- (a) a higher need of other persons for whom the deceased had assumed responsibility or with whom the deceased associated, or
 - (b) recognition of contributions made by some other person to the estate or wellbeing of the deceased, or

- (c) a desire to donate a reasonable part of the deceased's estate to charitable or other purposes for the public good (whether or not the deceased had any personal connection with those purposes).
- (4) The deceased's dissociation from, or lack of responsibility for, the child (referred to in subsection 2(b)) may include and take into account
 - (a) substantial periods of estrangement or lack of family contact between the deceased and the child, however caused, or
 - (b) the child's lack of any substantial economic need, or
 - (c) opportunities that the child has had to provide against economic need.
- (5) The established practices or understandings within the family of the deceased (referred to in subsection 2(c)) may include
 - (a) arrangements made by the deceased during his or her lifetime for the benefit of the child and the child's parent, spouse, de facto partner, or child, or
 - (b) ethnic or cultural practices of a group of which the deceased was a member, or
 - (c) any settled understanding among members of the deceased's family (whether or not the child is a party to that understanding), or
 - (d) any expectations the deceased and other persons had in respect of property that the deceased acquired by gift or inheritance.
- (6) The court is to determine the amount of a provision order under this section in the following manner:
 - (a) the court is to set aside such proportion of the deceased's estate as the court thinks appropriate for any child or children of the deceased designated for the purpose by the court;
 - (b) if a proportion is designated for more than one child, the provision order is, in the absence of special circumstances, to be an amount calculated by dividing the proportion of the deceased's estate set aside into equal portions for the children for whom that proportion was designated;
 - (c) an order may take into account any special circumstances that the court considers relevant.

Option 4: No power to intervene

Under this option no adult children could claim an award.

- 263 This option has the advantage of clarity. It is also a recognition that the grounds on which adult children might claim provision from will-makers' estates do not lend themselves to clear and consistent definition, so that the problem of "unfairness" may be more apparent than real. It can be supported on the grounds that it is generally undesirable to maintain legal rules which are uncertain, which have no defined purpose, and which operate unpredictably. This option is also supported by efficiency considerations. It does not invite lengthy and expensive litigation by providing a law with no clear purpose. This option is based on the conviction that no distribution substituted for a will-maker's, achieves so much more fairness or promotes social good to such an extent that

it justifies the accompanying expense, delay and divisive interference with family life.

- 264 This option has the advantage of permitting conscientious will-makers to make provision which accommodates and responds to their varied family circumstances better than any law can. It also recognises that the scale of the problem of wills which adult children perceive as unfair does not justify the extensive powers granted to counter them. Powers as extensive and indeterminate as those in the present law, if they applied to the living, would be intolerable. This option also permits a justifiably greater emphasis to be given to clearer and stronger first-tier claims.
- 265 Yet this option also permits will-makers who are capable of making a will to exclude their children from their estates, perhaps for reasons that others may disagree with, or perhaps for no discernible reason at all. The Commission is aware that the abolition of adult children's claims would be regretted by lawyers practising in this area who consider that the law produces useful results which they can anticipate. It would also be regretted by a broad range of legal practitioners who see in such claims the virtue that they deal with wills which they consider capricious and vindictive.
- 266 No statutory provision would be necessary to give effect to this option.

CONCLUSION

- 267 It appears that, while courts need statute law which provides more direction on how cases should be decided, tighter legal tests based on "need" or "absence of good reason" cannot be unequivocally supported. It may be that in the course of further discussion, one of the options proposed, or some modification of it, emerges as a preferred solution. Alternatively, it may be that the existing law, with all its difficulties, is seen as less unsatisfactory than any of the other options and prevails by default.
- 268 **The Commission considers it is preferable at this stage not to express a view on which course is to be preferred. It welcomes fuller discussion and comment on the options raised and on other ways of meeting the problems discussed in this chapter (paras 224, 232–266).**
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8

Other relatives' support claims

Present law

- 269 **T**HE PRESENT LAW (Family Protection Act 1955) allows grandchildren of a will-maker, and a parent of the will-maker, in limited circumstances, to make a support claim. Children who are not children of the will-maker cannot claim support at all. The purpose of the Commission's proposals in this chapter is to abolish the claims parents and grandchildren have under the Act, yet at the same time to widen the categories of people who might claim as "children" in accordance with the proposals set out in chapter 6.

Proposal in outline

Of the will-maker's other relatives,

- a *child who is not a child of the will-maker* but for whom the will-maker has assumed a parent-like responsibility can make a *child's support claim*; but
- no other relative of the will-maker should be able to make a claim.

Example 13:

Will-maker is divorced. There is only 1 child of the marriage, Child1, who married in Australia and had a child of his own (Grandchild1) before dying at 35 years of age. Child1 having fallen out with Will-maker, Will-maker never met her only grandchild who grew up in Australia.

When Child1 had left home, Will-maker also became a foster parent for her sister's child, Child2. Will-maker was the sole provider of care for Child2 – although Will-maker did not formally adopt Child2. Will-maker's father, Parent, an elderly man, occasionally helped her out by babysitting Child2. Will-maker dies leaving Child2 (aged 15) \$5 000 of her \$150 000 estate, and the rest to a charitable organisation.

- 270 Under the Commission's present proposals, Child2 could claim a lump-sum support award to ensure her maintenance and education until she had completed her tertiary education or reached the age of 25 years. The judge might award her between \$75 000 and \$100 000. No provision has been included at this stage which would allow Parent or Grandchild1 to make a claim.
- 271 By comparison, under the present law, Child2 would not be able to make any support claim. Grandchild1 would be entitled to an award and would probably be given between \$18 750 and \$30 000. Will-maker's father, Parent, 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).

Alternatives

- 272 The possibility of a grandchild receiving an award based more on recognition of the relationship rather than an obligation to provide support meeting financial needs cannot be excluded, in view of the fact that the Commission has reached no definite conclusion on the way the law should deal with adult children's claims. However, for the general reasons given in the previous chapter, the Commission considers there are disadvantages in conferring a right on parents, grandchildren and other relatives to claim
- a fixed share of the will-maker's estate (see paras 203–210),
 - a discretionary award to reward or punish (see paras 211–217), and
 - a discretionary award to alleviate their need (see paras 218–222).
- 273 The difficulties are increased if the court has to weigh the interests of grandchildren against the competing interests of children.

Example 14:

Will-maker left a life interest in his estate (valued at some \$800 000) to Widow. The residue was left to his 6 children of 3 marriages; A, B, C, D, E and F. C died before Will-maker, leaving no children. A (who had been left a life interest) died by his own hand some 3 months after Will-maker, leaving 2 children, Aa and Ab. There was no evidence that any family member was in pressing financial need, though some families were better off than others. The scheme of the will was that each of the children was left some of the residue, but in unequal shares. The present value of the shares in the will as at the will-maker's death was: Widow, 65%; A, 4.45%; B, 1.57%; D, 3.32%; E, 12.95% and F 12.95%.¹³⁹

The lower provision for B was partly due to Will-maker's wish to provide less for his daughters (B and C) than for his sons. B was on distant terms with her father and had lived overseas. In her favour, though, she had chronic illness and had over-committed herself on a house purchase.

The higher provision for E and F was accounted for by the fact that they were under 25 and still undergoing training; and also by the fact that they were the children of the third marriage, which was the only one during which significant assets were acquired.

- 274 In a case with these facts,¹⁴⁰ the court (applying the present law) made a number of awards, giving the following present values: Aa, 3.88%; Ab, 3.88%; B, 8.15%; D, 3.88%; E, 3.76% and F, 3.76%. This resulted in significantly more going to A's side of the family than if he had survived. This was inconsistent with the scheme of the will, and it is highly debatable whether the will-maker was under a moral duty to dispose of the property amongst his family in that way.
- 275 In the Commission's view, by contrast, only the widow and E and F have a clear basis for a claim. The widow could claim capital and a certain amount for support (as she did in the case), resulting in provision for her of some 72% of the estate. In view of E and F's prospects of inheriting from her, which are inconsistent with the general scheme of the will, their share in the estate would be reduced by at least 50%, to say 6% (see Appendix B for priorities between beneficiaries).

¹³⁹ These values are calculated by reference to the Estate and Gift Duties Act 1968 Second Schedule tables.

¹⁴⁰ *In the estate of V* (unreported, High Court, Auckland, 15 December 1995, M 776/94).

- 276 Aa's and Ab's expectations would be reduced to nothing on the death of A. Whether they should have a right to claim, and the form that right would take, depends on which of the options is selected for dealing with adult children's claims. It will not be pursued further in this paper. But the Commission accepts that if adult children are to have a claim, grandchildren might reasonably have a claim on a similar basis if their parents are: dead, otherwise unable to provide support, or unable to pass on a grandparent's wealth.
- 277 Without such a claim, because of the contingencies of life, it may be that, as with the grandchildren Aa and Ab, the will sometimes operates harshly. A child may be left a share by the will, but it is taken away from their family if he or she dies unexpectedly shortly before or shortly after the will-maker. The child's own children are not qualified to, and so cannot, apply for a support award. In ordinary cases, however, anything which has been given to the child will pass to the child if they die after the will-maker, and they can pass it on to their family. Or there will be a clause in the will substituting the grandchildren for a child who dies before the will-maker. Even if nothing is said in the will, the statutory substitution provision (Wills Amendment Act 1955 s 16) has the same effect. Only in unusual cases, such as *Example 13*, will the will-maker's inadvertence be a problem.

Reasons for a proposal for a support claim

- 278 At this stage the Commission proposes only that, where the will-maker established an on-going nurturing relationship with a child and became responsible for that child, the will-maker's estate should continue to discharge that responsibility. The Commission suggests that this will achieve a proper balance between certainty and flexibility. Moreover the proposal relies on rules, already established under the Child Support Act 1991 ss 2, 7 and 99, which apply to will-makers during lifetime.¹⁴¹
- 279 If a will-maker chooses to assume a parent-like responsibility for meeting a minor child's needs, then the court will be able to make a support award for the child. The amount will be calculated in the same way as the support award proposed for children in chapter 6. Of course, only will-makers who were custodians (the sole or principal providers, or who shared substantially in the provision of a minor child's ongoing daily care) are likely to have assumed a parent-like responsibility to meet the needs of that child.
- 280 A will-maker should not be regarded as having assumed an enduring responsibility like that of a parent of a child simply because he or she had a relationship in the nature of marriage with a parent of a child.
- 281 The Commission has not overlooked cases where property passes to the will-maker from the estate of a partner who has children from an earlier marriage. These children often fairly expect to succeed to their parent's property through the will-maker. The proposal that the estate of a partner who dies first be able to apply for a property division against the survivor (or, more usually, the survivor's estate) provides additional protection for these children of the will-maker's partner who are not children of the will-maker (paras 106–110).

¹⁴¹ See, for example, *Elston v Brice* (1993) 10 FRNZ 252; *Lyon v Wilcox* [1994] 3 NZLR 422.

Proposal in detail

282 WHEN CHILDREN WHO ARE NOT CHILDREN OF THE WILL-MAKER CAN CLAIM

When deciding whether a person is to be regarded as having been accepted as a child of a will-maker, courts must consider

- the extent to which and the basis on which the will-maker assumed responsibility for the maintenance of the child,
- the period of time during which the will-maker maintained the child,
- whether the will-maker was at any time the lawful guardian of the child,
- whether any other person has or had any liability or responsibility to maintain the child or contributed to the child's maintenance during the period the will-maker assumed some responsibility for the child,

and may also consider

- whether the will-maker assumed or discharged any responsibility for maintenance of the child knowing that the will-maker was not the natural parent of the child, and
- whether the will-maker was ever married to or a de facto partner of a parent of the child.

283 This definition, which has been developed in relation to support awards, could also be used to determine who are "children" who might make an adult child's claim, as discussed in chapter 7. The alternative statutory provisions have been drafted on that basis (see paras 234, 250 and 262).

284 CHILD MAY CLAIM AGAINST TWO SETS OF PARENTS

A child may sometimes claim against both birth and informally adopting parents.

285 In many cases only one parent or couple will have assumed parent-like support responsibilities for a child. However if both birth and informally adopted parents have assumed parent-like responsibilities to support the child, it may be unreasonable to confine the child's claim for support to either birth or informally adopting parents. When permitting informally adopted children to claim and assessing the level of support award to make, courts will of course balance a child's claim against the will-maker with claims against other parents and sources of support.

286 PRIORITY OF CLAIMS OF CHILDREN WHO ARE NOT CHILDREN OF THE WILL-MAKER – Appendix B sets out proposals for resolving the relative priority of support claims competing with other types of claims and with one another.

Other relatives of the will-maker may still claim as contributors

287 Other relatives of the will-maker may claim as contributors. The criteria they need to comply with are set out in the next chapter.

Contributors' and promisees' claims

Introduction

- 288 **A** CONTRIBUTOR is any person who, during a will-maker's lifetime, contributes a benefit (eg, money, property, work or services) to the will-maker. Contributors may be part of the will-maker's family, but need not be. Usually, however, they will have a close relationship with the will-maker. Otherwise they are unlikely to wait until the will-maker's death before they are paid for their services. People who contribute in this way should have a specific statutory claim.
- 289 Such contributions are often made in circumstances where justice requires that the will-maker make some provision in return. (An example would be an adult child or sibling who provides care for the will-maker in the will-maker's last years, saving the will-maker the considerable expense of entering a nursing home.) What is "just" in this context will be explored later in this chapter. The Commission's proposals have two major objectives. First, the law should allow ample scope for courts to reward work and services where the will-maker should have done so. Second, the law should (and, as far as possible, consistently with the first objective) ensure that the principles for obliging will-makers to reward others' services on death are reasonably close to those applying under the existing law as between the living. This would make the law clearer and more consistent.
- 290 From time to time, reference is made to children as contributors. It may be (in view of the discussion in chapter 7) that these children will also have an adult child's claim. However, they will be dealt with here on the assumption that their contribution claim will be their primary and possibly their only claim. Contributors' claims would take precedence over any other claim adult children would make.

Present law

- 291 **GENERAL LAW CLAIMS** – Under the general law contributors who want to be paid for the benefit must bring a claim under one of the following:¹⁴²
- **CONTRACT**¹⁴³ – Contributors may show that the will-maker agreed orally or in writing that they would be rewarded by will.

¹⁴² For discussion, see Davey, "Testamentary Promises" (1988) 8 *Legal Studies* 92; Sweatman, "Claims for Compensation for Services Rendered" (1994) 14 *E & TJ* 143.

¹⁴³ See, for example, *Webster v Webster* [1976] 2 NZLR 304; *Breuer v Wright* [1982] 2 NZLR 77; *McCormack v Foley* [1983] NZLR 57; *Flemming v Beevers* [1994] NZFLR 108.

- ESTOPPEL¹⁴⁴ – Contributors may show that a will-maker encouraged them to believe or expect that they would receive an interest in the will-maker's property, and they then provided a benefit to the will-maker in reliance on this expectation or belief.
- RESTITUTION (*QUANTUM MERUIT* AND *QUANTUM VALEBAT*) – Contributors may show that the will-maker has been *unjustly enriched* because the will-maker
 - requested the benefit which the contributors provided, and did not pay for it;¹⁴⁵ or
 - knew (or should reasonably have known) that the contributors provided the benefit expecting to be paid, if the will-maker had a reasonable opportunity to reject the benefit and did not do so.¹⁴⁶
- TRUSTS – Contributors may show that
 - they meant to retain an interest in the property given as a benefit (under a *resulting trust*); or
 - they and the will-maker acted in a way that shows that both meant to share property preserved or increased as a result of the benefit (under an *implied or inferred trust*);¹⁴⁷ or
 - although there was no common intention, the will-maker remained silent in circumstances where it is reasonable that contributors share in the property they contributed to (under a *constructive trust*).¹⁴⁸

292 The general law applies both before and after the death of the person who has received the benefit. It is complex and not always certain in its operation. There are many claims with differing requirements. Moreover, as claimants in recent times have preferred to make testamentary promise claims, the general law is not often used as a basis for claims once will-makers have died.

293 STATUTORY CLAIM BASED ON TESTAMENTARY PROMISES – The general law mosaic of statute law, common law and equity is overlaid by special statutory rules which provide additional grounds for a contribution claim. Under the Law Reform (Testamentary Promises) Act 1949 a will-maker must pay the reasonable value of work or services to the person who provided them, if the will-maker has made a testamentary promise. To make a statutory claim a

¹⁴⁴ See, for example, *Griffiths v Williams* (1977) 248 Estates Gazette 947; *Greaseley v Cooke* [1980] 3 All ER 710; *Re Basham* [1986] 1 WLR 1498, [1987] 1 All ER 405; *Wayling v Jones* (1993) 69 P & CR 170; *Walton v Walton* (unreported, English Court of Appeal, 14 April 1994). See too estoppel arguments with testamentary promises claims in *Re Moore* (unreported, High Court, Dunedin, 11 October 1982, A 12/82); *Moffat v Moore* (unreported, High Court, Christchurch, 16 February 1983, A 402/79).

¹⁴⁵ See, for example, *Degelman v Guaranty Trust Co of Canada* (1954) 3 DLR 785; *Hink v Lhenen* (1974) 52 DLR (3rd) 301; *Clarkson v McCrossen Estate* (1995) 122 DLR (4th) 239.

¹⁴⁶ See, for example, *Baxter v Gray* (1842) 3 M & G 771, 133 ER 1349; *Walker v Broughner* (1889) 18 Ontario Reports 448; *Re Jacques* (1968) 66 DLR (2nd) 447. Compare *Webster v Wooley* (unreported, Supreme Court, Christchurch, 5 October 1977, A 27/77). See also Birks, *An Introduction to the Law of Restitution* (Rev ed, Clarendon Press, Oxford, 1989); Goff and Jones, *The Law of Restitution* (4th ed, Sweet and Maxwell, London, 1993).

¹⁴⁷ See, for example, *Ogilvie v Ryan* (1976) 2 NSWLR 504.

¹⁴⁸ See, for example, *Re Newman* (unreported, High Court, Whangarei, 3 March 1992, M 72/87) "Often a consideration of 'reasonable' provision in all the circumstances in respect of a testamentary promise will not be far from a consideration of 'reasonable expectations' involved in the trust context."

contributor must show that the will-maker has promised to reward them by will for providing work or services. The promise need not be an enforceable contract under the general law.

- 294 There are a number of problems with the present statutory claim.¹⁴⁹ Some of these problems go to basic policy.
- 295 It is a significant defect that the statutory claim can be made only by contributors who can show that they are “promisees”. This may well be too limiting for a statutory code (although under the present law a general law claim can be brought in the alternative). Moreover, the effect of a promise may vary. Nowadays courts may find that a promise gives rise to a contractual, an estoppel or a restitutionary claim. This classification makes a difference to the remedies available. The statute obscures this difference.
- 296 There are also technical problems. Even where a promise grossly undervalues the services provided, the court can award no more than the amount specifically promised.¹⁵⁰ Yet the converse does not apply – the court is not obliged to award the value of the promise, or to specifically enforce it, if an award of lesser value is “reasonable”. The principles on which the courts act in making this election are not made explicit in the statute. The present law also requires that a promise be to reward a contributor personally. The contributor may have asked instead that his or her own family be rewarded, and it could be said that “[t]here is a real sense in which provision for one’s dependants [or nominees] can be a reward for oneself.”¹⁵¹ The law does not permit the contributor to nominate who will get the benefit of the promise.¹⁵²
- 297 Another problem is that the Act allows the contributor to make a claim even where the contributor has provided a benefit unlawfully or under an illegal agreement or arrangement. The general law is less generous if a contractual or equitable claim involves illegality.¹⁵³
- 298 Despite these limitations and difficulties, contributors’ claims are frequently brought under the Law Reform (Testamentary Promises) Act 1949. This is due in part to the courts’ generous interpretation of the term “promise”. But the interplay between statute law and the general law is complex and artificial.

¹⁴⁹ For discussion, see Patterson (2nd ed, Butterworths, Wellington, 1994), chapters 17–18; *Butterworths Family Law in New Zealand* (7th ed, Butterworths, Wellington, 1995), paras 7.931–7.939; Peart, “*Re Welch*: The Boundaries of the Testamentary Promises Act” [1991] NZLJ 77; Property Law and Equity Reform Committee, “Working Paper on Proposals for Reform of the Law Reform (Testamentary Promises) Act 1949” (circa 1974); Coote, “Testamentary Promises Jurisdiction in New Zealand” in Northey (ed), *A G Davis Essays in Law* (Butterworths, Wellington, 1965), 1; Davis, “The Law Reform (Testamentary Promises) Act 1949 (NZ)” (1950) 13 MLR 353.

¹⁵⁰ Law Reform (Testamentary Promises) Act 1949 s 3(1); *Olsen v Cambus* (1994) 12 FRNZ 142, [1994] NZFLR 520; Peart [1991] NZLJ 77, 81.

¹⁵¹ Section 3(1); *McMillan v New Zealand Insurance Co* [1956] NZLR 353, 357.

¹⁵² Contrast (in the law of contract) the Contracts (Privity) Act 1982.

¹⁵³ See, for example, *Heathwaite v NZ Insurance Co* [1950] NZLR 6 (a promise not to marry; compare Human Rights Act 1993 s 136); *Re Newman* (unreported, High Court, Whangarei, 3 March 1992, M 72/87) (beneficial interest by way of constructive trust after misapplying welfare funds).

Proposal in outline

Contributors may make a *contribution claim* for an award in respect of *their unremunerated services* to the will-maker, based on

- an express *promise*, or if there is no such promise,
- the will-maker having *retained the benefit of the services where it is just that provision be made* for the claimant.

Example 15:

Contributor, now aged 64 and never married, had lived with her widowed mother, Will-maker, since her father's death 34 years ago. Well before Will-maker's health declined seriously 4 years ago, Contributor had (in addition to her full-time job as a nurse) increasingly run the household single-handed: cooking meals, shopping, cleaning and maintaining the house and grounds. When Will-maker's health seriously declined in the last 4 years of her life, Contributor (now a superannuitant) devoted herself full-time to her mother's personal care and comfort. Contributor's care enabled Will-maker to stay happily in her own home in considerable comfort until she died at age 86. Contributor had, at least until she retired, paid weekly rent and board to her mother.

Will-maker's will left Contributor \$10 000 of her \$250 000 estate. Contributor had believed that she would be better looked after in the will. At no time did Will-maker request the work or services, nor did she promise her daughter any reward in her will. But neither did she tell Contributor that she would not be able to remain in the house when Will-maker died.

- 299 Under the Commission's proposals, Contributor would be entitled to an award (perhaps as much as the entire estate) for the reasonable unremunerated value of the work and services she performed for her mother over more than 20 years. For the estate to retain the benefit would, in the circumstances, be unjust (see para 312).
- 300 By comparison, under the present law, Contributor, being unable to show her mother had promised to reward her, could not bring a testamentary promise claim. She may well make a constructive trust claim, but her claim would be difficult to establish as she could not show contributions to specific *property*.
- 301 The proposed statutory provision for contributors will have no application to contributions between married couples or de facto partners. Their claims will be dealt with by resorting to the principles of equal sharing and support discussed in chapters 4 and 5.

Alternatives

- 302 The Commission considers the proposal to be preferable to the following alternatives:
- *Amending the Law Reform (Testamentary Promises) Act 1949 to give greater clarity and consistency.* This alternative might address some concerns (paras 294–297), for example:
 - allowing the courts to make an award which is larger than the amount promised;
 - allowing the contributor's nominees to make claims (by analogy with the Contracts (Privity) Act 1982);
 - applying the Illegal Contracts Act 1970 where services are rendered illegally.

But some deserving cases will still not be covered. *Example 15* is one illustration as we have seen (para 298). Contributor in that case could not establish that there had been a promise. Further, the law of testamentary promises will still be inconsistent with the general law applying to will-makers before and after death. The confusion between contractual and restitutionary claims will remain.

- *Restricting Law Reform (Testamentary Promises) Act 1949 claims to family members and leaving claims under the general law for others.* This option recognises that formal legal arrangements between family members are unusual and may require special treatment. Family members especially will perform onerous duties under informal arrangements. This may be because the agreed arrangements become more onerous as the will-maker gets older or because of strong pressures brought to bear by the will-maker or other family members.

But there is a problem of definition. Often contributors will have had a very close association with the will-maker, but would not usually be considered “family” in the ordinary sense of the term, as meaning “kin”. Further, there is no strong reason why will-makers’ families should make contribution claims on different grounds from other contributors. The same principles of liability should apply even though the court will need to take into account the effects of a long-term association on the parties’ expectations.

There is no advantage in confusing provision made for the purpose of (a) supporting family and (b) rewarding valuable services for which the will-maker should in fairness pay. This confusion is already apparent in the existing law, although courts have sometimes advanced a distinction between services rendered as part of “normal family relationships” and those which are part of “much more than normal family relationships”, tending to discount contributions in the former case, because of their reciprocal character.¹⁵⁴ This ambiguity of purpose is most evident where claimants are de facto partners who at present cannot make support claims.¹⁵⁵ In the Commission’s view, claims for support should be addressed directly (as they are for spouses, de facto partners and dependent children: chapters 4–6).

- *Repealing the Law Reform (Testamentary Promises) Act 1949 so that contributors could only claim under the general law as it would apply if both people were still alive.* The present general law is complex and is not the preferred way of proceeding in New Zealand. It may not go far enough for the deserving contributors we have identified. In some respects, the criteria we propose, though based on established theory, are not yet accepted by the courts as appropriate rules in this particular context. *Example 15* (para 298) is one instance where the present general law provides no remedy.

Reasons for the proposal

- 303 The Commission considers that the proposal
- ensures that people who have conferred benefits on the will-maker without

¹⁵⁴ *Re Welch* [1990] 3 NZLR 1, 7.

¹⁵⁵ See, for example, *Wright v Holland* (1995) 14 FRNZ 87, [1995] NZFLR 951, [1996] 1 NZLR 213; *Vaney v Bright* [1993] NZFLR 361; *Thwaites v Keruse* (1993) 11 FRNZ 19.

- appropriate recompense will be able to make a claim;
 - includes cases where the will-maker has not made an explicit promise to reward the contributor, but where justice requires compensation;
 - sets out clear principles for determining the size of awards and when they will be made, and, in particular;
 - ensures that contribution claims are dealt with separately from claims based on need and recognition of parental duties.
- 304 The Commission's proposal also sets out limits on when claims should succeed. Awards cannot be made merely because:
- *Claimants have been promised or believe that they will receive something under the will when they have given nothing in return.* We do not propose any relaxation of the well-established rule that the courts do not assist people who have not given anything in return for the promises on which they rely.
 - *Claimants have conferred the benefit making it clear at all times that they do not expect to receive any kind of reward.* The proposal is not a charter for claims by people who perform family and good-neighbourly services and later change their mind about not being paid. If benefits are represented as gratuitous, claimants should get what they consistently hold themselves out as wanting: nothing.
 - *Claimants have conferred a benefit where there is no express agreement and good reason to believe that the will-maker will not reward them for it.* Where, for example, the will-maker does not know that the claimant is performing services, the will-maker has no opportunity to reject them and therefore should not ordinarily be liable to pay for them. Similarly, where the will-maker makes it clear to the claimant that nothing will be paid for the services, it is then unjust for the claimant to seek payment later.
- 305 There will always be difficulties in finding out what the intentions of the parties are. They can only be ascertained by looking at the nature of the services and any discussions which have taken place between the parties. But even if there are no express arrangements, courts should be permitted to make an award if services are substantial and the parties have not determined that the services will go unrewarded. Their silence may be caused not by that determination, but by the closeness of the relationship and their unwillingness to spell out terms which people bargaining at arm's length would not hesitate to include.

Proposal in detail

- 306 Under our proposals, contributors will rely upon either an agreement or a promise, or the unjust enrichment of the will-maker.

307 AN AGREEMENT OR PROMISE

Contributors would have to show that the will-maker *expressly promised* to reward them (or a nominated third party) for the benefit.

- 308 This provision may be compared with the present law under the Law Reform (Testamentary Promises) Act 1949. First, it follows that Act in providing that a promise does not necessarily have to be made before the benefit is conferred. It is sufficient that, at some point, the will-maker has seen the benefit as something for which recompense should be made. This rule is particularly

important in cases where services begin at a low level, but gradually increase as the will-maker becomes older. The parties' initial intentions may not be a reliable indication of whether the benefit should be paid for.

- 309 Second, the proposal departs from the Act, in that the Act limits promises to those which will be honoured in the will. It will be sufficient that the will-maker has promised recompense, but has not made it by the time he or she dies. The fact that performance of a promise has been deferred until after death, is a strong (though not invariable) indication that the parties are in a close relationship as family or friends. This makes it appropriate for the claim to be assessed alongside other testamentary claims. Further, since the principles of our proposed provisions are largely identical with those of the general law, there is no need to draw a sharp distinction between promises to leave property by will, and promises to make recompense in other ways.
- 310 Third, the proposal departs from the Act by requiring that the promise be express.¹⁵⁶ If there is clear evidence of a contribution in circumstances which make it just that the contributor be rewarded, courts under our proposals will have power to make an award without the need to find an "implied promise" which the facts of the case may not sustain. Further, as amounts awarded will normally be established by promises specifying rewards (see paras 319–321), courts should rely only on express promises, because it will be clearer whether or not will-makers made them, and what the effect of performing them is.
- 311 In some cases the testamentary promise will create a contract, legally enforceable apart from the proposed contribution right. In those cases, we propose that the contributor be permitted either to sue under the contract or to make the contribution claim. However, except in cases of ordinary commercial bargains, which do not involve family members or close associates, the court will have power to order that both claims be taken. They will then be heard concurrently according to the procedures laid down for testamentary claims (see paras 323–324).
- 312 THE UNJUST ENRICHMENT OF THE WILL-MAKER

Contributors would have to show in the alternative that they provided the will-maker with a benefit and that

- 1 the will-maker was
 - (a) aware of the conferment of the benefit, or
 - (b) not sufficiently competent to be aware of the conferment of the benefit;and
- 2 at the time the benefit was conferred the will-maker did not inform the contributor, and it was not otherwise clear from the circumstances, that no remuneration would be paid; and
- 3 in view of
 - (a) any hope or expectation of remuneration on the part of the contributor, before or after the will-maker died, and the will-maker's knowledge of that hope or expectation, or

¹⁵⁶ Compare the present law. The Law Reform (Testamentary Promises) Act 1949 s 3 provides that the claimant must prove " . . . an express or *implied* promise" (emphasis added).

- (b) any moral or social obligation on the contributor to provide the benefit conferred, or
 - (c) the will-maker's need for the benefit, and, if there was any person who might reasonably have been expected to provide the benefit, whether they had unreasonably failed to do so, or
 - (d) the special circumstances of the case,
- it is just that the contributor be remunerated for the benefit provided.
- 4 No award is to be made where the contributor conferred the benefit gratuitously, that is, without any intention of claiming remuneration or of fulfilling a moral or social obligation owed to the deceased.

313 In *Example 15* (para 298) Contributor provided onerous unremunerated work and services for her mother over a period of 20 years. She had an expectation of a benefit under the will and Will-maker told her nothing to the contrary. At no time did Will-maker request the work or services provided, promise her daughter any reward in the will or pay her any money. Will-maker knew of the conferment of the benefit (rule 1) and did not inform Contributor that the benefit was unwanted or would not be paid for (rule 2). Having regard (in this case) to the application of rules 3(b) and 3(c), the court could make an award. The court might award Contributor the reasonable unremunerated value of the work and services she performed for her mother (at \$25 000 per year for 10 years this would be the entire estate: see para 299).

314 Alternatively it might be said that the case comes within rule 3(a), though there is little evidence of what Will-maker knew about Contributor's expectations. In most cases one would expect there to have been some discussion between mother and daughter about what would happen when Will-maker died. But an inference may be drawn from the fact that the mother said nothing at all, together with the size of the benefit Contributor conferred and her probable expectations as a daughter. This would be sufficient for the court to infer that the mother in all likelihood kept her intentions secret because she knew that Contributor would be disappointed.

315 REMUNERATED BENEFITS

Contributors cannot claim for a benefit the value of which was fully remunerated by the will-maker either before or after the benefit was conferred.

316 This provision is of particular importance where the contributor and the will-maker are in a long-term relationship in the course of which benefits have been conferred both ways. In such cases the court ought not to look at a single transaction but the totality of the arrangement between the parties and contributions passing from one to the other.

317 ILLEGAL BENEFITS

If a benefit is conferred unlawfully, or according to an unlawful arrangement, an award will be made only if the court in its discretion so orders.

318 As under the general law illegality in the conferral of a benefit should make the benefit non-compensable unless the court in its discretion orders otherwise.¹⁵⁷

319 AWARDS

Where the will-maker made a promise specifying the reward for the work or services provided, then the court would normally order that the specific promise be carried out according to its terms.

In any other case the court would normally award the contributor the reasonable unremunerated value of the work or services provided.

The court can in either case award a greater or lesser sum where there are circumstances arising, for example, out of

- the provisions of any arrangement or understanding between the parties,
- whether the arrangement was fair and reasonable when made, and whether it now operates fairly, and
- the time that has elapsed since the services were provided and any change in circumstances occurring after that time.

320 In general, if the will-maker promises a certain amount or particular property as the reward for the benefit conferred by the contributor, this will set the appropriate value of the award. Where no such promise is made, the court will be required to estimate the objective value of the services. There will be cases when the amount may need to be increased; for example, where the contributor has improved property years before the will-maker dies and that property has increased in value. There will also be cases when the award will need to be reduced; for example, where the will-maker has made an imprudent promise or has otherwise been imposed on by the contributor.

321 These provisions may be compared with the corresponding rules under the Law Reform (Testamentary Promises) Act 1949. In its original form, the Act required promises for specific sums and property to be carried out in full.¹⁵⁸ This was found to be too inflexible. In 1961 the Act was changed, so that in all cases the court awarded "such amount as may be reasonable" not exceeding the value of the promise.¹⁵⁹ We consider that this latter formulation is too open-ended and the upper limitation too strict. There should in general be a preference for awarding the promised amount. However, there may be circumstances, as set out above, where awarding the promised amount would be unjust.

322 FORM OF AWARD

An award may be for a sum of money or for the transfer of specific property to which the claimant has contributed.

¹⁵⁷ See Illegal Contracts Act 1970. Compare *Re Newmann* (unreported, High Court, Whangarei, 2 March 1992, M 72/87); *Tinsley v Milligan* [1993] 3 WLR 126, [1993] 3 All ER 65; Enonchong, "Title Claims and Illegal Transactions" (1995) 111 LQR 135.

¹⁵⁸ Law Reform Act 1944 s 3(1).

¹⁵⁹ Law Reform (Testamentary Promises) Act 1949 s 3(1) (as amended by Law Reform (Testamentary Promises) Amendment Act 1961 s 2).

323 RIGHTS UNDER THE GENERAL LAW OF CONTRACT AND RESTITUTION

If a contributor makes a claim under the general law of contract, a court can order

- that the claim be heard according to the procedures to be established for a testamentary claim for contribution,
- that the contributor bring a concurrent testamentary claim for contribution and that both claims be heard together, and
- that any defence which would be available for a testamentary claim is also available in respect of the general law claim.

- 324 This provision would be applied in cases where the contributor is a family member or close friend of the will-maker who would normally be expected to claim under the Commission's proposed provisions. However, on the facts, the contributor may argue that the promise made by the will-maker is a contractual one. Our proposal will result in the matter being dealt with under the more informal procedures we envisage for testamentary claims. It will also encourage the court to take into account the wider considerations which follow from the close relationship between the parties; for example, the fact that both parties have given services to each other over an extended period.

Contributors may not make any other claim based on the unjust enrichment of the will-maker as a result of a benefit provided by a contributor (whether by way of *quantum meruit*, *quantum valebat*, beneficial interest under constructive trust, proprietary estoppel or otherwise).

However the court may, if satisfied that the enrichment occurred in the context of a strictly commercial transaction with parties who had no close personal connection with the will-maker, grant contributors special leave to make such a claim.

- 325 The contributors' claim will usually displace the law relating to claims based on the unjust enrichment of the will-maker. Yet if the enrichment occurred in the context of a strictly commercial transaction with parties who had no close personal connection with the will-maker, the court will be able to grant contributors special leave to make these other claims.

326 PRIORITY OF CONTRIBUTORS' CLAIMS AND POWER TO PERMIT TRACING CLAIM

Contributors' claims should have the same priority which creditors' claims under the general law have against other testamentary claims.

As in creditors' claims under the general law of contract or restitution, the court should have power, when it considers it just, to permit contributors to make proprietary or tracing claims against specific assets or property comprised in the estate.

327 Appendix B sets out proposals for resolving the relative priorities of contributors' claims competing with other claims and one another.

328 CONTRIBUTORS AND WELFARE

For the purposes of assessing means-tested State welfare, tests of contributors' financial position should include the contribution claim.

329 Like partners' property divisions (see para 122), the contributors' claim is a claim for property belonging to the contributor. When a person applying for means-tested welfare can make a contributors' claim the amount of this claim should be taken into account, even if the claim is not actually made, in any welfare test of the person's financial position.

330 Conversely, where it is the will-maker who is receiving social welfare benefits (eg, the residential care subsidy), an amount corresponding to the value of any contribution claim which could be made against the estate should be deducted from the will-maker's assets. This has been recognised, to a certain extent, by the new administrative arrangements made by the Government for the financial means assessment of people in long-stay residential care. However, these new arrangements only apply in limited circumstances and require the concurrence of the will-maker in care and the making of an immediate disposition to honour the obligation (see Appendix D).

331 The claim should be recognised when the will-maker first goes into care. This recognition would not require the will-maker to make an immediate disposition to fulfil the obligation. We would prefer that the will-maker have the option of recognising the claim at that time. If the will-maker is unable or unwilling to recognise that the claim is valid, recognition by the Social Welfare Department should be conditional upon the contributor bringing proceedings to enforce the claim within a limited period after the will-maker's death. In either event the claim should be counted as a liability in the assessment of the will-maker's financial position on going into care.

10 Other reform issues

332 **A** NUMBER of other matters need to be attended to. Though subordinate to the main areas of the proposed legislation, they are nevertheless important. Various more detailed matters are discussed in the Draft Act. Those dealt with in this chapter are

- JURISDICTION, AWARDS AND PRIORITIES
 - which court should have jurisdiction to deal with testamentary claims (paras 333–337);
 - what is the “estate” against which awards can be made (paras 338–341);
 - how to deal with attempts by the will-maker to avoid the impact of testamentary claims (paras 342–345);
 - priorities between conflicting claims (para 346 and Appendix B); and
 - priorities between estate beneficiaries (paras 347–348).
- MAKING AND SETTLING CLAIMS
 - time limits for making claims (paras 349–355);
 - agreements to waive and settle testamentary claims (paras 356–361); and
 - the relationship of the proposals in this paper to other legal doctrines which may provide other grounds to upset or interfere with a will (paras 362–364).

JURISDICTION, AWARDS AND PRIORITIES

Jurisdiction

333 Under the present law (Law Reform (Testamentary Promises) Act 1949 and the Family Protection Act 1955) the Family Court (a division of the District Court) and the High Court have concurrent jurisdiction.¹⁶⁰ The Family Court will not have jurisdiction if, when an application is filed, proceedings relating to the same matter have already been commenced in the High Court.¹⁶¹ The provisions relating to transfer of proceedings from the court in which they were commenced express no consistent preference for the Family Court or the High Court as the court of first instance. A Family Court may refer the proceedings to the High Court with or without an application by any party if the court considers that the application would be “more appropriately dealt with in the High Court.”¹⁶² Conversely, the High Court, on application by any party, must order removal of the proceedings into the High Court unless it is satisfied that

¹⁶⁰ From 1 July 1992. See Family Protection Act 1955 s 3A (as inserted by Family Protection Amendment Act 1991 s 3); Law Reform (Testamentary Promises) Act 1949 s 5 (as inserted by Law Reform (Testamentary Promises) Amendment Act 1991 s 3); Family Courts Act 1980 ss 11(1)(gb), 11(1)(gc) (as inserted by Family Courts Amendment Act 1991 s 2(1)).

¹⁶¹ Family Protection Act 1955 s 3A(2); Law Reform (Testamentary Promises) Act 1949 s 5(2).

¹⁶² Family Protection Act 1955 s 3A(3); Law Reform (Testamentary Promises) Act 1949 s 5(3).

the proceedings would be "more appropriately dealt with by the Family Court."¹⁶³

- 334 Under the Matrimonial Property Act 1963 the Family Court and the High Court again have concurrent jurisdiction.¹⁶⁴ The 1963 Act itself makes no provision for transfer of proceedings. The Family Courts Act 1980 s 14 does so, though the wording is different from the wording in the Family Protection Act 1955 and Law Reform (Testamentary Promises) Act 1949 for transferring these proceedings commenced in the Family Court to the High Court.¹⁶⁵ Section 14 permits the Family Court, on the application of any party, or on the Court's initiative, to transfer the proceedings to the High Court if satisfied that, because of the complexity of the proceedings or of any question in issue, it is expedient for the High Court to deal with the proceedings. A Family Court may also, on application by a party or on the Court's initiative, state a case for the opinion of the High Court: Family Courts Act 1980 s 13.
- 335 Should the same arrangements apply to the new statutory testamentary claims? Two views have been expressed. The Commission's report on *The Structure of the Courts*,¹⁶⁶ tentatively recommended that testamentary claims proceedings be commenced in the Family Court, and be capable of transfer to the High Court, by order of the High Court, on the grounds of their complexity or general importance or by the consent of all parties to the proceedings. Providing there is standard and principled provision for the transfer of proceedings, there is virtue in the present concurrent jurisdiction in the High Court and the Family Court. The contribution of the High Court to the development of the jurisdiction under the Matrimonial Property Act 1976 and to the law of testamentary claims is undeniable. As well, parties' freedom of choice and the High Court's ability to resolve complex issues support the present practice.¹⁶⁷
- 336 The opposing view is that the Family Court should have the exclusive original jurisdiction to hear testamentary claims. Transfers from the Family Court to the High Court would be unusual, if indeed they were permitted at all. A number of considerations support this suggestion: the particular expertise and speciality of the Family Court; its now extensive experience in the area; the fact that many parties presently initiate proceedings there and its special procedures to facilitate settlement. The Family Court's ability to state cases presenting especially complex or important matters for the opinion of the High Court (Family Courts Act 1980 s 13) supports this approach as well. The High Court would, in its appellate jurisdiction, continue to make an important (if less regular) contribution to the jurisdiction by correcting individual trends and discrepancies which emerged and developing the policy of the law.

¹⁶³ Family Protection Act 1955 s 3A(4); Law Reform (Testamentary Promises) Act 1949 s 5(4).

¹⁶⁴ From 1 July 1992. See Family Courts Act 1980 s 11(1A) (as inserted by the Family Courts Amendment Act 1991 s 2(2)); District Courts Amendment Act (No 2) 1992 s 6.

¹⁶⁵ The transfer provisions in the Family Courts Act 1980 (s 14) prevail over the general provisions for transfer of proceedings in the District Courts Act 1947: Family Courts Act 1980 s 16(2).

¹⁶⁶ (1989, NZLC R7), paras 5, 295, 307–308, 312–313, 315. This tentative recommendation should be put in the context of the related proposal that jurisdiction over the grant of probate and letters of administration be conferred on the Family Court on the same basis.

¹⁶⁷ The Commission understands that the present civil case management system in the High Court requires parties to consider mediation of a dispute.

- 337 Although as now drafted section 38 of the Draft Act provides for concurrent High Court and Family Court jurisdiction, the Commission has not committed itself to a preferred view on this question. We would welcome comments on this point.

Should the Family Court have exclusive original jurisdiction to hear testamentary claims?

“Estates” against which awards may be made

- 338 A person dies. The deceased person’s personal representative (“administrator”) obtains probate and so establishes his or her right to administer the estate (being appointed in the will or by the court when there is no valid appointment under a will). The representative collects the deceased person’s property to make it available to claimants. Under the present law, broadly speaking, testamentary claimants may claim only against property which would otherwise pass to the personal representative under a deceased person’s will or intestacy.
- 339 The dead person may well have had property which passes independently of the will. For example, a jointly owned property passes directly to the co-owner. If the estate is insolvent, some of these assets (“non-probate assets”) may be reclaimed by creditors once the estate is formally declared insolvent under Part XVII of the Insolvency Act 1967. So they have a degree of protection. So too will testamentary claimants who can establish their claim as some form of non-statutory legal right (eg, a constructive trust or contract). However claimants under the Matrimonial Property Act 1963,¹⁶⁸ the Law Reform (Testamentary Promises) Act 1949,¹⁶⁹ and the Family Protection Act 1955¹⁷⁰ are not generally permitted to satisfy their claims out of non-probate assets.
- 340 The Commission proposes that courts have the power to include non-probate assets in the estate to meet testamentary claims.

Property comprised in the following arrangements, so far as it was (or could, at the will-maker’s request, have been made) available to the will-maker immediately before death, should be actually or notionally available for claims (the “non-probate assets”):

- *contracts to make (or not to revoke) a will;*
- *contracts with a bank or another financial institution providing that an account or policy is to pass to a co-owner or a nominated beneficiary on the death of the deceased person (see, eg, Administration Act 1969 ss 68C–68D);*
- *deathbed gifts (donationes mortis causa) which the deceased person has made in contemplation of death;*

¹⁶⁸ Sections 5, 8A; *Re Madden* (1993) 11 FRNZ 45.

¹⁶⁹ Section 3(1); *McCormack v Foley* [1983] NZLR 57; Patterson (2nd ed, Butterworths, Wellington, 1994), para 17.4, 272.

¹⁷⁰ Section 2(5), stating that for the purposes of the Act the estate is deemed to include *donationes mortis causa* (gifts in contemplation of death); *Nosworthy v Nosworthy* (1907) 9 GLR 303; *Re Kensington* [1949] NZLR 382; *Re Brownlee* [1990] 3 NZLR 243.

- *trusts* set up by the deceased person expressed to be revocable by the deceased person before death;
- *beneficial powers of appointment* exercisable by the will-maker during his or her lifetime; and
- *joint tenancies* held by the will-maker with others.

- 341 These assets appear not to be available to the administrator now, unless it can be established in any particular case that the transaction, although arranged during the deceased person's lifetime, was in reality a form of will disposition which fails because the formalities required in the Wills Act 1837 (UK) s 9 have not been complied with.

If the estate disposed of by will or on intestacy is significantly affected by a testamentary claim, the administrator, claimants or beneficiaries may apply to the court to have the non-probate assets bear a proportionate part of the burden.

Anti-avoidance: enforcing duties to make provision

- 342 Our present proposals apply only where the will-maker has a clear duty to do something for a potential claimant. Any attempt to evade that responsibility should not be viewed favourably (see, eg, provisions for restraining or setting aside dispositions during the will-maker's lifetime in Child Support Act 1991 ss 200–201; Matrimonial Property Act 1976 ss 44–45). Yet there is nothing in any of the present Acts dealing with testamentary claims which would prevent a will-maker from putting assets beyond the reach of claimants. Illustrations of anti-avoidance provisions for testamentary claims are found in overseas legislation including the Inheritance (Provision for Family and Dependents) Act 1975 (England) ss 10–13, the Family Provision Act 1982 (New South Wales) Division 2 and the Uniform Probate Code (1990 Revision) § 2–202.
- 343 Anti-avoidance provisions must achieve an appropriate balance between preventing people from avoiding their testamentary obligations, and protecting certainty and reasonable expectations arising out of property transfers made by will-makers during their lifetime.

To satisfy awards on testamentary claims, claimants should be able to apply after the will-maker's death to bring back into the estate property comprised in dispositions by the will-maker:

- for less than full value made within three years before the will-maker's death, and
- made at any time with a view to putting assets beyond the reach of any testamentary claimant, or otherwise prejudicing the interests of a testamentary claimant.

Bona fide purchasers acquiring an interest in the property will be protected, as will those who have acted to their detriment believing in the validity of the disposition.

- 344 Courts should not invariably bring the property comprised in these dispositions back into the estate. They can treat it as if it were included in the estate when calculating awards (especially spouses' and de facto partners' property division). If the estate is sufficient to satisfy awards the court makes, and appropriate adjustments can be made between the beneficiaries (paras 347–348), it may not be necessary to bring the property back into the estate.
- 345 The Commission's proposals to deal with non-probate assets and avoidance would call for further consideration if it were decided that adult children (or grandchildren) should have a claim. There would not then seem to be the same compelling reasons to interfere with settled arrangements and transactions. We consider these "second-tier" arrangements should be substantially provided for out of the probate estate and any gifts made in anticipation of death (as they are under the present law).

Priorities: claimants

- 346 There are a number of uncertainties and anomalies in the law concerning the relative priorities of testamentary claims. These have created problems in practice.¹⁷¹ It may be that our proposals will give rise to fewer priorities problems because they are simpler and clearer, and a major category of claimants (adult children) may no longer have rights. Nevertheless new legislation setting out testamentary claims should clarify how the priority of claims is to be established in each case. Appendix B sets out proposals for resolving the relative priorities of testamentary claims.¹⁷²

Priorities: beneficiaries

- 347 If a substantial claim succeeds, the property available to the beneficiaries under the will is reduced. Under the general law, each legacy is categorised (as a residuary,¹⁷³ general¹⁷⁴ or specific¹⁷⁵ legacy) and abates according to that categorisation. Residuary legacies, which by value are often the largest, and hence most important dispositions of the estate, abate first (then general

¹⁷¹ See, for example, *Re Webster* [1976] 2 NZLR 304; *Breuer v Wright* [1982] 2 NZLR 77; *McCormack v Foley* [1983] NZLR 57; *Re Cullen* (unreported, High Court, Auckland, 15 August 1986, A 1015/84); *Re Hayward* [1989] 1 NZLR 759; *Re Madden* (1993) 11 FRNZ 45; *Re Hills* (unreported, High Court, Christchurch, 14 October 1994, M 1209/89); *Re B* (unreported, High Court, Wellington, 25 July 1995, CP 228/93).

¹⁷² For discussion of questions of priority, see Patterson (2nd ed, Butterworths, Wellington, 1994), para 18.4, 306–307; Atkin (Butterworths, Wellington, 1991), para 8.12, 170–171; Sheppard, "Contracts to make Wills and the Family Protection Act 1955: Is the Promisee a Creditor or a Beneficiary?" (1985) 15 VUWLR 157, 179; Flannery, "Family Protection: Coach and Four through an Act of Parliament" [1978] NZLJ 451, 454; Sutton, "Ousting the Family Protection Act Jurisdiction" [1977] NZLJ 57, 58–59; Hardingham, "*Schaefer v Schuhmann*: Promisee v Dependant" (1972) 10 University West Aust LR 115, 128.

¹⁷³ For example, "the rest of my estate".

¹⁷⁴ For example, "\$1 000".

¹⁷⁵ For example, "my Nissan motorcar, registration SJ 1234".

legacies, then specific legacies).¹⁷⁶ If the shortfall is due to a substantial testamentary claim, this approach is unsatisfactory as it is almost always inconsistent with the will-maker's intentions.

- 348 The present testamentary claims legislation confers broad powers on the courts to determine which of the beneficiaries suffers as a result.¹⁷⁷ Consistently with our general approach to testamentary claims, we are not in favour of giving the court a broad discretion to do what the court thinks right. This makes it more difficult to settle disputes since, even where a claim has clear merit, there can be considerable argument about which beneficiary should bear the cost of meeting it. The most reliable touchstone is either proportionality, or what can be gathered about the will-maker's likely intention in such a situation. As proportionality requires the court to evaluate each beneficiary's interest, which may be onerous in some situations, the court might be excused from obtaining and applying exact valuations providing there is no significant departure from the will-maker's intentions.

Beneficiaries' interests in the estate (under the will or otherwise) should be reduced only to the extent necessary to satisfy testamentary claim awards.

Beneficiaries' interests should generally be reduced rateably according to their value.

The court should be able to alter this rateable reduction of beneficiaries' interests where the court considers that rateable abatement would not accord with the will-maker's intentions, had the will-maker contemplated the making of a successful claim.

MAKING AND SETTLING CLAIMS

Time limits for making claims

The proposed testamentary claims should in general have a three-year limitation period. The limitation period runs from the date the will-maker died.

There will be no bar on making a claim after the "final distribution of the estate." Claimants should be able to trace the estate property into the beneficiary's hands.

Beneficiaries who receive property in good faith and change their position detrimentally because of its receipt will not have to restore it to the estate.

¹⁷⁶ As occurred in applications under the Testator's Family Maintenance Act 1900. See, for example, *Parker v Carr* [1906] 24 NZLR 895; *Plimmer v Plimmer* (1906) 9 GLR 10. These decisions were effectively reversed by later legislation: Testator's Family Maintenance Act 1906 s 3(4); Family Protection Act 1908 ss 33(3)–(4); Family Protection Act 1955 s 7. Compare Estate and Gift Duties Act 1968 s 56(1), providing that estate duty is a charge on the whole of the dutiable estate.

¹⁷⁷ Matrimonial Property Act 1963 s 8A; Family Protection Act 1955 s 7; Law Reform (Testamentary Promises) Act 1949 s 3(6).

- 349 The Commission considers that testamentary claimants, like claimants in other civil proceedings, should be able to make claims within three years of the time the right of action arose, that is, the will-maker's death.¹⁷⁸ The present law is apparently more restrictive.¹⁷⁹
- 350 The reason for having a tight time limit is to allow administrators to distribute estates within a reasonable time after the grant of administration. Even so, administrators may have to delay distribution until no further claims can be made. In practice, if there is no likelihood of claims, administrators frequently distribute before the time limits have expired, though they do so at their own risk.
- 351 We consider that now that property can readily be traced into the hands of beneficiaries,¹⁸⁰ there is no good reason for imposing a duty on the administrator to retain the property. If a period of delay is still needed to allow claims to be made, it should be no more than three months after the death of the will-maker. The people who will be able to make claims under our proposals are confined to those who, for the most part, are close to the will-maker. Support claimants will need to make a claim soon after the will-maker's death. Those who delay making claims will run the risk that the property will be distributed to people who cannot refund it. But that is a relatively small risk and has to be balanced against the inconvenience caused by delays in distributing the estate.
- 352 This proposal has been viewed with concern by certain lawyers we have consulted. The tracing procedures are relatively unfamiliar; under present law they can seldom be invoked in family protection cases.¹⁸¹ It has been suggested that beneficiaries will feel doubly aggrieved if, to meet a late claim, they have to pay back what they have received from the estate.
- 353 Against that point of view, it may be argued that once family claims are put on a clearer basis, the family of the will-maker will normally know which family members have a claim, and how those claims might affect each beneficial interest under the will.¹⁸² They will take their share knowing the risks.

¹⁷⁸ *Limitation Defences in Civil Proceedings* (1988, NZLC R6), para 128.

¹⁷⁹ Claims must generally be made within one year of the date of grant of administration, although time limits may be extended for an indefinite period unless the estate has been "finally distributed": Matrimonial Property Act 1963 s 5A; Family Protection Act 1955 s 9; Law Reform (Testamentary Promises) Act 1949 s 6. By contrast, the Commission's limitation defence recommendations envisage a "long-stop" extension period of 15 years from the time the cause of action arose, which is subject to only three exceptions: *Limitation Defences in Civil Proceedings* (1988, NZLC R6), paras C196–C198 and Schedule 3.

¹⁸⁰ Administration Act 1969 ss 47–51.

¹⁸¹ Particularly since the decision in *Re Bimler (Deceased)* [1994] 3 NZLR 13; (1994) 12 FRNZ 68. The lack of District Court jurisdiction to make tracing orders under the Administration Act 1969 s 49 identified in *Re Plank* (unreported, High Court, Whangarei, 18 November 1994, M 2/92) should be cured by the Law Reform (Miscellaneous Provisions) (No 5) Bill 1995 cl 44. (This Bill was introduced and referred to the Justice and Law Reform Select Committee on 19 December 1995, and at 26 July 1996 had not been read for a second time: *Parliamentary Bulletin*, 96.16, 29 July 1996, 32.) See Draft Act s 49(3), para C162.

¹⁸² The same cannot be said with confidence for adult children's claims, if they continue to be allowed (see chapter 7). In that case, we would propose that the time limit be six months from the death of the will-maker, unless there are exceptional circumstances; and, even then, an extension should not be permitted to disturb distributions of the estate which have been made when the extension is sought.

Conversely, if there is no sign of a claim, even now administrators often distribute the property as soon as they are ready to do so. This is so notwithstanding the rule that no distribution should occur until six months after the court has made a grant of administration.¹⁸³ If there is an unexpected claim, then the administrator is at some risk of personal liability. This risk seems to be unjustified, when the administrator is following a sensible and well-established practice.

- 354 Administrators, therefore, will not be legally required to hold property longer than is necessary to ascertain and pay the ordinary debts of the will-maker. Nor will they be required to find out whether a potential claimant exists and is likely to make a claim. However, there will be some restrictions on what administrators may do when they know of a claim. They should not be able to pass the property on if they know that the claimant's rights are likely to be defeated by distribution.

Administrators should only be liable for passing the property on to a beneficiary if

- they know of the existence of a claim when they distribute, and
- they know or have reason to believe that the beneficiary intends to put the property beyond recovery by a claimant.

- 355 There is a further time limitation which deserves brief reference here, though it has already been discussed in chapter 5. This relates to the support claims of spouses and de facto partners. We propose (paras 166–169) that such claims should automatically lapse unless made within five years of the couple's most recent separation.¹⁸⁴ The presumption here is that by that time both parties will already have established a reasonable, independent standard of living, at whatever level they have been able to achieve.¹⁸⁵ To allow one of them to try to improve their situation with a late support claim would unduly disrupt estate planning and would raise issues which could not easily be dealt with at such a distance in time.

Agreements

During the will-maker's lifetime people who have testamentary claims may agree with the will-maker not to make a claim.

After the will-maker's death, a claimant may compromise a claim without the need for court approval.

These principles do not apply to the support claims of children under 25 years of age.

¹⁸³ Administration Act 1949 s 47.

¹⁸⁴ Compare the present law. A spouse who has separated from the will-maker but whose marriage to the will-maker is not dissolved at the time the will-maker dies may still claim: Patterson (2nd ed, Butterworths, Wellington, 1994), para 11.8, 203–206.

¹⁸⁵ This is an effort required of living spouses whose marriage dissolves on separation: Family Proceedings Act 1980 s 64(2).

- 356 **SETTLING CLAIMS** – Under the present law, family protection claims cannot be settled before death. After death, it is now accepted that any compromise must be approved by the court before it is binding.¹⁸⁶ There seems to be no good reason why, in general, an adult claimant should not be able to surrender a potential property division, support award or contributors' award. As far as the contribution or property division element of a claim is concerned, it is no different from any other property right that the claimant may surrender. If there is concern about surrenders to avoid social welfare means tests, it should normally be dealt with by appropriate provisions in welfare legislation preventing welfare beneficiaries from depriving themselves of assets.¹⁸⁷ With respect to support claims, it may perhaps be argued that they are different. But it is difficult to see why that is so.¹⁸⁸ In any event, as already stated (para 109), the welfare authorities should have no power to insist that a spouse or de facto partner take a support claim.
- 357 There is one exception: the support claim which can be brought by children under 25. Admittedly the law would normally assume that when they attain 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. People under 20 are also frequently able to deal with their own interests. Sometimes the advice or consent of an adult or appropriate official is an essential prerequisite.¹⁸⁹ However, Family Protection Act 1955 claims have not been able to be dealt with in this way in the past, and the only way it could be done is with the consent of the court after proceedings have been brought. The question is whether minors' incapacity to contract before death, and to settle after death with the court's consent, should continue for children's claims under the proposed new legislation.
- 358 The Commission considers that it should, for a number of reasons:
- The child's need for maintenance and support is so vital that it should not be able to be waived or compromised (this applies to a lesser extent, of course, when the child reaches 18).
 - The child may find it difficult to assess a promise of immediate advantage, against the right to provision for the child's longer term future.
 - There is a risk of undue influence operating between a parent and their adolescent children.
 - The State has a continuing interest to see that the child is provided for by its parents and that it is not thrown back on the Department of Social Welfare as a provider of last resort.
- These considerations outweigh, in the Commission's view, any concern that the proposals unduly limit children's rights.
- 359 If a child of 25 years of age or over with a mental or intellectual disability has a property manager appointed under the Protection of Personal and Property Rights Act 1988, the manager may contract on the child's behalf: ss 31, 36. The considerations we have listed in the previous paragraph do not raise serious issues in this context.

¹⁸⁶ *Hooker v Guardian Trust & Executors Co of NZ* [1927] GLR 537; Patterson (2nd ed, Butterworths, Wellington, 1994), para 6.3, 82–85.

¹⁸⁷ Compare Social Security Act 1964 s 69F(6).

¹⁸⁸ See, for example, *Singer v Berghouse [No. 2]* (1994) 123 ALR 481. Compare Family Proceedings Act 1980 Part VI.

¹⁸⁹ Minors' Contracts Act 1969; Matrimonial Property Act 1976 s 21(7).

360 FORMALITIES – Under the present property division law, the dominant policy is to allow agreements but to impose adequate procedural safeguards.¹⁹⁰ We consider that this policy should apply to all testamentary claims, aside from those made by children under 25 years of age. This involves a change for contribution claims by those who are not spouses or de facto partners. Under the general law and the Law Reform (Testamentary Promises) Act 1949, there are usually no statutory formalities specifically applying to the waiver or compromise of these claims.¹⁹¹

An agreement to waive or compromise a testamentary claim must

- be in writing,
- be witnessed when signed, and
- contain a solicitor's certificate that
 - independent advice has been given, and
 - the claimant clearly understands the effect and implications of the agreement.

The court must enforce a written or oral agreement which does not comply with these formal requirements when satisfied that it

- was made,
- represents the true intent of the parties,
- is not vitiated by undue influence, and
- complies with the requirements for substantive justice.

361 SUBSTANTIVE INJUSTICE – It is accepted that for matrimonial property agreements the court should have power to refuse to enforce agreements which are unfair, or which have become unfair with the passage of time.¹⁹² We consider that the same principle is applicable to all testamentary claims, given the close relationship between claimant and will-maker which they usually imply. This is a change, since under the general law and the Matrimonial Property Act 1963 s 6(2) the courts do not go behind the parties' common intention about property division.

The court should be able to refuse to give effect to an agreement where that would be unjust, considering

- whether the agreement was fair and reasonable at the time it was made;
- the time that has elapsed since the agreement was entered into; and
- whether the agreement is fair and reasonable in light of any changes in circumstances since it was made.

¹⁹⁰ See Matrimonial Property Act 1976 s 21; Matrimonial Property Act 1963 s 6; *Gillies v Keogh* [1989] 2 NZLR 327, 334, (1989) 5 FRNZ 490, 496–497, (1989) 5 NZFLR 549, 555–556.

¹⁹¹ The Contracts Enforcement Act 1956 s 2 requires that contracts relating to interests in land be in writing, although the contributor may be relieved of proving a written agreement if he or she can show part performance: see, for example, *Flemming v Beevers* [1994] NZFLR 108. See also Property Law Act 1952 s 49A; *A New Property Law Act* (1994, NZLC R29), Part 4 Subpart 1 ss 38–40, 264(2) and Schedule 8, paras 223–235.

¹⁹² Matrimonial Property Act 1976 s 21(10)(c)–(d).

Other grounds for upsetting the provisions of a will

362 The broad powers conferred by the present Family Protection Act 1955 can, if only in an indirect and unclear manner, be used by the courts to remedy other concerns about will-makers' failure to make an adequate will. We have already considered the arguments for entitling children to "second-tier" awards when the will-maker has excluded them without good reasons (chapter 7). Whether or not claims of this kind continue to be made, there are other situations in which family members may be dissatisfied with the terms of a will and may wish to make a claim to upset the will. The legal doctrines outlined in the following paragraphs are important:

- INCAPACITY – The present legal test for capacity requires the person propounding the will to prove that the will-maker executed the will
 - when they were 18 years of age or older (unless married, a privileged will-maker or the will is approved by the Public Trustee or District Court),¹⁹³ and
 - with "sound mind, memory and understanding" of "the nature of the act and its effects", fully and properly recollecting and understanding¹⁹⁴
 - (a) the extent of the property they were disposing of,
 - (b) the persons who were the objects of their bounty or the claims on the property which they ought to satisfy, and
 - (c) the manner in which the property would be distributed between those persons or to satisfy those claims.

A person subject to a property order under the Protection of Personal and Property Rights Act 1988 is not automatically incapable of making a will. If they are found to be incapable, a property manager can apply to have a court-directed will executed.¹⁹⁵

- UNDUE INFLUENCE – This means that the will-maker was in fact *mentally* coerced so that their freedom of action in making the will was destroyed. The burden of proving undue influence is (in the case of a gift by will) usually on the person alleging it, however "those who take a benefit under a will and have been instrumental in preparing or obtaining it have thrown upon them the onus of showing the righteousness of the transaction."¹⁹⁶
- REVOCATION BY LATER MARRIAGE AND PARTIAL REVOCATION BY DIVORCE – Section 18 of the Wills Act 1837 (UK) provides that "every will made by a man or a woman shall be revoked by his or her marriage" (unless it is expressed to be made in contemplation of marriage: Wills Amendment Act 1955). Similarly the Wills Amendment Act 1977 s 2 provides that on the making of an order for the dissolution of a marriage certain specified dispositions to the will-maker's former spouse in a will shall be null and void.

¹⁹³ Wills Amendment Act 1955 Part I; Wills Amendment Act 1969 s 2.

¹⁹⁴ *Banks v Goodfellow* (1870) LR 5 QB 549; *Public Trustee v Bick* [1973] 1 NZLR 301; *Peters v Morris* (unreported, Court of Appeal, 19 May 1987, CA 99/85); *B v F* [1992] NZFLR 279; *Brown v Pourau* [1995] 1 NZLR 352.

¹⁹⁵ Protection of Personal and Property Rights Act 1988 ss 6, 11, 54–55. See, for example, *K v Public Trustee* (1995) 13 FRNZ 91; *B v F* [1992] NZFLR 279.

¹⁹⁶ *Barry v Butlin* (1838) 2 Moo PC 480, 12 ER 1089; *Boyse v Rossborough* (1857) 6 HLC 2; *Tanner v Public Trustee* [1973] 1 NZLR 68.

- **INFORMAL WILL-MAKING AND REVOCATION** – The will must be in writing and properly executed in the presence of two witnesses, failing which, the will is invalid. But the modern tendency in overseas legislation (which the Commission intends to review in a later paper) is to relax these requirements where the will-maker's intentions are clear.

- 363 The usual consequence, if these laws apply, is that the will-maker dies wholly or partially intestate. Intestate distribution gives effect to a concern for equality between members of the same rank of the will-maker's family. In other situations, however, an earlier will apparently revoked is made effective again. If only part of a will does not take effect, the property may pass under other clauses of the will or according to the intestacy provisions. Here too, modern overseas laws sometimes permit the court to give effect to other expressions of will-making intent, and these will also need to be reviewed by the Commission. There is also the possibility that the provisions of later informally made wills or earlier apparently revoked wills could be accepted and given effect by the court. Some changes to the laws of distribution on intestacy may also be appropriate.
- 364 The Commission welcomes comment on whether the laws in paras 362–363, taken alongside the proposals in this paper, are sufficient to allow courts to remedy will-makers' failure to make an adequate will. Any comments can be taken into account in the next stage of the Commission's succession project.
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DRAFT TESTAMENTARY
CLAIMS ACT 199-
AND COMMENTARY

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The Parliament of New Zealand enacts the
Testamentary Claims Act 199–

PART 1
PRELIMINARY

1 Purposes

The principal purposes of this Act are

- (a) to provide an entitlement to property division on the death of a partner in a marriage or a relationship in the nature of marriage, where no sufficient provision for property division has been made under the will or intestacy of the deceased person, or otherwise; and
- (b) to provide for support claims and contribution claims to be made against the estates of deceased persons in cases where no sufficient provision has been made under the will or intestacy of the deceased, or otherwise, to meet those claims; and
- (c) to empower courts to make property division orders, support awards and contribution awards against the estates of deceased persons; and
- (d) to empower courts to make property division orders against surviving partners on the application of administrators of the estates of deceased partners; and
- (e) to codify the law that applies to property division on the death of a partner and the law that applies to support claims and contribution claims.

Definitions: contribution award, contribution claim, court, estate, property division order, support award, support claim, s 8; partner, ss 9, 10(3)

Section 1

- C1 The Draft Act provides for three categories of testamentary claims: property division entitlements, support and contribution claims. It develops and replaces in one Act the present claims under
- the Matrimonial Property Act 1963 (preserved by the Matrimonial Property Act 1976 s 57(4)),
 - the Family Protection Act 1955, and
 - the Law Reform (Testamentary Promises) Act 1949.
- It also substantially codifies a variety of general law claims for remuneration of benefits conferred on the will-maker during lifetime.
- C2 The Draft Act extends the categories of claimants in one important respect. Formerly only legally married people had a right to make a statutory claim. Now both married people and those living in de facto relationships will be able to make statutory claims for property division and support. The two groups are both referred to in the Act as *partners* (see *sections 9 and 10(2)–(3)* and paras C31 and C34).

2 Principles

- (1) This Act is to be interpreted with regard to the principles stated in this section.
- (2) This Act recognises and presumes to be of equal value the contributions of spouses to a marriage and de facto partners to a relationship in the nature of marriage and recognises that this principle should be the basis for property division.
- (3) This Act recognises that a surviving partner of a deceased person who does not have sufficient resources to enable him or her to maintain a reasonable, independent standard of living should have a right of support from the deceased's property in respect of the period until the partner, having regard to the economic consequences of the partnership for that partner, can reasonably be expected to maintain such a standard of living for himself or herself.
- (4) This Act recognises that a child of a deceased person during such period as the child remains under the age of 20 years or in certain other circumstances while unable to earn a reasonable, independent livelihood has a right of support from the deceased's property.
- (5) This Act recognises that a person who has provided a benefit to a deceased person should be entitled to provision from the deceased's property in return for the benefit if
 - (a) the deceased expressly promised to make provision in return for the benefit;
or
 - (b) it would be unjust for the estate of the deceased to retain the benefit without provision in return for the benefit being made.

Definitions: **benefit**, **child of a deceased**, **estate**, **property division order**, **provision**, s 8; **partner**, ss 9, 10(3)

Section 2

- C3 This section states the principles which apply to each category of testamentary claim.
- C4 *Subsection (2)* states the principles which apply to domestic partners' property division entitlements. The same principles apply to the division of married partners' property whether their relationship ends on separation or on death. This changes the present, broadly discretionary, approach to dividing spouses' property when their marriage ends on death (Matrimonial Property Act 1963). All claims will now be governed by the rules which apply to marriages which end by separation (Matrimonial Property Act 1976). (See, however, the *Note to Part 2*, paras C25–C29). The Act presumes partners' contributions to their relationship to be of equal value, and this presumption is the usual basis for partners' property division.
- C5 *Subsection (3)* states the principles which apply to partners' support claims. The rights of both surviving spouses and children under the present legislation are based on a right to "adequate provision for their proper maintenance and support". No clear and principled approach to making awards is spelt out in that legislation (Family Protection Act 1955, Matrimonial Property Act 1963). Under the Draft Act surviving partners whose resources are insufficient to permit them to maintain a reasonable, independent standard of living have a right to support from the will-maker's estate until they can reasonably be expected to maintain themselves, having regard to the financial consequences of their partnerships.
- C6 *Subsection (4)* provides that will-makers' children also have a right to support from the will-maker's estate if they are under 20, under 25 and undergoing education or training, or permanently disabled from youth. A further or alternative subsection will be needed if adult children are also to have a testamentary claim: see chapter 7, paras 233–266.
- C7 *Subsection (5)* states the principles which apply to contribution claims. People who conferred benefits on a living will-maker must under existing law show that the will-maker promised to remunerate them for those benefits by will (Law Reform (Testamentary Promises) Act 1949). Alternatively or additionally, they may make one of many claims under the general law of contract or the law of restitution. Both the statute and the common law are now replaced by two claims based on (a) express agreement, and (b) unjust enrichment. These correspond broadly to the law of contract and restitution respectively. But they have been adapted to meet the needs of testamentary claims. In particular, it will be easier for carers of older and disabled people to bring claims than it is under the present law.

3 Commencement

This Act comes into force 6 months after the date on which it receives the Governor-General's assent.

4 Application

- (1) This Act applies in respect of entitlements and claims against the estates of persons who die after this Act comes into force, except that it does not apply in respect of entitlements to property division or to support claims where before this Act comes into force the partners ceased to live together or a partner had died.
- (2) This Act applies in respect of a property division initiated by the administrator of the estate of a person who dies after this Act comes into force against a surviving partner of the deceased person.
- (3) This Act does not apply to Māori freehold land as defined in section 4 of the Te Ture Whenua Māori/ Māori Land Act 1993, Māori customary land as defined in section 4 of that Act, shares in a Māori incorporation as defined in section 4 of that Act, and trusts constituted under Part XII of that Act.

Definitions: administrator, estate, support claim, s 8; partner, ss 9, 10(3)

5 Application to testate and intestate estates

Applications to the court for property division orders, support awards, and contribution awards may be made under this Act against the estates of deceased persons whether or not the deceased persons died leaving a valid will disposing of all or part of their estate.

Definitions: contribution award, court, estate, property division order, support award, s 8

Section 3

- C8 This section allows a period of 6 months for will-makers and potential claimants to become informed about and to consider how the Act affects them, so that, if they wish, they may make or alter their arrangements before the Act comes into force.

Section 4

- C9 *Subsection (1)* provides that claims may be made against will-makers' estates under the Act if the will-maker dies after the Act comes into force. The present law will continue to apply for those who die earlier. In the case of partners' claims, the present law will continue to apply where they separate before the Act comes into force, or where one of the partners dies before that time.
- C10 *Subsection (2)* provides further that property division claims may be made under the Act by administrators of will-makers' estates against will-makers' surviving partners (see *section 10(2)* and para C34).
- C11 *Subsection (3)* provides that the Act does not apply to interests in property currently defined and disposed of in accordance with Te Ture Whenua Māori/Māori Land Act 1993.
- C12 No provision has yet been made to deal with conflict of laws issues. In general, the law applicable to the substantial validity of provisions made in wills is well settled. It is
- as regards immovables (that is, land), the law of the place where the land is situated; and
 - as regards movables, the law of the will-maker's domicile.
- Section 7 of the Matrimonial Property Act 1976 follows a similar pattern, though as regards movables owned by a person domiciled overseas, New Zealand law may still be applied if the owner's husband or wife is domiciled here. The position also allows the parties to agree on the appropriate law which will apply. The Commission is currently considering what conflict of laws rules should apply to testamentary matters generally.

Section 5

- C13 The Act refers to "testamentary" claims and is intended primarily to deal with wills which do not observe the testamentary obligations laid down in the Act. But it will be equally available where the deceased dies without leaving a will which disposes of all of his or her estate, and the distribution on intestacy (or under the will and on intestacy) does not adequately recognise those obligations.

6 Act to be a code

- (1) Except as otherwise expressly provided in this Act, this Act has effect in place of the rules and presumptions of the common law and equity to the extent that they apply to transactions between partners in respect of property, and in cases for which provision is made by this Act, between partners, and each of them, and third persons as they would otherwise apply on the death of a partner.
- (2) Without limiting the generality of subsection (1),
 - (a) any presumption of advancement, and
 - (b) any presumption of resulting trust, and
 - (c) any presumption that the use of a partner's income by his or her partner with consent during the partnership is a gift,do not apply between partners.
- (3) Nothing in this section affects the law that applies where a partner is acting as trustee under any deed or will, and, for the purposes of this subsection, every enactment and rule of law or of equity continues to operate and apply accordingly as if this section had not been passed.

Definitions: **partner**, ss 9, 10(3)

Origin: Matrimonial Property Act 1976 s 4

7 Act binds Crown

This Act binds the Crown.

Section 6

- C14 The Act will have effect in place of common law and equitable rules which apply to property disputes between partners, but will not affect the law that applies where a partner is acting as a trustee.

Section 7

- C15 The Act will bind the Crown. It will apply, for example, if a testamentary claim is made against property left to the Crown in a will: see *A New Interpretation Act* (1990, NZLC R17) chapter 4.

8 Definitions

In this Act

administration means

- (a) probate of the will of a deceased person; and
- (b) letters of administration of the estate of a deceased, granted with or without a will annexed, for general, special, or limited purposes; and,
- (c) in the case of the Māori Trustee or the Public Trustee or a trustee company, an order to administer and an election to administer;

administrator means a person to whom administration is granted and the Māori Trustee or the Public Trustee or a trustee company where that official or company is deemed to be an executor or administrator by reason of having filed an election to administer;

award means a support award or a contribution award;

benefit

- (a) means money, property, work, services, and any other benefit of value, and a benefit may be of value although
 - (i) the person to whom the benefit is provided does not accept it, or accepts it believing that it will not be remunerated, if the benefit adds value to the deceased's property or relieves the person from expenditure which would otherwise be necessary or desirable; or
 - (ii) the benefit has no significant objective value, but the person to whom it is provided requests or accepts the benefit as being of value to that person; but
- (b) excludes services performed by a person without a significant expenditure of time, effort or money;

child of a deceased person has the meaning given in section 26;

contribution award means an award made by the court under this Act in respect of a contribution claim;

contribution claim means a claim made under section 29;

contributor means a person who provided a benefit to a deceased person during the lifetime of the deceased;

court means a court that has jurisdiction in a proceeding under this Act;

de facto partner has the meaning given in section 9;

estate means real and personal property of every kind, including things in action;

Section 8

- C16 This section defines all terms used in more than one place in the Act. The Commentary covers the more important definitions.
- C17 **Administration** and **administrator** are defined to include all formal modes of administration by all possible administrators. Intestacies are also included in the legislation: see *section 5*, para C13.
- C18 **Benefit** is a term used in respect of contribution claims. It means a thing of significant value that a contributor has provided to the will-maker when alive and for which the contributor claims provision from the will-maker's estate. A benefit may be of value because it has an objective value (that is, the contributor conferring it made the estate more valuable). Or it may be valuable because the deceased person regarded it as valuable, even though others would not (eg, companionship).
- C19 **Contributors** may make contribution claims. They are people who contributed a benefit to will-makers when the will-makers were alive.

homestead has the meaning given in section 13;

non-probate assets has the meaning given in section 48;

parent, in relation to a child, includes a person who is taken for the purposes of section 26(1) to have assumed on a continuing and enduring basis the responsibilities of a parent of that child;

partner has the meaning given in sections 9 and 10(3);

partnership chattels, in relation to a partnership,

- (a) means chattels owned by a partner, or both partners, which are
 - (i) household furniture or household appliances, effects, or equipment; or
 - (ii) articles of household or family use or amenity or of household ornament, including tools, garden effects and equipment; or
 - (iii) motor vehicles, caravans, trailers, or boats, used wholly or principally, in each case, for partnership purposes; or
 - (iv) accessories of a chattel to which subparagraph (iii) applies; or
 - (v) household pets; and
- (b) includes any of the chattels mentioned in paragraph (a) which are in the possession of a partner under a hire purchase or conditional sale agreement or an agreement for lease or hire; but
- (c) does not include chattels used wholly or principally for business purposes, or money or securities for money;

partnership home means the dwellinghouse that is used habitually or from time to time by the partners or by either partner as the only or principal family residence, together with any land, buildings, or improvements appurtenant to any such dwellinghouse and used wholly or principally for the purposes of the household and includes a joint family home;

partnership property has the meaning given in section 18;

Section 8 (Cont.)

- C20 **Partnership chattels** are one of three categories of partnership property divided when a property division claim is made (the other two are the **partnership home** (*section 13(5)*, paras C40–C41) and **other partnership property**, *section 18*, paras C52–C59). There is a strong presumption that partnership chattels, broadly, are items of personal property used in the home or for the partnership and grouped with the partnership home. They are usually divided equally between the deceased person's estate and the surviving partner (*section 12*, paras C36–C39). Other partnership property is also presumptively divided equally, but the presumption of equal sharing is not so strong (*section 17*, paras C50–C51). **Separate property** is usually not divided (*sections 19 and 20*, paras C60–C69). The present law applying to claims against estates (Matrimonial Property Act 1963 ss 5 and 6) does not categorise partners' property in this way nor presume that courts divide it in any particular way. At present courts divide spouses' property as appears just. Courts must consider spouses' respective contributions to a matrimonial home, and may consider spouses' respective contributions to other disputed property.
- C21 A **partnership home** is the only or principal residence used by the deceased person and his or her surviving partner. Homes settled under the Joint Family Homes Act 1964 can also be partnership homes subject to property division claims (currently they are not subject to spouses' property claims if the spouses were cohabiting when either died: Matrimonial Property Act 1963 s 5(6)).

personal debt means a debt incurred by a partner, other than a debt incurred

- (a) by the partners jointly; or
- (b) in the course of a common enterprise carried on by the partners, whether or not together with any other person; or
- (c) for the purpose of acquiring or improving or repairing the partnership home or acquiring or improving or repairing family chattels; or
- (d) for the benefit of both partners or of any child of the partnership in the course of managing the affairs of the household or bringing up any child of the partnership;

promise includes any statement of fact or representation and any expression of intention;

property division order means an order made by the court under this Act in respect of an application for property division;

provision, in reference to provision made or to be made by a deceased person, includes provision made or to be made before or after the death of the deceased and provision made by will or otherwise;

remunerate includes reward or recompense, by way of money or by the provision of any other benefit;

separate property has the meaning given in section 19;

support award means an award made by the court under this Act in respect of a support claim;

support claim means a claim made under section 24 or 27.

Definitions: **partner**, ss 9, 10(3)

Origins: Administration Act 1969 s 2 (administrator); Law Reform (Testamentary Promises) Act 1949 s 2 (promise); Matrimonial Property Act 1976 s 2 (homestead, partnership chattels, partnership home, personal debt, separate property)

Section 8 (Cont.)

- C22 **Personal debts** is a term defined for use in respect of partners' property division entitlements. **Personal debts** are not usually deducted from the value of **partnership property** (see *section 23*, paras C76–C81). **Personal debts** are debts which do not fall within one of the expressly defined debts which will be deducted from **partnership property**.
- C23 **Promise** is a term defined for use in respect of contribution claims. Contributors who claim on the basis of the deceased person's promise of remuneration must show that the promise was express (*sections 29(1)(a) and 31(1)*, paras C106 and C111–C113). This differs from the present law (Law Reform (Testamentary Promises) Act 1949 s 3(1)) under which courts can accept express *and* implied promises. Implied promises will be dealt with under the heading of unjust enrichment (*sections 29(1)(b) and 33*, paras C106 and C117–C122).
- C24 **Remunerate** is also used in respect of contribution claims to refer to the provision the contributor actually receives in return for the benefit contributed. Unlike the present law (Law Reform (Testamentary Promises) Act 1949 s 3(1)), the Draft Act includes as **provision**; anything given or promised to be given, in return for contributions. A promise of remuneration would include, for example, a promise to transfer property during the will-maker's lifetime; for example, in old age.

NOTE ON PART 2 OF THE DRAFT ACT

- C25 The form that *Part 2* of the Draft Act takes will depend in large measure on the state of the law governing property division when partners separate during their lifetime. The Minister of Justice has stated publicly that he has asked his Ministry to progress reform of the Matrimonial Property Act 1976 and also legislation governing the property of de facto couples.
- C26 We do not know what these reforms will be (though issues and possible reforms were foreshadowed by the Report of a Working Group in 1988). As regards husbands and wives, therefore, the present draft is based on the present provisions of the Matrimonial Property Act 1976. Any changes in the principles governing property division would need to be reflected in this part of the Act.
- C27 The Commission is not yet committed to any view on whether the provisions relating to married partners which appear in our Draft Act should ultimately appear as part of the Matrimonial Property Act 1976, or as part of a new Testamentary Claims Act. That is a matter for further discussion with the Ministry of Justice. The choice will depend on considerations such as clarity of drafting and convenience of access and application. There are, however, some wider issues which also need to be taken into account. These have to do with the concept of matrimonial property rights and issues in conflict of laws. Comment on this point is welcome.
- C28 The provisions dealing with married partners have been drafted in the present form to show how matrimonial property law provisions interrelate with testamentary claims. This has had the result that some 16 provisions of this Draft Act have been taken (with necessary adaptation) from the Matrimonial Property Act 1976 (see *Part 2*).
- C29 As regards our proposals for division of property between de facto partners, we recognise that, if they were implemented now, there would be a considerable difference between the law which applies during the partners' lifetimes, and the law which applies after one of them dies. This may not be easy to justify, although there is something to be said for the view that the law should be more favourable to claimants against the estates of dead partners, than it is to claimants who are separated from a living partner (see chapter 5, paras 139 and 142). For the present, we assume that there will be some legislation in place governing property division during de facto partners' lifetimes when our legislation is implemented. What form it will take we do not know. The Commission's tentative view is that the relevant principles of matrimonial property law could readily be applied in the de facto situation, with minor modifications. We have prepared our Draft Act accordingly, hoping that it will be useful in any public debate there may be on that issue.

PART 2
THE PROPERTY AND SUPPORT OF PARTNERS

Subpart 1 – Partners and their entitlements

9 Who is a partner?

- (1) A person is to be regarded as a partner of another person for the purposes of this Act if the person was at any time married to that other person or was at any time a de facto partner of that other person.
- (2) A person is to be regarded as a de facto partner of another person for the purposes of this Act if the person lived in a relationship in the nature of marriage with that other person.
- (3) For the purposes of this Act, a relationship in the nature of marriage includes a relationship between 2 persons of the same sex.

10 Property and support applications by partners

- (1) A partner of a deceased person may, by application to the court,
 - (a) initiate a property division; or
 - (b) initiate a property division and make a support claim, against the estate of the deceased.
- (2) The administrator of a deceased may, by application to the court, initiate a property division against a partner of that deceased or against the administrator of such a partner.
- (3) Any reference in this Act to proceedings that may be brought by a partner, or to procedural requirements to be observed by a partner, is to be taken to include a reference to those proceedings being brought or requirements observed by the administrator of a partner.

Definitions: **administrator**, **court**, **estate**, **support claim**, s 8; **partner**, ss 9, 10(3)

Section 9

- C30 This Part deals with partnership property. For married couples, comparable rights exist under the Matrimonial Property Act 1976 during their joint lifetimes only (see section 5 of that Act). The provisions in this part will apply where either partner dies. Either the surviving partner, or the estate of a partner who has died, will be able to bring a claim (see *section 10(2)*).
- C31 *Section 9* defines a **partner** for the purposes of property division applications and support claims. A person's partner must at some time have been either that person's husband or wife or de facto partner. A de facto partnership is defined as a relationship in the nature of marriage, and includes a relationship between two persons of the same sex (compare Matrimonial Property Bill 1975 cl 49, Electricity Act 1992 s 111(2)(e) and Domestic Violence Act 1995 s 2 for similar definitions).
- C32 At present when a relationship ends on death, only spouses may initiate statutory property divisions and make support claims (Matrimonial Property Act 1963 s 5, Family Protection Act 1955 s 3). De facto partners may make what the Draft Act styles a "contribution" claim under the Law Reform (Testamentary Promises) Act 1949 or under the general law. When both de facto partners are living, they may make property claims under the general law, and may have more limited support claims under statute (Family Proceedings Act 1980 s 81).

Section 10

- C33 *Subsection (1)* provides that partners may institute a property division only, or initiate a property division and make a support claim. The court cannot consider a partner's support claim without considering what division of partnership property the partner is entitled to (*section 24(2)*, para C84). At present spouses may choose to bring any combination of property claims (Matrimonial Property Act 1963) and support claims (Family Protection Act 1955).
- C34 *Subsection (2)* provides that the administrator of the estate of a deceased partner may institute a property division against a surviving partner (or the estate of a partner who outlived the deceased partner). This is also permitted under the present law (Matrimonial Property Act 1963 s 5(7)). In practice, it may not be worthwhile for the administrator to bring property division proceedings during the survivor's lifetime. The claim is likely to be met by the survivor's claim for support. But on the survivor's death, the equalisation of estates may well be desirable, for example, to secure provision for the children from the previous marriage of the partner who dies first.

11 Election by partners

A partner in whose favour a property division order is made, with or without a support award, must elect whether to accept the benefit of the order or to accept his or her entitlement under the estate of the deceased person (whether or not the deceased left a will) and is not entitled to both the benefit of that order and an entitlement under the estate.

Definitions: **property division order**, s 8; **partner**, ss 9, 10(3)

Section 11

- C35 The present law is unclear on how a partner's property claim should be affected by any property the surviving partner receives under the will-maker's will (Matrimonial Property Act 1963, *Re Mora* [1988] 1 NZLR 214). The Draft Act does not compel surviving partners to institute a property division. But when the court has determined both the property entitlements and the support award (*section 10*) and dealt with claims by any other person (*section 62*, paras C204–C207), surviving partners must choose between taking either
- what they receive from the deceased's estate – reduced as necessary to satisfy other valid claims against the estate (if any, *section 56*, paras C188–C191), or
 - the amount of the property division order the court must make in their favour.

Neither the support claim nor the property division entitlement can be used to "top-up" the provision made for the partner under the will.

*Subpart 2 – Partnership home and chattels***12 Partnership home and partnership chattels**

- (1) A partner is entitled on a property division to be awarded an equal share of the partnership home and the partnership chattels.
- (2) If
 - (a) the partners or either of them have sold the partnership home with the intention of applying the proceeds of the sale wholly or in part towards the acquisition of another home as a partnership home; and
 - (b) that home has not been acquired; and
 - (c) not more than 2 years have elapsed since the date when those proceeds were received or became payable, whichever is the later,a partner is entitled on a property division to be awarded an equal share in those proceeds as if they were the partnership home.
- (3) If subsection (2) does not apply and either there is no partnership home or the partnership home is not owned by the partners or one of them, a partner is entitled on a property division to be awarded an equal share in such part of the partnership property as the court thinks just to compensate for the absence of an interest in the partnership home.
- (4) This section is subject to sections 13, 14, 15, 21 and 66.

Definitions: **partnership chattels**, **partnership home**, **partnership property**, s 8; **partner**, ss 9, 10(3)

Origin: Matrimonial Property Act 1976 s 11

Section 12

- C36 This section sets out how courts on property division applications divide the partnership home or its equivalent, and also partnership chattels.
- C37 Under *subsection (1)* courts divide the partnership home and partnership chattels equally between the surviving partner and the deceased partner (or the estates of two deceased partners) unless (*subsection (4)*)
- the partnership home was a homestead (*section 13*, paras C40–C43), or
 - the partnership was one of short duration (*section 14*, paras C44–C47), or
 - extraordinary circumstances make equal sharing repugnant to justice (*section 15*, para C48), or
 - each partner owned a home capable of becoming a partnership home when the relationship began (*section 16*, para C49), or
 - one partner's separate property has been sustained by the application of matrimonial property or the actions of the other partner, or one partner's separate property has been diminished by the deliberate actions of the other partner (*section 21*, para C70), or
 - the partners agreed in a fair manner on a different division of this partnership property (*section 66*, paras C214–C219).
- C38 *Subsections (2) and (3)* provide that where there is no partnership home, equivalent funds may be set aside and divided as the partnership home would have been. This applies
- where there is no partnership home, or
 - where the partnership home was not owned by one or both partners, or
 - where the partnership home was sold with the intention of applying the proceeds of the sale towards the acquisition of another home.
- C39 The present law which applies on the death of a spouse (Matrimonial Property Act 1963 ss 5 and 6) does not categorise spouses' property in this way nor does it presume that courts divide it in any particular way. Currently courts divide spouses' property as appears just. Courts must consider spouses' respective contributions to a matrimonial home, and may consider spouses' respective contributions to other disputed property.

13 Homesteads

- (1) If the partnership home is a homestead which is owned by the partners or either of them, section 12(1) does not apply but a partner is instead on a property division entitled to be awarded an equal share of a sum of money equal to the equity of the partners or either of them in the homestead.
- (2) A partner who does not have a beneficial interest in the land on which the homestead is situated is, until his or her share of that sum is paid or otherwise satisfied, to be taken to be beneficially interested in that land.
- (3) For the purposes of subsection (1), the value of the homestead is to be determined in accordance with an apportionment of the capital value of the land on which the homestead is situated. Such apportionment is to be made and the capital value is to be determined by the Valuer-General on the requisition of either partner as at the date of the making of the valuation.
- (4) Either partner may appeal to the Administrative Division of the High Court against any apportionment made or any value determined by the Valuer-General under this section.
- (5) In this section, **homestead** means a partnership home where the dwellinghouse that is the partnership home is situated on an unsubdivided part of land that is not used wholly or principally for the purposes of the household, but does not include a partnership home that is occupied
 - (a) under a licence to occupy within the meaning of Part VIIA of the Land Transfer Act 1952; or
 - (b) because of the ownership of a specified share of any estate or interest in the land on which the dwellinghouse that is the partnership home is situated and because of reciprocal agreements with the owners of the other shares; or,
 - (c) in the case of a flat or town house which is part of a block of flats or town houses or is one of a number of flats or town houses situated on the same piece of land, under a lease or other arrangement under which the occupants of the flat or town house are entitled to exclusive possession of it.
- (6) This section is subject to sections 14, 15, 21 and 66.

Definitions: **homestead**, **partnership home**, s 8; **partner**, ss 9, 10(3)

Origin: Matrimonial Property Act 1976 s 12

Section 13

- C40 **Homestead** is a term used to distinguish **partnership homes** from other unsubdivided land on which they are situated, such as farms or business properties. *Paragraphs (a)–(c) of subsection (5)* make clear that while landsharing schemes (like licences to occupy and tenancies in common with cross-leases or licences) do not count as homesteads, they may still be **partnership homes**.
- C41 When dividing partners' property, courts must separate partnership homes from other unsubdivided land where they are situated, such as farms or business properties. If the partnership home, whether owned by one or both partners, is a homestead, then the partners share equally in the equity of the partners or either of them in the homestead (unless any of *sections 14, 15, 21 or 66* apply: see para C37), but not necessarily in the rest of the land on which the homestead is situated.
- C42 *Subsection (2)* protects partners making property division claims by deeming them to have beneficial interests in the land until their shares of the equity of homesteads are paid.
- C43 *Subsections (3) and (4)* set out a process for deciding how much of the land on which the homestead is situated should be apportioned to the homestead and what the value of that apportioned land should be. The Valuer-General makes these decisions, which either partner may challenge by appeal to the Administrative Division of the High Court.

14 Partnerships of short duration

- (1) If a partnership was of short duration, sections 12 and 13 do not apply
 - (a) to an asset owned wholly or substantially by a partner when the partnership began; or
 - (b) to an asset that has come to a partner after the date the partnership began by succession or by survivorship or as the beneficiary under a trust or by gift from a third person; or
 - (c) where the contribution of a partner to the partnership has clearly been disproportionately greater than that of the other partner.
- (2) If subsection (1) applies, the share of the partnership property that is to be awarded to a partner on a property division is to be determined in accordance with the contribution of that partner to the partnership.
- (3) A partnership is to be regarded for the purposes of this section as of short duration if the partners have lived together in marriage or in a relationship in the nature of marriage
 - (a) for a period of less than 3 years (in the computation of which any period of resumed cohabitation with the motive of reconciliation may be excluded if it lasts for not more than 3 months); or
 - (b) for a period of longer than 3 years, if the court having regard to all the circumstances of the partnership considers it just.

Definitions: **partnership property**, s 8; **partner**, ss 9, 10(3)

Origin: Matrimonial Property Act 1976 s 13

15 Extraordinary circumstances

If in the opinion of the court extraordinary circumstances render it repugnant to justice that a partner should be awarded an equal share of any property to which section 12 applies or of any sum of money under section 13, the court may award a partner on a property division an amount determined in accordance with the contribution of that partner to the partnership.

Definitions: **partner**, ss 9, 10(3)

Origin: Matrimonial Property Act 1976 s 14

Section 14

- C44 While the partnership home and the partnership chattels are normally divided equally between the partners (*sections 12 and 13*, paras C36–C43), this does not occur when the partners' relationship was one of short duration.
- C45 *Subsection (3)* defines a partnership of short duration as one where the partners have lived together in marriage or in a de facto relationship for a period of less than three years (or longer if the court considers it just having regard to all the circumstances). In calculating this (usually three-year) period, the court may deduct periods where separated partners live together again for less than three months in an attempt at reconciliation.
- C46 *Subsection (1)* provides that if the partnership was one of short duration, then equal sharing of the partnership home (or equity in the homestead) and partnership chattels does not apply
- if they were owned wholly or substantially by a partner when the relationship began; or
 - if one partner received them during the relationship by inheritance, under a trust or as a gift; or
 - where one partner's contribution to the relationship was clearly disproportionately greater than the other partner's contribution.
- C47 *Subsection (2)* provides that if equal sharing does not apply, then the partnership home (or equity in the homestead) and partnership chattels are divided in accordance with the partners' respective contributions to the partnership (*section 22*, paras C71–C75).

Section 15

- C48 Partnership homes (or equity in homesteads) and partnership chattels will not be shared equally if courts consider that extraordinary circumstances make equal sharing repugnant to justice. Courts divide this property instead according to the partners' respective contributions to the partnership (*section 22*, paras C71–C75).

16 Adjustments where each partner owned home when partnership began

Notwithstanding anything in sections 12 to 15, where, at the date the partnership began, each partner owned a home capable of becoming a partnership home, but the home (or the proceeds of its sale) of only one partner is included in the partnership property at the time when a property division is to be made under this Act, the court may make such adjustments to the shares of the partners in any of the partnership property (including the partnership home and partnership chattels) as it thinks just to compensate for the inclusion of the home of only one partner in the partnership property.

Definitions: **partnership home**, **partnership property**, s 8; **partner**, ss 9, 10(3)

Origin: Matrimonial Property Act 1976 s 16

*Subpart 3 – Other partnership property***17 Remainder of partnership property**

- (1) On a property division, a partner is entitled to be awarded an equal share in partnership property other than property to which section 12 or 13 applies unless that partner's contribution to the partnership has been clearly greater than that of the other partner.
- (2) If under subsection (1) a partner is not entitled to an equal share in partnership property, or any part of it, the share of that partner in the partnership property or in that part of it is to be determined in accordance with the contribution of that partner to the partnership.
- (3) This section is subject to sections 21, 22 and 66.

Definitions: **partnership property**, s 8; **partner**, ss 9, 10(3)

Origin: Matrimonial Property Act 1976 s 15; compare Matrimonial Property Act 1963 s 6

Section 16

- C49 Sometimes both partners owned homes when the partnership began. Either property could have become the partnership home, but only one is chosen. So, when the court divides the partnership property, only one partner's home (or the proceeds of it after it is sold) is included in this property for division. This section permits the court to adjust the sharing of partnership property so as to compensate for that imbalance.

Section 17

- C50 This section sets out how courts on property division claims divide the residual category of partnership property (*section 8*, paras C21–C22). For a definition of **partnership property** see *section 18*, paras C52–C59. The method of division laid down in this section does not apply to
- the partnership home (or homestead), and
 - the partnership chattels
- which are divided under *section 12*, paras C36–C39. Separate property is not divided at all.
- C51 Under *subsection (1)*, courts will divide the residual partnership property equally between the surviving partner and the deceased partner (or the estates of two deceased partners) unless
- one partner's contribution to the relationship has been clearly greater than that of the other partner, in which case under *subsection (2)* courts divide this property in accordance with the partners' respective contributions to the partnership (*section 22*, paras C71–C75), or
 - one partner's separate property has been sustained by the application of matrimonial property or the actions of the other partner, or one partner's separate property has been diminished by the deliberate actions of the other partner (*section 21*, para C70) – see *subsection (3)*, or
 - the partners agreed fairly on a different division of this partnership property (*section 66*, paras C214–C219) – see *subsection (3)*.

18 What is partnership property?

Partnership property consists of

- (a) the partnership home, whenever acquired; and
- (b) the partnership chattels, whenever acquired; and
- (c) all property owned jointly or in common in equal shares by the partners; and
- (d) all property owned immediately before the partnership began by either partner if the property was acquired in contemplation of the partnership beginning and was intended for the common use and benefit of both partners; and
- (e) except for property that is separate property under section 19 or 20, all property acquired by either partner after the beginning of the partnership; and
- (f) except for property that is separate property under section 19 or 20, all property acquired after the beginning of the partnership for the common use and benefit of both partners out of property owned by either partner or both of them before the beginning of the partnership or out of the proceeds of any disposition of any property so owned; and
- (g) any income, and gains derived from, the proceeds of any disposition of, and any increase in the value of, any property described in paragraphs (a) to (f); and
- (h) any policy of assurance taken out by one partner on his or her own life or the life of the other partner, for the benefit of either partner (not being a policy that was fully paid up at the time of the beginning of the partnership and not being a policy the proceeds of which a third person is beneficially entitled), whether the proceeds are payable on the death of the assured or on the occurrence of a specified event or otherwise; and
- (i) any policy of insurance in respect of any property described in paragraphs (a) to (f); and
- (j) any pension, benefit, or right to which either partner is entitled or may become entitled under any superannuation scheme if the entitlement is derived, wholly or in part, from contributions made to the scheme after the beginning of the partnership or from employment or office held since the beginning of the partnership; and
- (k) all other property that the partners have agreed under section 21 of the Matrimonial Property Act 1976 is to be regarded as matrimonial property for the purposes of that Act; and
- (l) all other property that is partnership property because of any other provision of this or any other Act.

Definitions: partnership chattels, partnership home, partnership property, s 8; partner, ss 9, 10(3)

Origin: Matrimonial Property Act 1976 s 8

Section 18

- C52 This section defines **partnership property**, which courts divide when partners apply for a property division. Partners' property will often be included for division under one or more subparagraphs.
- C53 Under *paragraphs (a) and (b)* partnership property includes the **partnership home**, and the **partnership chattels**, both defined elsewhere in the Act (*section 8, paras C21–C22*).
- C54 *Paragraph (c)* includes property owned jointly or in common or in equal shares by the partners.
- C55 Other partnership property is defined by reference to the date the partners acquired it or the purpose for which it was acquired.
- C56 Under *paragraph (d)* property either partner owned immediately before the partnership began, if acquired in contemplation of the partnership beginning and intended for the common use and benefit of the partners, is partnership property.
- C57 *Paragraph (e)* defines partnership property to include property acquired by either partner after the partnership began (except property which is separate property under *sections 19 and 20*). Similarly, under *subparagraph (f)* any property which either partner acquired for the partners' common use and benefit out of their own separate property after the partnership began, is partnership property. *Subparagraph (g)* includes any increase in value in any of the property described in *subparagraphs (a)–(f)*.
- C58 *Paragraphs (h)–(j)* include as partnership property specified policies of assurance, policies of insurance and superannuation pensions, rights or benefits.
- C59 *Paragraph (k)* permits partners to agree in a fair manner (*section 66, paras C214–C219*) that any other property may be partnership property. Under *subparagraph (l)* other provisions in the Act or other Acts may declare specified property to be partnership property.

19 What is separate property?

- (1) Separate property consists of all property of a partner which is not partnership property.
- (2) Subject to subsection (6) and to sections 16 and 18(f), all property acquired out of separate property, and the proceeds of any disposition of separate property, is separate property.
- (3) Subject to subsection (6), any increase in the value of separate property, and any income or gains derived from such property, is separate property unless the increase in value or the income or gains are attributable wholly or in part
 - (a) to actions of the other partner; or
 - (b) to the application of partnership property,in either of which events the increase in value or the income or gains are partnership property.
- (4) All property acquired by either partner while they are not living together as partners or after the death of a partner is separate property unless the court considers that it is just in the circumstances to treat such property or any part of it as partnership property.
- (5) Subject to any agreement made under section 21 of the Matrimonial Property Act 1976 and to any agreement made under section 66 of this Act, all property acquired by either partner after an order of the court (other than an order under section 25(3) of that Act) has been made defining their respective interests in the partnership property, or dividing or providing for the division of that property, is separate property, except that where the partnership property has been divided on the bankruptcy of a partner,
 - (a) the partnership home and any partnership chattels acquired after division may be partnership property; and
 - (b) any other property acquired by either partner after the discharge of that partner from bankruptcy may be partnership property.
- (6) Subject to section 20, any separate property which is or any proceeds of any disposition of, or any increase in the value of, or any income or gains derived from, separate property, which are, with the express or implied consent of the partner owning, receiving, or entitled to them, used for the acquisition or improvement of, or to increase the value of, or the amount of any interest of either partner in, any property referred to in section 18 is partnership property.

Definitions: **partnership chattels**, **partnership home**, **partnership property**, s 8: **partner**, ss 9, 10(3)

Origin: Matrimonial Property Act 1976 s 9

Section 19

- C60 This section defines **separate property**, which courts do not divide on partners' property division claims.
- C61 *Subsection (1)* defines separate property negatively as all property of a partner which is not partnership property (*section 18*, paras C52–C59).
- C62 *Subsection (2)* provides that separate property may become partnership property where
- income or gains derived from separate property is used, with the express or implied consent of the spouse entitled to them, to acquire or improve partnership property: *subsection (6)*; or
 - separate property is used, after the partnership began, to acquire property for the common use and benefit of the spouses (*section 18(f)*, para C57); or
 - the court adjusts the division of partnership property to compensate where both partners owned homes when the partnership began, and only one is included as partnership property when the partners' property is divided (*section 16*, para C49).
- C63 *Subsection (3)* provides that courts will regard as partnership property any increases in the value of separate property which are attributable to the actions of the other partner or the application of partnership property.
- C64 *Subsection (4)* provides that property either partner acquires, while the partners are not living together as partners or after the death of a partner, will be separate property unless the court considers it just in the circumstances to treat it as partnership property.
- C65 *Subsection (5)* deals with any property either partner acquires after the court has made an order for the division of partnership property. It must be separate property unless
- the parties agreed fairly otherwise under the Matrimonial Property Act 1976; or
 - the parties agreed fairly otherwise under *section 66* of the Act (paras C214–C219); or
 - the partnership property was divided on the bankruptcy of a partner under the Matrimonial Property Act 1976 and
 - a partnership home and partnership chattels are acquired after the division, and
 - other property is acquired after the discharge of that partner from bankruptcy and that property, according to the principles set out in *section 18*, is partnership property.

20 Property acquired by succession, survivorship, trust or gift

- (1) Property that is
- (a) acquired by succession or by survivorship or as a beneficiary under a trust or by gift from a third person; or
 - (b) the proceeds of a disposition of property to which paragraph (a) applies; or
 - (c) acquired out of property to which paragraph (a) applies,
- is not partnership property unless, with the express or implied consent of the partner who received it, the property or the proceeds of any disposition of it have been so intermingled with other partnership property that it is unreasonable or impracticable to regard that property or those proceeds as being separate property.
- (2) Property acquired by gift from the other partner is not partnership property unless the gift is used for the benefit of both partners.
- (3) Notwithstanding subsections (1) and (2) and section 19(4), both the partnership home and the partnership chattels are partnership property unless designated separate property by an agreement made in accordance with section 21 of the Matrimonial Property Act 1976 or section 66 of this Act.

Definitions: **partnership chattels**, **partnership home**, **partnership property**, **separate property**, s 8; **partner**, ss 9, 10(3)

Origin: Matrimonial Property Act 1976 s 10

21 Sustenance or diminution of separate property

- (1) Notwithstanding anything in sections 12 to 15 and 17, if the separate property of one partner has been sustained by the application of partnership property or the actions of the other partner, the court may increase the share on a property division to which the other partner would otherwise be entitled in relation to the partnership property.
- (2) Notwithstanding anything in sections 12 to 15 and 17, where the separate property of one partner has been materially diminished in value by the deliberate actions of the other partner, the court may decrease the share on a property division to which the other partner would otherwise be entitled in relation to the partnership property.

Definitions: **partnership chattels**, **partnership home**, **partnership property**, **separate property**, s 8; **partner**, ss 9, 10(3)

Origin: Matrimonial Property Act 1976 s 17

Section 20

- C66 This section further defines **separate property**, which courts do not divide on partners' property division claims.
- C67 *Subsection (1)* provides that property acquired by inheritance, under a trust or by gift from a third person (or the proceeds of that property or property acquired with them) is separate property. An exception is made if, with the implied or express consent of the partner who received it, the property is so intermingled with partnership property that it is unreasonable or impracticable to regard it as separate property.
- C68 *Subsection (2)* provides that property one partner acquires by gift from the other partner is partnership property only if used for the benefit of both partners.
- C69 *Subsection (3)* provides that the partnership home and partnership chattels are partnership property, even if acquired
- by inheritance, under a trust or by gift from a third party (*section 19(1)*, para C61), or
 - by gift from the other partner (*section 19(2)*, para C62), or
 - when the partners were not living together as partners or after the death of a partner (*section 19(4)*, para C64);
- unless the partners fairly agreed otherwise under the Matrimonial Property Act 1976 s 21 or *section 66* (paras C214–C219) of this Act.

Section 21

- C70 This section deals with actions of a partner which increase or diminish the partners' separate property. Here exceptions are made to the general principles of division based on equal sharing or contribution. The exceptions apply to all partnership property, including the partnership home and chattels:
- Under *subsection (1)*, where one partner's separate property has been sustained by the application of partnership property or the actions of the other partner, the other party's share of the matrimonial property may be increased.
 - Under *subsection (2)*, where one partner's separate property has been materially diminished in value by the other partner's deliberate actions, the other party's share of the matrimonial property may be decreased.

22 Contribution of partners

- (1) For the purposes of this Act, a contribution to the partnership means all or any of the following:
- (a) the care of a child of the partnership or of any aged or infirm relative or dependant of a partner;
 - (b) the management of the household and the performance of household duties;
 - (c) the provision of money, including the earning of income, for the purposes of the partnership;
 - (d) the acquisition or creation of partnership property, including the payment of money for those purposes;
 - (e) the payment of money to maintain or increase the value of
 - (i) the partnership property or part of it; or
 - (ii) the separate property of the other partner or part of it;
 - (f) the performance of work or services in respect of
 - (i) the partnership property or part of it; or
 - (ii) the separate property of the other partner or part of it;
 - (g) the foregoing of a higher standard of living that would otherwise have been available;
 - (h) the giving of assistance or support to the other partner (whether or not of a material kind), including the giving of assistance or support which
 - (i) enables the other partner to acquire qualifications; or
 - (ii) aids the other partner in the carrying on of his or her occupation or business.
- (2) The court is not to presume that a contribution of a monetary nature (whether under subsection (1)(c) or otherwise) is of greater value than a contribution of a non-monetary nature.
- (3) In determining the contribution of a partner to a partnership or in determining what order to make on a property division, the court may take into account any misconduct of a partner that has been gross and palpable and has significantly affected the extent or value of the partnership property, but the court must not otherwise take any misconduct of a partner into account, whether to diminish or detract from the positive contribution of that partner or otherwise.

Definitions: **partnership property**, **separate property** s 8; **partner**, ss 9, 10(3)

Origin: Matrimonial Property Act 1976 s 18

Section 22

- C71 This section defines partners' contributions to a partnership for the purposes of partners' property division claims.
- C72 The present law for property division (when a marriage ends on the death of a spouse) requires courts to divide the spouses' property "as appears just" (Matrimonial Property Act 1963 s 5). Courts must consider spouses' respective contributions to a matrimonial home, and may consider spouses' respective contributions to other disputed property (Matrimonial Property Act 1963 s 6(1)–(1A)). Courts may consider spouses' contributions whether in the form of "money, payments, services, prudent management, or otherwise howsoever". Courts may make orders even though spouses make no contributions in the form of money payments and their other forms of contribution are of a "usual and not extraordinary character" (see *Haldane v Haldane* [1976] 2 NZLR 715, 726–727).
- C73 The Draft Act instead follows the present law for property division when marriages end on separation (Matrimonial Property Act 1976 s 18; Angelo and Atkin (1977) 7 NZULR 237, 251). Under *subsection (1)* courts must consider partners' respective contributions to the partnership, which need not be monetary in form nor directly related to acquiring, preserving or improving particular property.
- C74 Under *subsection (2)* courts must not presume monetary contributions to be more valuable than non-monetary contributions.
- C75 Under *subsection (3)* courts may consider partners' misconduct in determining partners' respective contributions to partnerships, and the appropriate property division award to make, only if that misconduct
- was gross and palpable, and
 - significantly affected the extent or value of partnership property, but not otherwise.

23 Subtraction of debts from partnership or separate property

- (1) The value of the partnership property that may be divided between partners under this Act is to be ascertained by deducting from the value of the partnership property owned by each partner
 - (a) any secured or unsecured debts (other than personal debts or debts secured wholly on separate property) owed by that partner; and
 - (b) the unsecured personal debts owed by that partner to the extent that they exceed the value of any separate property of that partner.
- (2) Where any secured or unsecured personal debt of one partner is paid or satisfied (whether voluntarily or pursuant to legal process) out of the partnership property, the court may order that
 - (a) the share of the other partner in the partnership property be increased proportionately;
 - (b) assets forming part of that partner's separate property be taken to be partnership property for the purposes of any division of partnership property under this Act;
 - (c) that partner pay to the other partner a sum of money by way of compensation.

Definitions: **partnership property**, **personal debt**, **separate property**, s 8; **partner**, ss 9, 10(3)

Origin: Matrimonial Property Act 1976 ss 20(5), 20(6)

Section 23

- C76 Parties to a domestic relationship will incur (separately or together) a variety of debts which may be unpaid when one of them dies. It will make a significant difference to the division whether those debts are charged to one or both partners. This section sets out whether courts on property division claims should deduct particular debts from either
- partnership property (which courts divide between surviving partners and deceased partners' estates); or
 - separate property (which courts do not usually divide).
- C77 Debts which are seen as "personal" to a partner should generally be charged to that partner's separate property. **Personal debts** are defined in *section 8* (see para C22). *Subsection (1)* provides that courts will deduct from partnership property,
- under *subparagraph (a)*, any joint debts of the partners (whether secured or unsecured), and,
 - under *subparagraph (b)* (as regards property owned by a debtor partner), any personal debts which exceed the value of the debtor's separate property.
- C78 The latter subparagraph has important practical effects as regards any particular property owned legally by one of the partners. Creditors of that owner will take priority over the claims of the other partner, if the debtor's separate property is insufficient to meet the debts (see *sections 52–53*, paras C171–C179). The other partner can claim priority only in respect of partnership property which is held in that partner's name.
- C79 By contrast the present law which applies on the death of a partner does not classify spouses' debts as joint or personal nor deduct them from disputed property in a similar way. Secured creditors' rights are unaffected where the court makes an order, and spouses' claims are sometimes accorded the same priority as creditors' claims (*Matrimonial Property Act 1963 s 8; Re Madden (1993) 11 FRNZ 45*).
- C80 *Subsection (2)* permits courts, when one partner's personal debts have been satisfied out of partnership property, to
- increase the other partner's division of partnership property proportionately, or
 - include in the partnership property assets which form part of the other partner's separate property, or
 - have the other partner pay compensation out of his or her separate property.
- C81 The subsection is of little assistance to the partner who is not the debtor, if the debtor partner is insolvent.

*Subpart 4 – Support claims***24 When can a partner make a support claim?**

- (1) A partner of a deceased person who initiates a property division against the estate of the deceased may at the same time make a support claim against that estate if the partner does not have sufficient resources to enable him or her to maintain a reasonable, independent standard of living.
- (2) An assessment under subsection (1) of whether a partner has sufficient resources must take into account any property division order made in favour of the partner.
- (3) Despite subsection (1), in the case of a partnership that terminated during the lifetime of the partners, a partner cannot bring a support claim against the estate of a deceased later than the time limit fixed under section 59 or later than 5 years after the partners most recently ceased to live together as partners, whichever is the earlier.

Definitions: estate, property division order, support claim, s 8; partner, ss 9, 10(3)

Section 24

- C82 This section sets out the requirements for surviving partners' support claims.
- C83 To make a support claim, *subsection (1)* requires surviving partners to show that they have insufficient resources to maintain a reasonable, independent standard of living. At present, the law of support requires widows and widowers to show that they have not received "adequate provision for their proper maintenance and support" (Family Protection Act 1955 s 3). Instead the Draft Act broadly follows the present spousal support rules for when a marriage ends on dissolution of marriage during spouses' joint lifetimes (Family Proceedings Act 1980 s 64).
- C84 Under *subsection (2)* survivors whose resources are insufficient to maintain a reasonable, independent standard of living are required, before making a support claim, to make a property division claim to enhance their financial resources. Surviving partners cannot make a support claim without first resorting to their division of partnership property.
- C85 Under *subsection (3)*, where two partners' relationship ends by separation during their joint lifetimes, then one partner dies, the survivor can claim support from the estate. But the claim must be made within five years after the partners most recently ceased to live together as partners. This is consistent with the general policy (applicable after a separation) that spouses who separate during their joint lifetimes must assume responsibility, within a time that is reasonable in all the circumstances, for meeting their own reasonable needs (Family Proceedings Act 1980 s 64(2)).
- C86 At present a will-maker's estate can be liable to support a spouse from whom the will-maker was separated if the marriage was not dissolved when the will-maker died (Family Protection Act 1955 s 3(1)(a)). This could be many years after separation, though in practice such claims are rare.

25 Assessment of support award

- (1) A support award made to a partner of a deceased person is to be the amount required to enable the partner to maintain a reasonable, independent standard of living during the period for which the partner is entitled to support.
- (2) A partner is entitled to support for the period until the partner can reasonably be expected to maintain a reasonable, independent standard of living for herself or himself, having regard to the economic consequences of the partnership for that partner, to the extent that these can be ascertained.
- (3) An assessment of the period for which a partner is entitled to support must take into account
 - (a) the age of the partner; and
 - (b) the duration of the partnership, and in particular whether the partnership was of short duration as defined in section 14(3); and
 - (c) the partner's custodial responsibilities for a child or children of the partnership; and
 - (d) the partner's physical or mental illnesses or disabilities; and
 - (e) the partner's ability to continue in, or train or qualify for, or secure and undertake reasonably suitable and rewarding paid employment; and
 - (f) any conduct of the partner which amounts to a device to prolong the partner's need for support.
- (4) In making a support award to a partner of a deceased, the court is to disregard any benefit payable under Part I of the Social Security Act 1964 or under any other Act which is or may become payable to the partner, unless the benefit is payable to the partner irrespective of the income or assets, or income and assets, that the partner has or is legally entitled to have.

Definitions: **support award**, s 8; **partner**, ss 9, 10(3)

Section 25

- C87 *Subsection (1)* states that the amount of support awarded will be what is required to enable the partner to maintain a reasonable, independent standard of living for the period in respect of which the partner may claim support. Currently, widows' and widowers' support awards are of an amount which is "adequate . . . for their proper maintenance and support" (Family Protection Act 1955). The Draft Act instead follows the law applicable to support of spouses whose marriages end on separation during their joint lifetimes (Family Proceedings Act 1980 s 64).
- C88 *Subsection (2)* provides that a partner may claim support from the will-maker's estate for the period until he or she can reasonably be expected to maintain a reasonable, independent standard of living herself or himself.
- C89 *Subsection (3)* sets out matters the court must consider when determining the period during which support will be payable. This period will vary according to the financial consequences of the partnership for the partner. Where the partnership is of long duration and the financial consequences for the partner are very significant, permanent support will be appropriate. Where however the partnership was of short duration and the financial consequences limited, only transitional support will be required.
- C90 *Subsection (4)* requires the court, when a partner claims support, to disregard any welfare benefit the partner is receiving, unless the benefit is paid irrespective of the partner's income or assets or both. Support awards will therefore be partners' primary source of support, with welfare benefits playing only a secondary role if the support award is insufficient. In this respect the Draft Act broadly follows the present law of support for widows and widowers (Family Protection Act 1955 s 13). The Draft Act does, however, differ from the present law in generally not permitting welfare authorities to refuse, reduce or terminate welfare payments to surviving partners who choose not to make support claims (compare Social Security Act 1964 s 73 and see *Schedule 4*).
- C91 The present law on support of spouses who divorce during their joint lifetimes also provides that support liability is not extinguished because the claimant spouse is receiving a "domestic benefit" (Family Proceedings Act 1980 ss 2, 62). Welfare authorities may refuse, reduce or terminate welfare payments to divorced spouses who choose not to claim support from their former husband or wife (Social Security Act 1964 s 74(e)). No change is proposed.

PART 3
SUPPORT CLAIMS BY CHILDREN OF A DECEASED PERSON

26 Who is a child of a deceased person?

- (1) For the purposes of this Act, a child of a deceased person may be a person of any age and includes a person who was accepted by the deceased as his or her child, the deceased having assumed on a continuing and enduring basis the responsibilities of a parent of that child.
- (2) When deciding whether a person is to be regarded under subsection (1) as having been accepted as a child of a deceased, the court must have regard to the following:
 - (a) the extent to which and the basis on which the deceased assumed responsibility for the maintenance of the child; and
 - (b) the period of time during which the deceased maintained the child; and
 - (c) whether the deceased was at any time the lawful guardian of the child; and
 - (d) whether any other person has or had any liability or responsibility to maintain the child or contributed to the child's maintenance during the period the deceased assumed some responsibility for the child.
- (3) When deciding whether under subsection (1) a person is to be regarded as a child of a deceased, the court may also have regard to the following:
 - (a) whether the deceased assumed or discharged responsibility for maintaining the child in the knowledge that he or she was not the natural parent of the child; and
 - (b) whether the deceased was ever married to or a de facto partner of a parent of the child.
- (4) For the purposes of subsection (2)(a), a person is not to be taken to have assumed responsibility for the maintenance of a child only because that person has met or contributed to the maintenance responsibilities for that child of another person who is wholly or partly maintained by him or her.

Origin: Child Support Act 1991 ss 2, 7, 99

Section 26

- C92 This section defines who may make a child's support claim against the estate of a will-maker.
- C93 Under *subsection (1)* there are two classes of claimant:
- the will-maker's children; and
 - those for whom the will-maker has assumed enduring parental responsibilities.
- C94 "Children" include natural children (Status of Children Act 1969), adopted children (Adoption Act 1955) and children born as a consequence of assisted reproductive technologies (to the extent that this is provided for in the Status of Children Amendment Act 1987).
- C95 The second class of claimant is new. The present law (Family Protection Act 1955 s 3(1)(d)) limits such claims to stepchildren who are being, or are legally entitled to be, maintained by the will-maker immediately before death. The definition, and the following provisions, are adapted from comparable provisions applicable to lifetime support, in the Child Support Act 1991, ss 2, 7 and 99.
- C96 *Subsection (2)* lists the principal criteria to be followed in determining whether the will-maker has in fact assumed parental responsibility for claimants who are not their own children. Courts should look at how much responsibility has been assumed, why this was done, the period the child has been maintained, guardianship arrangements, and the responsibility of others for the child.
- C97 *Subsection (3)* refers to matters to do with the will-maker's intent:
- Did the will-maker, when assuming responsibility, believe mistakenly that this was their natural child? A fundamental mistake like this could vitiate the assumption of responsibility.
 - Was the will-maker married to, or a de facto partner of, the parent of a child? It should not be assumed that a step-parent automatically assumes responsibility for their partner's child on an enduring basis; support may be no more than an incident of the partnership arrangements.
- C98 This is reinforced by *subsection (4)*. Someone who maintains another person, and for that reason meets or contributes to the maintenance costs of that person's children, does not necessarily assume responsibility for the child as well.

27 Which children of a deceased person can make support claims?

A child of a deceased person may make a support claim against the estate of the deceased in respect of the period or periods

- (a) until the child attains the age of 20 years;
- (b) during which the child is undertaking education or technical or other vocational training before attaining the age of 25 years;
- (c) during which the child does not have or is unable to earn sufficient income to enable her or him to maintain a reasonable, independent standard of living because of a physical, intellectual or mental disability that arose before the child attained the age of 25 years.

Definitions: **child of a deceased person**, **support claim**, s 8

Section 27

- C99 This section sets out the basic rules governing support. A claim may be made only if the child is
- under 20; or
 - under 25 and still being educated or trained; or
 - unable to earn a reasonable, independent living because of disability arising before the child reached 25.
- When making an award, the court cannot fix an amount which would take support beyond the age limits set out above, or (in the case of disabled children) beyond the time when the child might be expected to earn an independent living.
- C100 For the form an award might take, see *section 41* (lump sum or capital, paras C138–C141) and *section 46* (establishment of trust fund, paras C148–C152).
- C101 Under the present law, the court has much more extensive powers, which are not limited by reference to the age or the means of the will-maker's children (Family Protection Act 1955). It has been the basis for substantial awards of capital to adult children who have obtained their independence. In many cases these are mature people who are approaching retirement.
- C102 The Commission has not at this stage included a provision which would limit, or state more clearly, courts' current powers under the Family Protection Act 1955 to make awards in favour of adult children. Examples of such provisions can be seen in chapter 7, paras 233–266. The Commission has not yet formed a view on which, if any, of these provisions is to be preferred. They are intended to assist discussion by showing various methods of stating the courts' powers. The provisions set out in chapter 7, if adopted, will be either alternative or additional to *sections 27–29* (which provide only for the claims proposed in chapter 6).

28 Assessment of child's support award

- (1) A support award made in favour of a child of a deceased person is to be of such a kind as to secure that during the period in respect of which the child is entitled to support the child is maintained in a reasonable way and to a reasonable standard, and so far as is practical, educated and assisted towards the attainment of economic independence.
- (2) The amount of a support award made to a child of a deceased is not to exceed what is reasonably necessary to achieve the purpose described in subsection (1).
- (3) In determining what is reasonable for the purposes of a support award to a child of the deceased, the court must have regard to
 - (a) the age and stage of development of the child, including the level of education or technical or vocational training reached by the child; and
 - (b) any other actual or potential sources of support available to the child, including support from a surviving parent or a support award from the estate of another deceased parent; and
 - (c) the amount of support provided by the deceased to the child; and
 - (d) the actual and potential ability of the child to meet his or her reasonable needs.
- (4) In making an award in respect of a support claim by a child of the deceased under the age of 25 years, the court is to disregard any benefit under Part I of the Social Security Act 1964 which is or may become payable to the child, unless the benefit is payable to the child irrespective of the income or assets, or both income and assets, that the child has or is legally entitled to have.

Definitions: *child of a deceased person*, *support award*, *support claim*, s 8

Origins: Family Protection Act 1955 s 13

Section 28

- C103 *Subsection (1)* requires a reasonable standard of support, covering maintenance, education and assistance to achieve independence. The court may not award more than is reasonably necessary to achieve that standard: *subsection (2)*. The criteria the court is to take into account are set out in *subsection (3)*.
- C104 *Subsection (4)* provides that the court is not to take into account means-tested social welfare payments in making an award. The will-maker must support the child in full, and not just top up the amounts payable by the Department of Social Welfare. That Department remains provider of last resort.
- C105 An exception is made for children over 25. They will be means-tested on what they in fact receive from the estate, but will not be expected to make testamentary claims in order to relieve the State from the cost of support. This is a change from the existing law (Family Protection Act 1955 s 13; *Re B* (unreported, District Court, Auckland, 16 August 1995, FP004/1343/92).

PART 4
CLAIMS BY CONTRIBUTORS

29 Contribution claims

- (1) A contributor who provided a benefit to a deceased person during that person's lifetime may make a contribution claim against the estate of the deceased in accordance with this Part if
- (a) the deceased expressly promised to make provision for the contributor in return for the benefit; or
 - (b) it is unjust for the estate of the deceased to retain the benefit without provision being made for the contributor.
- (2) A contributor cannot make a claim in respect of a benefit for which the contributor has been fully remunerated.
- (3) A contribution claim may be made either by the contributor or by the administrator of the contributor's estate against the estate of the person on whom the benefit was conferred.

Definitions: administrator, benefit, contribution claim, contributor, estate, promise, provision, remunerate, s 8

30 Limitation of contribution claims by partners

- A person cannot make a contribution claim in respect of any benefit provided to a partner of that person if the benefit
- (a) has been taken into account in a property division under the Matrimonial Property Act 1976 or under the law applying to the division of property of de facto partners during their joint lifetime; or
 - (b) has been or could be taken into account in any property division under this Act.

Definitions: benefit, contribution claim, s 8; partner, ss 9, 10(3)

Section 29

- C106 There are two broad grounds on which claims will be able to be made for contributions to the will-maker or to the will-maker's estate (*subsection (1)*):
- The fact that the will-maker expressly promised to make provision for the contributor (see *section 31*).
 - The fact that the will-maker's estate has been unjustly enriched as a result of the benefit conferred by the contributor. The concept of unjust enrichment is already well known in the law, and is further refined here by the provisions of *section 33*.
- C107 No claim may be made if the contributor has already been fully remunerated: *subsection (2)*. A claim does not die with the death of the contributor, but may be made by the contributor's administrator for the benefit of the contributor's own estate: *subsection (3)*.
- C108 This Part of the Act does not greatly change existing law. However, the present law is complex and is derived from a variety of legal sources. Part of it is found in the Law Reform (Testamentary Promises) Act 1949, which applies where there is an express or implied promise to leave property by will, made in return for services. Another part derives from the common law actions for *quantum meruit* and *quantum valebat*. Yet another part is equitable, based on the doctrines of estoppel and constructive trust. More recently, these general law doctrines have been grouped together as part of the law of restitution. But they remain separate sets of rules, whose precise definition is still subject to debate.
- C109 This complex set of laws is replaced by the two principles referred to in the section.

Section 30

- C110 This section sets out the relationship between the contribution claim and the property division claim which is available to domestic partners. Generally the process of property division takes precedence. That is to say, any contribution made to a partnership by one of the partners will be taken into account in the course of the property division, and not otherwise. Contribution claims cannot be made unless they are independent of the partnership (eg, for benefits provided after the partners have divorced, and their property has been divided).

31 Contribution claim based on express promise

- (1) A contributor who makes a contribution claim based on an express promise to make provision for the contributor in return for a benefit provided by her or him must satisfy the court that the deceased person expressly promised to make such provision to take effect either in the lifetime or after the death of the deceased.
- (2) The promise may have been made either before or after the benefit was provided.

Definitions: **benefit, contribution claim, contributor, promise, provision**, s 8

Origin: Law Reform (Testamentary Promises) Act 1949 s 3(2)

32 Contribution claim based on express promise to make provision for another person

- (1) This section applies in respect of a benefit provided by a contributor where an express promise is made that the recipient of the benefit will make provision in return for the benefit to a person (other than the contributor) designated by name, description or reference to a class, whether or not the person was in existence when the benefit was provided or the promise made.
- (2) Where this section applies, a contribution claim may be made against the estate of the deceased person by a person designated as a promisee under subsection (1) in the same way and to the same extent as if the promise had been made to make provision for the contributor; and the promise is enforceable by the designated person accordingly.
- (3) This section does not apply to a promise which is not intended to create an obligation in respect of the benefit enforceable by the promisee.
- (4) Schedule 1 applies to a promise to which this section applies.

Definitions: **benefit, contributor, contribution claim, promise, provision**, s 8

Origin: Contracts (Privity) Act 1982 s 4

Section 31

- C111 The essential requirements of the claim based on a promise are
- the contributor provided a benefit during the will-maker's lifetime (see the definition of **benefit**, *section 8*, para C18); and
 - the will-maker expressly promised to make provision for the contributor, either by will or else during the will-maker's lifetime.
- C112 These provisions are wider than those of the present Law Reform (Testamentary Promises) Act 1949. First, the concept of "benefit" is probably more general than the concept of "work or services" used in that Act (though those words have been generously construed by the courts). Second, these provisions cover any form of promised provision (eg, by way of gift or transfer at an undervalue during the will-maker's lifetime), whereas the 1949 Act is limited to promises to make testamentary provision. However, the limitations of the 1949 Act are for the most part made up by principles of general law.
- C113 In one respect *section 31* is narrower than the 1949 legislation. It does not apply to implied promises. These are promises gathered from the circumstances (eg, the will-maker may show the contributor the terms of a will, without actually saying that provision will continue in force until death; or may give the contributor the idea that "he will be looked after", no specific promise being made). Implied promises are dealt with instead by *section 33*.

Section 32

- C114 The purpose of this section is to deal with express promises to provide for someone other than the contributor. For example, a neighbouring farmer may look after the will-maker's stock for a substantial period of time, on the understanding that the will-maker will in due course transfer certain paddocks to the farmer's son. In general, contractual promises to benefit a third party, such as the son, can be sued on by that party (Contracts (Privity) Act 1982). The section follows that principle.
- C115 *Subsection (1)* sets out the main condition under which third parties may enforce the promise. They must be designated in some way (even if only by reference to a particular class of people: eg, "my sons"). They may then make a claim based on the promise in the same way as if they were the contributor: *subsection (2)*. But they cannot do so unless the promise is intended to create a benefit which is enforceable by them: *subsection (3)*.
- C116 Various issues can arise where defences against liability (eg, the set-off of another debt owed by the contributor) would be available against the contributor, or where the contributor subsequently agrees with the will-maker to vary or discharge the contract. Are third party beneficiaries bound by such defences or variations? In general they are, but in some circumstances they ought to be able to enforce the original contract. These have been fully worked out in the provisions of the Contracts (Privity) Act 1982. *Subsection (4)* and *Schedule 1* adapt these provisions to contribution claims based on express promises.

33 Contribution claim based on unjust retention of benefit

- (1) A contributor who makes a contribution claim based on the unjust retention of a benefit must satisfy the court that
 - (a) the deceased person was aware of the provision of the benefit or was not sufficiently competent to be aware of the provision of the benefit; and
 - (b) the benefit is retained by the estate; and
 - (c) it is just that provision be made for the contributor in return for the benefit.
- (2) A contribution claim cannot be made if,
 - (a) when the benefit was conferred, the deceased informed the contributor, or it was agreed between the deceased and the contributor, or it was otherwise clear from the circumstances, that no provision would be made in return for the benefit; or
 - (b) the contributor conferred the benefit gratuitously.
- (3) The court can decide that it is just that provision be made to a contributor in return for a benefit if
 - (a) the contributor hoped or expected to receive provision in return for the benefit and the deceased knew of that hope or expectation; or
 - (b) the contributor was under pressure of a moral or social obligation to provide the benefit; or
 - (c) the deceased needed the benefit provided by the contributor and, if there was any other person who might reasonably have been expected to provide the benefit, that person unreasonably failed to do so; or,
 - (d) in the special circumstances of the case and for any other reason, it is inequitable that the estate should retain the benefit.
- (4) A benefit which has been provided to the deceased is retained by the estate of that deceased if the circumstances of that deceased or the deceased's estate have not so changed since the benefit was provided that it is inequitable to require that provision in return for it be made from the estate.

Definitions: **benefit, contribution claim, contributor, court, estate, provision, s 8**

Section 33

- C117 This section defines the circumstances in which it is “unjust” for the will-maker or the will-maker’s estate to retain a benefit which has been conferred by the contributor, without making appropriate remuneration.
- C118 Under *subsection (1)*, the basic elements of the claim are that
- the contributor provided a benefit during the lifetime of the will-maker; and
 - the will-maker either knew it was being provided, or else was not sufficiently competent to know of it; and
 - it is just that provision be made for the contributor.
- C119 These elements are qualified in various ways. The term **benefit** is defined so as to exclude services provided without significant expenditure of time, effort or money (*section 8*, para C18). Even where it is a significant benefit, the contributor will not succeed if the benefit was conferred on the understanding that nothing is to be paid for it, or if the contributor intends the benefit as a gift: *subsection (2)*.
- C120 The contributor must then establish that the claim is “just”. This is a matter for the court to decide. But there are three situations in which, according to *subsection (3)*, the court may find the claim is just, without further inquiry:
- the contributor hopes for or expects a provision, and the will-maker knows of that hope (eg, the contributor daughter frequently refers to the fact that her mother had done the same for her grandfather, and her mother had received something under the grandfather’s will); or
 - the contributor has a strong moral or social obligation to confer the benefit (eg, an unmarried daughter living in the same town as her aged parent feels that both the parent and her brothers and sisters expect her to look after the parent); or
 - the will-maker needs to be provided with the benefit, and no-one else might reasonably be expected to provide it (eg, a person in an advanced state of dementia is placed in a rest-home, and her brother – her sole close relative – cleans up her house and arranges to sell it, meets her expenses until the house is sold, and generally looks after her welfare during her last illness).
- C121 If none of those three criteria are met, the court may still look to the particular circumstances of the case to find a justification for a contribution award: *subsection (3)(d)*.
- C122 The definition of the terms **retained** and **retention** is important for those contribution claims where the claimant alleges that a benefit has been conferred on the will-maker and it is unjust for the estate to retain that benefit. It will not be necessary for the claimant to point to any particular asset the estate still owns, or any particular way in which the estate remains the richer as a result of that benefit. Continuing enrichment will be presumed unless the estate can show that the circumstances of the deceased or the deceased’s estate have so changed since the benefit was provided, that it is inequitable for the estate to be made to pay for the benefit: *subsection (4)*. This is a recognised method of dealing with the question used also in other New Zealand statutes: for example, Administration Act 1969 ss 49–51; Insolvency Act 1967 s 58 (see *A New Property Law Act* (1994, NZLC R29) 76, 297–299).

34 Assessment of contribution award

- (1) An award made on the basis of an express promise must be an award of the value of the promise unless a greater or lesser award is made under subsection (3).
- (2) An award made in recognition of the unjust retention of a benefit must be an award of the value of the benefit unless a greater or lesser award is made under subsection (3).
- (3) The court can make a greater or lesser award than that provided for by subsection (1) or (2) after having regard to
 - (a) an arrangement or understanding between the contributor and the deceased person; and
 - (b) the fairness and reasonableness of the terms of an arrangement or understanding between the contributor and the deceased; and
 - (c) the fairness of the operation of an arrangement or understanding between a contributor and the deceased; and
 - (d) the length of time that has passed since the benefit was provided by the contributor and any subsequent change in any circumstance the court considers relevant; and
 - (e) any other circumstances, including the possible implications of the award for third parties, that the court considers relevant.
- (4) An award made to a contributor on a contribution claim may be of a sum of money or may direct the transfer to the contributor of specific property.

Definitions: award, benefit, contribution claim, contributor, court, s 8

35 Illegal benefits

- (1) A court may make an award to a contributor in respect of a benefit that was conferred unlawfully or was conferred under an unlawful agreement or arrangement.
- (2) In considering whether to make an award to a contributor under subsection (1), the court must have regard to
 - (a) the conduct of the parties; and,
 - (b) in the case of a breach of an enactment, the object of the enactment and the gravity of the penalty expressly provided for a breach of it; and
 - (c) such other matters as the court thinks proper;but the court must not make such an award if it considers that to do so would not be in the public interest.
- (3) The court may make an order under subsection (1) notwithstanding that the contributor conferred the benefit with knowledge of the facts or law giving rise to the illegality, but the court must take such knowledge into account in exercising its discretion under that subsection.

Definitions: award, benefit, contributor, s 8

Origin: Illegal Contracts Act 1970 s 7(2), (3)

Section 34

- C123 This section sets out the normal approach to fixing the amount of a contribution award. If there is an express promise, the amount awarded will be the value of the thing promised: *subsection (1)*. The promised provision may be worth more or less than the benefit given by the contributor. But if there is no express promise, the amount awarded will be the value of the benefit conferred: *subsection (2)*. These amounts can be varied, by the court having regard to the criteria set out in *subsection (3)*.
- C124 Under *subsection (4)* the award may take the form of an order to pay a specified sum of money, or else an order that a particular item of property be transferred to the contributor.

Section 35

- C125 If arrangements are unlawful, the courts have in the past refused to give the parties who have entered into them any relief under the common law at all. In the case of illegal contracts, however, courts are now empowered by the Illegal Contracts Act 1970 to validate the contract (if appropriate), or to make orders by way of restitution or compensation. It is not at present possible to apply these provisions to all testamentary claims. While some contribution claims are based on contracts, others are not. The purpose of this section is to extend the remedial provisions of the Illegal Contracts Act to all arrangements which are the subject of contribution claims.

36 Contractual claims by contributors

- (1) If a contributor brings a proceeding under the law of contract against the estate of a deceased person in respect of a benefit provided by the contributor to the deceased in his or her lifetime, the court in which the proceeding is brought may order
 - (a) that the contractual claim be heard in the same manner as is followed for contribution claims; or
 - (b) that the contributor make a contribution claim to be heard with the contractual claim.
- (2) When making an order under this section, the court may further order that the proceeding be transferred to another court with jurisdiction to hear a proceeding under this Act.
- (3) This section does not apply in respect of a contract for the provision of a benefit on a strictly commercial basis by a person with no close personal relationship to the deceased.
- (4) This Act is not to be construed so as to inhibit or prevent the administrator of the estate of a deceased from lawfully settling any contractual claim against the estate.

Definitions: **administrator, benefit, contribution claim, contributor, court**, s 8

37 Contribution claim codifies restitution claims

- (1) This Act codifies the law relating to claims made under the law of restitution (unjust enrichment) by contributors who conferred benefits on persons who have subsequently died anticipating that the deceased person would make provision for them in return for the benefits.
- (2) Subject to subsection (3), no claim other than under this Act can be brought in any court in respect of the unjust enrichment of a deceased as a result of any benefit provided by a contributor, whether by way of *quantum meruit*, *quantum valebat*, beneficial interest under constructive trust, proprietary estoppel or otherwise.
- (3) A proceeding based on the law of unjust enrichment may be brought by special leave in any court if that court is satisfied that the enrichment occurred in the context of a strictly commercial transaction with a person who had no close personal relationship with the deceased.

Definitions: **benefit, contributor**, s 8

Section 36

- C126 The purpose of this section is to ensure that all contribution claims are dealt with in accordance with appropriate procedures. In many cases, contributors will be family members and others with a close personal association with the will-maker. Especially if they claim a sizeable amount from the estate, it is important to treat the matter as a family one. Other members of the family should be drawn into discussions, mediation should be encouraged, and the claim should be understood in the context of the general family background.
- C127 As has already been pointed out (paras 323–324), some contribution claims relate to agreements which could be enforced as contracts. But these are not like the great majority of contractual claims against the estate. Most ordinary creditors will not accept arrangements under which they are unlikely to be paid until the will-maker dies. Of course, when the will-maker dies some current commercial liabilities need to be met. This section does not apply to them: *subsection (3)*.
- C128 With respect to contribution claims generally, however, the court will be able to order that any contractual aspects be dealt with in accordance with the procedures for testamentary claims: *subsection (1)*. The claimant may be asked to institute a contribution claim. If the contractual claim has been brought in the District Court or the High Court, it may be transferred to the Family Court: *subsection (2)*.
- C129 It will be for the administrators, in the first instance, to decide whether to treat the claim as an ordinary contractual one and pay it: *subsection (4)*. If there are grounds for defending the claim, they may concur in proceedings brought by the claimant in the District Court or High Court. They may, on the other hand, resist that form of procedure and ask the court in which proceedings are brought to transfer them to the Family Court.

Section 37

- C130 The Act codifies the law of restitutionary claims which can be made on the ground that the claimant conferred a benefit expecting remuneration out of a will-maker's estate: *subsection (1)*. This means that claims based on the relevant common law and equitable principles can no longer be sustained. Reference is made, in *subsection (2)*, to traditional actions based on *quantum meruit* (for services rendered), *quantum valebat* (for goods supplied), and to claims for beneficial interests under constructive trusts and proprietary estoppel.
- C131 Not all restitutionary claims are codified, however. For example, actions based on duress or mistake will still be brought at common law or in equity. Only those claims where the plaintiff asserts that he or she has conferred a benefit on the will-maker, in anticipation of being remunerated for that benefit, are brought within the Draft Act.
- C132 *Subsection (3)* exempts commercial transactions between the will-maker and those with whom the will-maker has no close personal association. These too may be brought and determined in the High Court or District Court, and the principles of general law will apply. However, the court in which the proceedings are brought must give special leave to allow the action to proceed.

PART 5
JURISDICTION, AWARDS, AND PRIORITIES

Subpart 1 – Jurisdiction

38 Jurisdiction

- (1) A Family Court has jurisdiction in respect of proceedings under this Act, except that, if a proceeding under this Act has been brought in the Family Court and has been removed to the High Court under subsection (2), another person may bring a proceeding under this Act in respect of the estate of the same deceased person only in the High Court.
- (2) The High Court may, on the application of a party to a proceeding under this Act or of its own initiative, order a proceeding to be removed from a Family Court into the High Court if it is satisfied that the proceeding would be more appropriately dealt with in the High Court.
- (3) The High Court has jurisdiction in respect of a proceeding under this Act which has been brought in that court under subsection (1) or removed to it under subsection (2).

Origins: Family Courts Act 1980 s 11(1A); Matrimonial Property Act 1976 s 22; Family Protection Act 1955 s 3A; Law Reform (Testamentary Promises) Act 1949 s 5

39 Right of appeal

Parties to proceedings under this Act and other persons prejudicially affected have the right to appeal as provided for in Schedule 2.

Section 38

- C133 This section is drafted on the basis that the Family Court and the High Court will have concurrent jurisdiction to deal with claims under the Act (but see chapter 10, paras 333-337). As with claims under the Matrimonial Property Act 1976, there will be no monetary limit on the Family Court's jurisdiction: *subsection (1)*. The High Court may order that a proceeding commenced in the Family Court be transferred into its own jurisdiction: *subsections (2) and (3)*.

Section 39

- C134 In general the rights of appeal will be governed by the District Courts Act 1947 Part IV and the Family Courts Act 1980. Some slight modifications of the general rules for appeals from decisions of Family Courts have been made for proceedings under the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949. These are not applied consistently to the Matrimonial Property Act 1963. The modifications have been carried forward in *Schedule 2* and will apply to all claims under the Draft Act.
- C135 It is expected that new court rules will be needed to simplify the present procedures used under the three Acts. The Commission intends to raise these matters with the Chief Justice, the Principal Family Court Judge and the Rules Committees at an appropriate time.

*Subpart 2 – Awards and orders***40 Kinds and effect of awards and orders**

- (1) A court may in accordance with this Subpart make an award or a property division order that directs one or more of the following:
- (a) the payment of a lump sum;
 - (b) the making of periodic payments;
 - (c) the transfer of specific property;
 - (d) the establishment of a trust.
- (2) An award has effect as if it were a provision in a will made by the deceased person, and a property division order has effect as if it were an order partitioning the property of the partners, but awards and property division orders are subject to
- (a) any orders made by the court relating to funds available to satisfy awards and property division orders; and
 - (b) the provisions as to priorities in Subparts 4 and 5.

Definitions: **award**, **property division order**, s 8; **partner**, ss 9, 10(3)

41 Lump sum and periodic payments

- (1) A court may make a support award directing the payment to the claimant from the estate of a deceased person of either a lump sum or periodic payments, or both a lump sum and periodic payments.
- (2) A court may make a property division order directing the payment to the applicant from the estate of a deceased of a lump sum or, on the request of the applicant, periodic payments or a lump sum and periodic payments.
- (3) A court may make a property division order directing the payment to the administrator of a deceased by a partner of the deceased of either a lump sum or periodic payments, or both a lump sum and periodic payments.

Definitions: **court**, **property division order**, **support award**, s 8

Origin: Family Protection Act 1955 s 5

42 Retrospective support awards

A court may make a support award directing that periodic payments be made to the claimant from the estate of a deceased person with effect from a date not earlier than the date of death of the deceased.

Definitions: **court**, **estate**, **support award**, s 8

Section 40

- C136 *Subsection (1)* introduces a series of provisions dealing with the form of the orders and awards that courts may make under the Draft Act. The principal forms are
- lump sum (*section 41*),
 - periodic payments (*section 41*),
 - transfer of specific assets (*section 43*), and
 - establishment of a trust (*section 46*).
- C137 While awards have effect as if they were provisions in the will-maker's will, property division orders have effect as if they were orders partitioning partners' property: *subsection (2)*.

Section 41

- C138 The court will have power to make a support award a lump sum payment or periodic payments, or both: *subsection (1)*. Normally a partner's property division entitlement will be a lump sum, representing the value of their share or contribution. A support award too may take that form. A sum can be calculated or estimated which (with interest) will provide the appropriate level of support for the period covered by the claim, and which will then be exhausted.
- C139 Under *subsection (2)*, the court may make a partner's property division order in the form of periodic payments, or as an interest in a trust, where this is requested by the claimant, or as is consistent with what has been agreed between the claimant and the will-maker. There is no reason, for example, why a widow or widower could not take a property division entitlement in the form of a life interest over all, or the balance of, the matrimonial property, if they so wish and the other claimants and beneficiaries have no serious ground of objection.
- C140 Unlike the present law (Law Reform (Testamentary Promises) Act 1949 s 3(4)), *section 41* does not give courts specific power to make an order for periodic payments under a contribution award.
- C141 *Subsection (3)* deals with the case where the estate of a dead partner makes a claim against the surviving partner. It assumes that the surviving partner owns the greater share of the matrimonial assets, and this needs to be equalised (subject to any support claim the survivor may wish to bring). An order in favour of the estate may take the form of either a lump sum, or periodic payments, or both a lump sum and periodic payments. Further orders may be made under *section 43*.

Section 42

- C142 Support awards may be made retrospective to the will-maker's death.

43 Order for transfer of property

- (1) A court may make a property division order or a contribution award directing the administrator of a deceased person's estate to transfer property specified in the award to the claimant if
- (a) the deceased promised to transfer the property to that claimant; or
 - (b) the order relates to property of the deceased's estate which has been provided or improved by the claimant, or which is the proceeds of sale or exchange of that property, or is property acquired with such proceeds.
- (2) An order or award under subsection (1) may be expressed to take priority over the claims of creditors or other claimants or other classes of creditors or claimants.
- (3) A court may in any proceeding under this Act, other than a proceeding of a kind referred to in subsection (1), make a property division order directing
- (a) the administrator of a deceased's estate to transfer property specified in the award to the claimant; or
 - (b) a partner of a deceased to transfer property specified in the award to the administrator of the estate of the deceased.
- (4) In this section
claimant includes a person who initiates a property division under this Act; and
property includes the proceeds of the sale or exchange of property.

Definitions: **administrator**, **contribution award**, **property division order**, s 8; **partner**, ss 9, 10(3)

Origins: Matrimonial Property Act 1963 s 5; Matrimonial Property Act 1976 s 33; Law Reform (Testamentary Promises) Act 1949 s 3(3)

44 Property division orders in favour of administrators

When making a property division order in favour of the administrator of the estate of a deceased partner against a surviving partner, the court may make any order that it might have made under the Matrimonial Property Act 1976 if the deceased partner had not died.

Definitions: **administrator**, **property division order**, s 8; **partner**, ss 9, 10(3)

Section 43

- C143 When making a property division or contribution award, the court may order that specific assets in the will-maker's estate be handed over to the claimant: *subsections (1) and (3)*. An obvious example would be the house the partners have been living in, or the property which a contributor has improved in anticipation of being given it by will. The court must of course ensure that the value transferred to the claimant is within the general guidelines laid down in *Part 2* (partners) and *section 34* (contributors). In most ordinary cases, this will simply be a matter of convenience, since the estate would normally sell the assets, or pass them on to beneficiaries who want them. But there may be cases where a beneficiary and a claimant want the same asset. The court will have to settle that dispute. This is generally provided for in *subsection (3)*.
- C144 In certain situations the problem becomes one of right rather than convenience. This is where the estate is insufficient to meet all the claims made against it, especially those of claimants and contributors. An award of a specific asset may disturb the normal priorities between these two groups. A specific award may still be appropriate, as long as the conditions in *subsection (1)* are complied with. The will-maker may have expressly promised to convey the property in return for the benefit. Or the property in question may represent in substance the benefit the contributor has conferred on the will-maker. In these cases, *subsection (2)* then permits the court to make an order which will take precedence over creditors and other claimants, as regards the asset in question. (Similar orders can at present be made under the general law). See also *subsections 48 and 49* (non-probate assets).

Section 44

- C145 This section deals with the unusual situation where the administrator of a deceased partner makes an application for a property division award against the surviving partner. For example, the deceased may have left her property to her children by an earlier marriage. If the application is successful, the powers already conferred on the court by the Draft Act are inappropriate, since they are all directed at the administrator of an estate. In this case, the general powers available under the Matrimonial Property Act 1976 will be needed. The relevant powers are found in sections 25, 27–33, 43–45 of that Act.

45 Payment of awards to children

A court may direct that payments made in accordance with a support award to a child of a deceased person are to be paid directly to the child or to a custodian of the child for the benefit of the child.

Definitions: **court**, **support award**, s 8; **child of a deceased person**, ss 8, 26

46 Provision for trusts

- (1) When making a property division order or an award, a court may order that an amount or particular property specified in the order is to be set aside out of the estate of a deceased person and held on trust for the benefit of 2 or more persons specified in the order.
- (2) The court may specify as a beneficiary of a trust established under this section any partner of the deceased, child of the deceased, contributor in relation to the deceased, beneficiary under the will of the deceased or a beneficiary on the intestacy of the deceased, and such persons may take as a class, or as regards specified amounts or property, or consecutively, subject to such conditions and contingencies or otherwise as the court may specify.
- (3) The trustee may apply the income and capital of such an amount in the manner provided by subsection (2) although only one of the persons for whose benefit the trust was established remains alive.
- (4) The court is to appoint a person to be the trustee of the trust and may do so by the order creating the trust or subsequently.
- (5) A trust established by the court under this section is subject to every enactment, including the Trustee Act 1956, and every rule of law or of equity governing or regulating trusts in New Zealand as if it were a trust created by the will of the deceased.

Definitions: **award**, **contributor**, **court**, **estate**, **property division order**, s 8; **partner**, ss 9, 10(3); **child of a deceased person**, ss 8, 26

Origin: Family Protection Act 1955 s 6

Section 45

- C146 There are some legal difficulties where children who are under the age of 20 have rights in a will or an estate. At common law, they could not give a receipt, so if they received a distribution from the estate during minority they may have been able to claim the same sum a second time. But it is now recognised in law that children have different capacities, depending on what they are called upon to do (see Age of Majority Act 1970). Particularly if a payment relates to immediate support needs, there seems no reason to withhold the money from the child, or to go to the expense of appointing a trustee.
- C147 *Section 45* allows the court, in appropriate cases, to order that payments under a child's award be paid direct to the child, or to a custodian of the child for the child's benefit.

Section 46

- C148 The Court will have power to make an award which establishes a trust and gives the claimant an interest in it. What the claimant receives under the trust may vary according to future events. This flexibility is useful where there are several potential beneficiaries, who may in the future have differing needs.
- C149 For example, a sum could be set aside for the education and training of three children until they reach 25. If one of them becomes a paid apprentice, another undertakes full-time study at a university or polytechnic, and the third undertakes work for which no period of training is necessary, their respective needs will be very different in their early twenties. A discretionary trust, established years before, would allow the court to distribute the fund in accordance with those needs.
- C150 Similarly, a trust fund might be set up which is available in full to a surviving spouse, if she needs it while the couple's children are living with her, but part of which is separated off and paid to the children when they leave home for training or education.
- C151 The section is designed to give the court that flexibility in making awards. *Subsection (1)* authorises the creation of a trust. *Subsection (2)* allows both claimants and existing beneficiaries to be included, with the respective interests specified by the court. *Subsection (3)* provides for a discretionary trust, with the trustee making decisions as to which of the beneficiaries will receive benefits. *Subsection (3)* allows the trust to continue even if only one potential beneficiary remains alive. *Subsection (4)* provides for the appointment of a trustee, either at the time of creating the trust or subsequently.
- C152 The section is based on section 6 of the Family Protection Act 1955. However, that section is limited to funds for claimants who together form a single class of people, for example children or grandchildren. The present section allows both claimants and beneficiaries, and people of different classes (eg, a parent and a child) to be joined in the same trust fund. The court's power to create such a trust has necessary limits. The value of each person's expectancy in the trust when it is created should correspond approximately to the value of their respective claims, as ascertained under Parts 2, 3 and 4 of the Act. But the total amount of money available to meet their needs will be applied flexibly over a period of time. Additional flexibility is given, in *subsection (5)*, by reference to provisions in the Trustee Act 1956 allowing variation of the administrative arrangements under a trust. See also *section 47* (paras C153–C155).

47 Power to vary support awards

- (1) If the court has made a support award for periodic payments or has ordered the establishment of a trust, the court may at any later time inquire into the adequacy of the provisions and may
 - (a) increase or reduce the provisions so made; or
 - (b) discharge, vary or suspend the award and make such other award as the court thinks appropriate in the circumstances.
- (2) If after a support award has been made, a claim is made by a person who is not bound by the award, the court may vary the previous award in such manner as it thinks appropriate.

Definitions: **award**, **support award**, s 8

Origin: Family Protection Act 1955 s 12

Section 47

- C153 This provision dealing with variation of earlier awards has been brought forward from the Family Protection Act 1955 s 12.
- C154 *Subsection (1)* applies to support awards made in the form of periodic payments or a trust. These may be varied by later court order, if they prove to be too generous or insufficient. In the latter case, it may be necessary to recover further property from the beneficiaries, unless funds have already been set aside from the estate, or are available in the trust, for that purpose. Applications to vary periodic payments are not often encountered in current practice.
- C155 *Subsection (2)* applies where there has been an award, or a series of awards, and then someone who has not been a party to the earlier proceedings brings a successful claim. Again, this is unusual, since every effort will be made in the earlier proceedings to ensure that all potential claimants are before the court (see *section 62*, paras C204–C207). Where all potential claims have not been brought in, and another claim is brought later, the court may have to vary its previous orders.

*Subpart 3 – Funds available to meet claims***48 Availability of certain assets to meet claims**

- (1) If in the opinion of the administrator so much of the estate of a deceased person as is disposed of by will or intestacy is significantly affected by a claim or claims or a property division application under this Act, the administrator may
 - (a) require that all or part of the non-probate assets of the deceased should be taken into account and required to bear a proportionate and equitable part of the burden of satisfying such claims or property divisions; and
 - (b) take all reasonable and practical steps to secure that result.
- (2) For the purposes of this Subpart, the **non-probate assets** of a deceased consist of all property passing on the death of the deceased by reason of any of the following transactions:
 - (a) contracts to make or not to revoke a will; and
 - (b) contracts with a bank or other financial institution providing for the property in an account or policy to pass to a co-owner or nominated beneficiary on the death of the deceased; and
 - (c) gifts that the deceased made in contemplation of death (*donationes mortis causa*); and
 - (d) trusts settled by the deceased that were revocable by the deceased in her or his lifetime; and
 - (e) beneficial powers of appointment that were exercisable by the deceased in her or his lifetime; and
 - (f) joint tenancies held by the deceased and any other person.
- (3) Property is to be regarded as a non-probate asset for the purposes of this Subpart only if that property was or could have been (if the deceased had so desired or requested) available to the deceased immediately before his or her death.
- (4) If the property needs to be valued for the purposes of this Act, the valuation is to be carried out as if the deceased had made the property available to himself or herself immediately before death.

Definitions: **administrator**, **estate**, s 8

Section 48

- C156 The next four provisions enlarge the estate which will be available to claimants in the event of a successful claim. The term “estate” normally only includes the property which will be got in by the administrator after obtaining “probate”, or other authority granted by the court to administer the estate. The property is used first to pay the debts of the deceased person. The balance of the estate is passed on to the beneficiaries under a will, or the statutory successors on an intestacy. But, for the purposes of meeting testamentary claims, the estate will now include
- the **non-probate assets**, and
 - property comprised in certain transactions entered into by the will-maker before death.
- C157 This section deals with what the Draft Act calls the non-probate assets of the will-maker. The non-probate assets are that part of the will-maker's property which he or she owns at the date of death, and which pass to another person otherwise than by will. Property of this kind is listed in *subsection (2)*. It includes joint property (where the will-maker's interest passes automatically to the other joint tenant), nominated bank accounts and insurances (the rights pass to the person named in the bank account or insurance contract), and gifts made in contemplation of death (the gifted property passes to the donee).
- C158 In nearly all cases, the will-maker could at any time during their lifetime have reclaimed the property. It would then have come back into the estate and been available to meet testamentary claims when the will-maker dies. It would also, in many cases, have been matrimonial property available for division under the Matrimonial Property Act 1976. The section allows the administrator to require non-probate assets to help meet the burden of the claim. If the administrator fails to take this step, the beneficiaries and affected owners may apply for a review: *section 49(2)*.
- C159 At present, property comprised in a gift in contemplation of death (*donatio mortis causa*) is the only part of the non-probate estate which is available under the Family Protection Act 1955 (see s 2(5)). Nominated account arrangements are limited to amounts not exceeding \$6 000 (see Administration Act 1969, Part 1A). Otherwise they will come into the probate estate and will also be available. But in principle, all non-probate assets should be available to testamentary claimants, even though technically they no longer form part of the estate when the will-maker dies. This is required in fairness to testamentary claimants, since the will-maker's obligations apply irrespective of the technical arrangements used to dispose of property upon death. It is also required in fairness to the will-beneficiaries, who may otherwise bear a disproportionate burden which cannot be passed on to the successors to the non-probate assets.
- C160 If an adult children's claim is adopted (see chapter 7, paras 232–266), *sections 48-51* will not apply to it, except possibly in the case of property gifted in contemplation of death (*donationes mortis causa*).

49 Recovery of non-probate assets

- (1) An administrator who makes a requirement under section 48 must file in the court a notice of the requirement in the prescribed manner and must serve copies of the notice in accordance with the regulations.
- (2) A person who has an interest in the estate or the non-probate assets of a deceased person may apply to a Family Court for a review of any action taken under section 48 by the administrator of the estate or of any failure to act under that section by that administrator and, after giving all affected parties an opportunity to be heard, the Family Court may affirm, vary or revoke any such action.
- (3) If no application is made for a review within 45 days after service of the notice referred to in subsection (1) or an application is made for a review of an administrator's failure to act under section 48, the court may order that the person in favour of whom the transaction was made, or that person's personal representative, or any person claiming through that person,
 - (a) must transfer to the administrator the property, or any part of it or interest in it retained by that person;
 - (b) must pay to the administrator such sum, not exceeding the value of the property as the court thinks proper,and the powers in sections 49 and 50 of the Administration Act 1969 are available to and may be exercised by the court subject to any necessary modifications.
- (4) The court may make any further order that it thinks necessary in order to give effect to an order made under subsection (3).

Definitions: **administrator**, *estate*, s 8; **non-probate assets**, s 48(2)

Origin: Insolvency Act 1962 s 58

Section 49

- C161 The non-probate assets will not be required to meet claims unless the administrator considers that the estate will be significantly affected by a claim: *section 48(1)*. This section lays down the procedures which will be used.
- C162 The administrator begins by filing a notice of his or her requirements in court and serving notice on those affected: *subsection (1)*. Within 45 days, those served with the notice who disagree with the requirement must apply to the court to have the decision reviewed: *subsection (2)*. In dealing with that application, the court may make appropriate orders: *subsection (3)*. Normally the only necessary order would be one revoking or amending the administrator's requirement.
- C163 Sometimes beneficiaries or other owners of non-probate assets may take the view that the administrator has not made a requirement, or not directed it at all the available property, when he or she should have done so. They too may apply for a review of the administrator's decision. If the application is justified, an appropriate order might be that the administrator make the requirement which the applicant seeks.
- C164 On the expiry of the 45-day time period, the administrator may make a further application to the court to recover the assets, or to order such payments as may be necessary to meet the claims. This may not be necessary until the size of the claims has been fixed by the court. In the meantime, however, owners of the non-probate assets will have been put on notice of their potential liability. If they do spend or dispose of the assets they have received, they will still be liable to repay the equivalent sum – the change of circumstance defence provided for in *section 51* will not be available because they knew of the pending claim.

50 Rights in respect of prior transactions and non-probate assets

- (1) A person who has commenced a proceeding to initiate a property division or to claim an award against the estate of a deceased person may apply to the court in the course of that proceeding for an order under this section and the court may make such an order if the court is satisfied that the exercise of the powers conferred by this section would facilitate the making of appropriate orders or awards under this Act which cannot otherwise be made equitably from the estate of the deceased and if further satisfied
- (a) that there are non-probate assets of the deceased which have not been called in under sections 48 or 49; or
 - (b) that the deceased, with the fraudulent intention of removing property from the reach of proceedings under this Act or otherwise with a fraudulent intention of prejudicing the interests of persons claiming awards or initiating a property division under this Act, made a disposition of property; or
 - (c) that, less than 3 years before the death of the deceased, the deceased made a disposition of property and that full valuable consideration for that disposition was not given by the person to whom the disposition was made ("the donee") or by any other person.
- (2) On an application under this section, the powers conferred by sections 49 to 51 of the Administration Act 1969 are available to and may be exercised by the court subject to any necessary modifications.
- (3) If the court makes an order under subsection (1), the court may give such consequential directions as it thinks appropriate for giving effect to the order or for the fair adjustment of the rights of the persons affected by the order.
- (4) In deciding whether and how to exercise its powers under this section, the court must have regard to the circumstances in which any disposition was made and any valuable consideration which was given for it, the relationship (if any) of the donee to the deceased, the conduct and financial resources of the donee, the availability of other assets within the estate of the deceased to meet claims and orders under this Act, and all the other circumstances of the case.

Definitions: *award*, *court*, *estate*, s 8; *non-probate assets*, s 48(2)

Section 50

- C165 This section confers on claimants rights (like those beneficiaries enjoy at present) to have non-probate assets made available to satisfy a successful claim. But it goes further and allows claimants to bring in property comprised in transactions made by the will-maker before death. In most cases these transactions will be made within a short period before death, but if there is fraudulent intent, there is no time limit. These transactions diminish the estate and tend to defeat testamentary claims. The same considerations of fairness discussed in respect of *section 48* apply here too.
- C166 *Subsection (1)* provides that property passing under the following transactions can be recovered in order to meet testamentary claims:
- gifts and other transactions for less than full consideration, made within three years before the will-maker died; and
 - transactions entered into with a view to prejudicing the rights of testamentary claimants and having that effect as regards the particular claim. There is no time limit on the second class of case, except that long-standing transactions are unlikely to “prejudice” claimants of more recent standing.
- C167 Again, a donee or other person benefiting from any such transaction would have the same defences as a beneficiary to whom property had been distributed under the will: *subsection (2)*.
- C168 If a successful application is made, the relevant property or a sum representing its value can be brought back into the estate: *subsection (2)*. Appropriate adjustments can be made to avoid any unfair or unequal results: *subsections (3) and (4)*. It is not necessarily a bar to recovery that the person who received property from the will-maker gave value, but this is a matter which the court may take into account: *subsection (4)*.

51 Denial of recovery

- (1) The court must not make an order under section 49 or 50 against a person if that person proves that he or she
 - (a) acquired the property for valuable consideration and in good faith without knowledge of the fact that the property is subject to a claim or application under this Act; or
 - (b) acquired the property through a person who acquired it in the manner described in paragraph (a).

- (2) The court may decline to make an order under section 49 or 50, or may make such an order subject to conditions or with limited effect, against a person if that person proves that
 - (a) he or she received the property in good faith without knowledge of the fact that the property is subject to a claim or application under this Act; and
 - (b) his or her circumstances have so changed since the receipt of the property that it is unjust to order that the property be transferred or compensation paid.

Definitions: **court**, s 8

Origin: Insolvency Act 1967 ss 58(5), 58(6)

Section 51

- C169 This section provides protection for those who have received non-probate assets or property which have been transferred under a prior transaction which can be attacked under *section 50*. It protects
- bona fide purchasers of the property: *subsection (1)*; and
 - those whose circumstances have so changed, as a result of receiving the property, that it is inequitable to make them return it or pay compensation for it: *subsection (2)*.
- C170 *Subsection (2)* does not follow the statutory form of change of circumstance previously used in, for example, the Judicature Act 1908 s 94B (as inserted by the Judicature Amendment Act 1958 s 2). On the difficulties which have been encountered with the wording in the earlier legislation, see *Contract Statutes Review* (1993, NZLC R25) chapter 4.

Subpart 4 – Priorities of awards as against creditors' claims

52 Ranking of awards on contribution claims as against creditors' claims

- (1) If the estate of a deceased person has insufficient assets to fully satisfy all the liabilities of the deceased and the awards made in respect of contribution claims and other claims by creditors against the estate, the assets of the estate are to be applied so that an award on a contribution claim ranks equally with unsecured liabilities of the deceased.
- (2) Despite subsection (1), the court may permit a contributor to make a proprietary or tracing claim against specific property formerly owned by the deceased and may confer priority over claims and creditors in accordance with section 43(2).

Definitions: award, contribution claim, contributor, court, estate, s 8

Section 52

- C171 This section is the first of a series of sections dealing with priority of claims. The present law has no express or consistent system for ranking claims. In practice, the courts take into account the fact that there are other claims in settling the size of each award. This approach is satisfactory where the courts are given no clear objectives in settling how large an award should be, although it is unsystematic and may lead to unpredictable results. With the Draft Act, however, it is assumed that the size of an award can usually be ascertained independently of the existence of other claims. It is therefore necessary to provide for the priority of claims, both as regards each other, and as regards the will-maker's general creditors.
- C172 *Section 52* deals with the first category of priority, unsecured creditors' and contributors' claims. Each ranks equally with the other: *subsection (1)*. However, it sometimes happens that a contributor is entitled to an order for the transfer of specific property (see *section 43*). In practical terms, such an order may have the effect of promoting the contributor to the status of secured creditor, as regards that particular asset: *subsection (2)*.

53 Ranking of property division orders as against creditors' claims

- (1) Except as otherwise expressly provided in this Act, the right to bring a property division proceeding does not
 - (a) affect the title of any person other than a partner to any property, or affect the power of either partner to acquire, deal with, or dispose of any property or to enter into any contract or other legal transaction as if this Act had not been passed; or
 - (b) limit or affect the operation of any mortgage, charge, or other security for the repayment of a debt given by either partner over property owned by that partner and every such instrument has the same effect as if this Act had not been passed.
- (2) Subject to subsection (3), if the estate of a deceased person has insufficient assets to fully satisfy all the liabilities of the deceased and property division orders,
 - (a) secured and unsecured creditors of a partner have the same rights against that partner and against the property owned by the partner as if this Act had not been passed; and
 - (b) all property that would have passed to the administrator of an insolvent deceased appointed under section 159 of the Insolvency Act 1967 if this Act had not been passed (and no other property) shall so pass.
- (3) Despite subsections (1) and (2), the court may permit a partner to make a proprietary or tracing claim against specific property formerly owned by the deceased and may confer priority over claims and creditors in accordance with section 43(2).
- (4) If a property division order is made against the estate of a deceased partner, the surviving partner may take priority because of a protected interest in the partnership home which interest is,
 - (a) if section 12(1) or (2) applies, to the extent of the specified sum or one half of the equity of the partners in the partnership home, whichever is the lesser; or
 - (b) if section 12(3) or 13 applies, to the extent of the specified sum or one half of the property or money shared under the section, whichever is the lesser.
- (5) A protected interest is not liable for the unsecured personal debts of the deceased partner.
- (6) In this section, **specified sum** means \$61 000 or such greater sum as the Governor-General may prescribe by regulation as the specified sum for the purposes of this section.

Definitions: administrator, partnership home, personal debts, property division order, ss 8; partner, ss 9, 10(3)

Origin: Matrimonial Property Act 1976 ss 20(1)–(3)

Section 53

- C173 *Section 53* deals with the second category of priority: property division orders. Where, during the partners' lifetimes, there is competition between the will-maker's partner and the will-maker's creditors, the Matrimonial Property Act 1976 s 20 applies (as between married couples). The principles in that section have been adopted in the Draft Act. They will apply both to married partners and to de facto partners.
- C174 The first principle is that New Zealand law recognises only deferred matrimonial property rights. That is to say, until the event occurs which triggers a general division of property, the partners can hold property in their own names and each is expected to meet debts out of the property which he or she owns. This is reflected in *subsection (1)*, which provides that each partner may legally transfer or mortgage their own property. Similarly, *subsection (2)(a)* provides that a security given to a creditor over the partner's own property is not prejudiced when the other partner institutes division of the partnership property.
- C175 Of particular importance is the further provision in *subsection 2(a)* which gives precedence to the partner's own unsecured debts in any distribution of property that partner owns. The practical effect is that, if a partner is insolvent, all that partner's property will be applied to meet his or her debts. In the event of bankruptcy all that property passes to the Official Assignee: *subsection 2(b)*. These are rules which, in any review of the Matrimonial Property Act 1976, may require careful consideration. But the present legislation is not the place to propose changes.
- C176 A significant qualification to the general rule is found in *subsection (1)*, which follows section 20 of the Matrimonial Property Act 1976. The rights of the creditors or Official Assignee take effect "as if this Act had not been passed". Husbands, wives and de facto partners, under the general law, can make claims to specific property, based on their contribution to that property. As in the case of contributors' claims (see para C102), this right may confer priority over unsecured creditors. Admittedly the provisions of the Act (especially *section 6*) take those rights away from a husband and wife in their relations with each other. But the words quoted reinstate them for the purpose of meeting creditor claims, so the non-debtor partner can rely on their general law right to specific property which is legally owned by the debtor partner.
- C177 A partner who institutes a property division may be able to assert priority over creditors if an order is made in respect of specific property under *section 43(2)*: see *subsection (3)*. This follows on from *subsection (2)*.
- C178 *Subsection (4)* contains an additional qualification drawn from the Matrimonial Property Act 1976. It relates to the non-debtor partner's protected right to a half share of the equity in the partnership home: *subsection (4)*. This is protected against the other partner's personal debts. The "equity" is what is left after deduction of any amounts charged on the property. There is a maximum protected sum of \$61 000: *subsection (6)*.
- C179 It will be noted that the protection applies to partnership homes and homesteads. It may even apply where there is no matrimonial home. The court may set aside part of the other matrimonial property for the same purpose. The protected interest applies only to personal debts of the other spouse. Personal debts of the claimant spouse, and matrimonial debts of both partners, can be enforced against the protected interest: *subsection (5)*.

54 Ranking of support awards as against creditors' claims

If the estate of a deceased person has insufficient assets to fully satisfy all the liabilities of the deceased and all support awards and claims by creditors against the estate, the assets of the estate are to be applied so that the unsecured liabilities of the deceased take priority over any support award.

Definitions: estate, support award, s 8

*Subpart 5 – Priority of awards amongst claimants***55 Ranking of awards and orders on property division and contribution and support claims**

- (1) If the estate of a deceased person has insufficient assets available after satisfaction of liabilities to fully satisfy property division orders and contribution and support awards, the assets of the estate are to be applied so that every contribution award
 - (a) ranks equally with any other contribution award, but subject to section 43(2);
 - (b) takes priority over any property division order, but subject to section 43(2);
 - (c) takes priority over any support award.
- (2) If the estate of a deceased has insufficient assets available after satisfaction of liabilities to fully satisfy property division orders and support awards, the assets of the estate are to be applied so that,
 - (a) in the case of successive partnerships, property division orders take priority in accordance with the chronological sequence of the partnerships;
 - (b) in the case of contemporaneous partnerships, a property division order is to be satisfied from that part of the estate of the deceased person as the court is able to attribute to the partnership concerned and, to the extent that such attribution is not practical, the court is to make an order that is proportionate to the contribution of each partnership to the acquisition of the assets;
 - (c) every property division order takes priority over any support award.
- (3) If the estate of a deceased has insufficient assets available after satisfaction of liabilities to fully satisfy support awards, the assets of the estate are to be applied so that every support award ranks proportionately with any other support award.

Definitions: contribution award, estate, property division order, support award, s 8; partner, ss 9, 10(3)

Section 54

C180 Support claims always cede priority to creditors' claims.

Section 55

- C181 This section deals with the priority of awards and orders as between themselves. Contribution awards rank equally with each other and ahead of property division entitlements and support claims: *subsection (1)*. This priority may be affected if an order is made in respect of specific property under *section 43(2)*.
- C182 Property division claims rank second in priority, again subject to the possibility of an order in relation to specific property under *section 43(2): subsection (2)*.
- C183 Competition may occur within the group of partnership awards and orders. This can occur even under the present law, where a marriage relationship ends, and one of the partners marries again, or enters a de facto relationship. If that too ends before the property division of the earlier marriage is settled, the assets owned by the common partner will be claimed by the two other partners. This is complicated further with the recognition of the property rights of de facto partners. Under the Draft Act, it will be possible for one person to live in two contemporaneous partnerships. Both of the other partners will now have property division entitlements against the common partner.
- C184 *Subsection (2)* contains two rules to deal with this situation. First, where the partnerships are one after the other, priority is determined in accordance with time. Second, where partnerships exist at the same time, property which is attributable to each partnership is first separated out. The balance is distributed between the two partnerships in proportion to the extent to which each contributed towards its acquisition, maintenance and improvement.
- C185 The first rule is not as arbitrary as it may at first sight appear. The first partnership will stop accumulating partnership property when the couple cease living together. The common partner can take into the second partnership, only that part of the matrimonial assets which is not claimable by the first partner. So it is sensible to determine the first partner's claim first, before determining what balance is available to the second partner's claim.
- C186 The second rule is inconsistent with the well-established presumption of equal sharing, and with the principle that the courts generally assess contributions to the partnership, and not exclusively to the property the partners acquire while the partnership exists. But these two principles cannot apply where there are two partnerships. The fact that two partners are assumed to contribute equally as between themselves tells the court very little about how much each partnership contributes to the overall well-being of the three people concerned. One may be an indolent, childless partnership, the other a hard-working business and family partnership. And in any event, any comparison of the worth of the two partnerships in an abstract sense would be invidious. It is simpler and safer to enquire only into their respective contributions to asset formation and maintenance.
- C187 The third priority group is support claims. These rank below the other two classes of claim and equally with each other: *subsection (3)*. If adult children's claims are recognised (chapter 7), they will rank below support claims (paras 225–231).

56 Ranking of orders and awards as against beneficiaries of the estate

- (1) If the estate of a deceased person has insufficient assets to fully satisfy property division orders, awards and entitlements under testamentary dispositions of the deceased and non-probate assets that have been called in under section 48 or 49, the assets of the estate are to be applied so that every property division order and every award takes priority over all entitlements under the deceased's testamentary dispositions and dispositions of non-probate assets and every entitlement under the testamentary and the non-probate asset dispositions is to abate proportionately according to its value to the extent necessary to fully satisfy property division orders and awards.
- (2) Despite subsection (1), a court may direct that entitlements under the testamentary dispositions and the disposition of non-probate assets of the deceased are to abate in the manner directed by the court if the court considers that a proportionate abatement would not have accorded with the intentions of the deceased had the deceased contemplated the making of awards and property division orders under this Act.
- (3) For the purposes of carrying this section into effect, a Family Court may, on the application of the administrator or of any person interested, make such orders as it thinks appropriate with respect to the administration of the estate of the deceased and may make such order to facilitate the sale and for the sale of property and the vesting of the property in the administrator or the appointment of a receiver of the rents, profits or income of property as it thinks appropriate.
- (4) If property is sold under such an order, the Family Court may make an order vesting the property in the purchaser.
- (5) Every such vesting order has the same effect as if all persons entitled to the property had been free from all disability, and had duly executed all property conveyances, transfers, and assignment of the property for such estate or interest as is specified in the order, and the purchaser's title may be registered in any relevant register as if it were a conveyance, transfer, or assignment by an owner or a registered owner.

Definitions: administrator, award, court, estate, non-probate assets, property division order, s 8

Section 56

- C188 The lowest priority group is that of beneficiaries. Assuming the appropriate procedural steps are taken by the administrators of the estate, beneficiaries will also include those who have acquired the will-maker's non-probate estate (*section 48*). Property comprised in dispositions which defeat testamentary claims will also (to the extent that the court orders under *section 50*) be brought into the pool.
- C189 All the beneficiaries in this group will normally share the burden of a testamentary claim equally: *subsection (1)*. However the court may direct that the burden be shared differently, if that more closely accords with the intentions of the will-maker: *subsection (2)*.
- C190 This is a departure from existing law, under which the court has a much wider discretion to allocate the burden of claims amongst individual beneficiaries, irrespective of the will-maker's wishes (see Matrimonial Property Act 1963 s 8A; Matrimonial Property Act 1976 s 48; Family Protection Act 1955 s 7; Law Reform (Testamentary Promises) Act 1949 s 3(6)).
- C191 The court may make appropriate orders to achieve that end, including orders directing the sale of property and vesting the property in a purchaser. These powers are contained in *subsections (3) and (4)*.

PART 6
MAKING AND SETTLING CLAIMS AND APPLICATIONS

57 Making claims and applications

- (1) A claim under this Act for an award and an application for a property division may be initiated by filing an application in court containing a brief statement of the nature of the claim or application and the relevant facts, including a statement of the facts on which the applicant's claim or application is based.
- (2) A claim or application is to specify whether the applicant
 - (a) requires a property division; or
 - (b) makes a support claim; or
 - (c) requires a property division and makes a support claim; or
 - (d) makes a contribution claim; or
 - (e) makes a support and contribution claim.
- (3) A claimant or applicant must supply such further information as the court may direct.
- (4) A claimant or applicant is to serve a copy of the application on the administrator of the estate of the deceased person.

Definitions: *administrator*, *award*, *contribution claim*, *court*, *support claim*, s 8

58 Duties of administrators as to property division

- (1) An administrator of the estate of a deceased person is not under a duty to initiate a property division against a surviving partner of the deceased unless instructed by a beneficiary of that estate.
- (2) If an administrator of a deceased's estate is instructed by a beneficiary of the estate to initiate a property division, the administrator may decline to proceed unless adequate provision to indemnify the administrator is made out of the estate or by the beneficiary.

Definitions: *administrator*, *estate*, s 8; *partner*, ss 9, 10(3)

59 Time limits

- (1) An application for an award or property division order against the estate of a deceased person must be made to the court within 3 years after the death of that person.
- (2) Despite subsection (1), an application for an award or property division order against the estate of a deceased person may be made to the court later than 3 years after the death of that person in the circumstances referred to and to the extent provided in Schedule 3.

Definitions: *award*, *court*, *estate*, *property division order*, s 8

Section 57

- C192 The procedures for making applications will be governed by rules of the High Court and Family Court: see paras 40–45, C133–C135. This section lays out the basis for that procedure. A claim will be instituted by a single statement of claim, which sets out the basis of the claim very briefly: *subsection (1)*. There will be no need at that point to file affidavits on matters of fact, or supply the court with details of family members, beneficiaries and potential claimants. Service of a copy of the application on the administrator will in general be sufficient at that time: *subsection (4)*.
- C193 It is anticipated that the next stage would involve the administrator notifying beneficiaries and other family members that there is a claim. Mediation processes would need to be seriously considered by the parties. No provisions governing this stage of the process are included in the Draft Act. However, provision is made to permit the court to order claimants or potential claimants, the administrator and beneficiaries to file further information in their possession in the court: *subsection (3)*. This should facilitate mediation.
- C194 If mediation is not undertaken, or if it fails, any further affidavits which may be needed would be filed, and the case would be set down for hearing in much the same way as it is now.

Section 58

- C195 Administrators of a will-maker's estate need institute a property division against the will-maker's surviving partner only when requested and sufficiently indemnified by a beneficiary of the will-maker's estate.

Section 59

- C196 The general time limit for bringing testamentary claims is three years after the will-maker's death: *subsection (1)*. It may be extended in certain cases, particularly
- where a claimant is unaware that the will-maker has died, or has not made an appropriate provision for the claimant; or
 - where the claimant is less than 18 years of age.
- The full list of extensions is found in *Schedule 3*.
- C197 This section replaces the present time limit for testamentary claims, which is one year (or sometimes two years where a claimant is under a disability: see, Matrimonial Property Act 1963 s 5A; Family Protection Act 1955 s 9; Law Reform (Testamentary Promises) Act 1949 s 6). This time limit is frequently extended by the court, sometimes after long periods of time have elapsed. The only mandatory limit under the present law is that no extension can be sought after the estate has been distributed. Under the Draft Act, the fact of distribution is not an absolute bar to bringing a claim, whether within the three-year period or beyond it.
- C198 The period of three years, and the general pattern of extensions, is derived from the Law Commission's Report, *Limitation Defences in Civil Proceedings* (1988, NZLC R6). If adult children's claims are recognised (chapter 7), they will have a much shorter time limit (six months), except in exceptional circumstances. The time limit will not be able to be extended once the property in the estate has been distributed (see para 230).

60 Administrator to assist court

When an application is made for an award or property division order against the estate of a deceased person and notice of the application is served on the administrator, that notice is to have the same effect (subject to necessary modifications) as an order for discovery and the administrator must place before the court all relevant information in the administrator's possession concerning details of members of the deceased's family, the financial affairs of the estate, persons who may be claimants under the Act, and the deceased's reasons for making the testamentary dispositions made by the deceased and for not making provision or further provision for any person.

Definitions: *administrator*, *estate*, *property division order*, s 8

Origin: Family Protection Act 1955 s 11A

61 Distribution of estate

- (1) An application for an award or property division order against the estate of a deceased person may be made although the assets of the estate have been fully distributed.
- (2) When distributing any part of the estate of a deceased to a beneficiary of the estate, the administrator must
 - (a) warn that beneficiary of the possibility that a claim may be made under this Act despite the distribution; and
 - (b) inform the beneficiary whether any potential claimant has indicated to the administrator that he or she will or may bring a claim.
- (3) Despite subsection (2), a notice is not required in respect of a distribution which is one of a series if
 - (a) notice was given in accordance with that subsection concerning an earlier distribution in the series; and
 - (b) the administrator has not been informed of any intended claim or application since the notice was given.
- (4) If an administrator who has observed the provisions of subsections (2) and (3) knows that an application for an award or property division order has been filed in court in respect of the estate, the administrator must not distribute any part of the estate otherwise than by authority of an order of the court (unless subsection (2) or (3) of section 47 of the Administration Act 1969 applies).
- (5) An administrator is not liable to a claimant for an award or applicant for a property division order in connection with the distribution of the assets of an estate unless the administrator distributed property
 - (a) knowing that a such a claim or application had been or was expected to be made; and
 - (b) knowing or having reason to believe that the recipient of the distributed property intended to deal with the property in such a way that it could not be recovered by a claimant.

Definitions: *administrator*, *award*, *estate*, *property division order*, s 8

Section 60

- C199 If the proceedings are to be heard by the court, it is important to ensure as far as possible that all persons who have an interest in the estate are formally notified, and that any other claims are heard at the same time. Under *section 60*, the administrator will have the responsibility of providing the court with information in his or her possession relating to the assets and administration of the estate, the beneficiaries and people who may have a claim, and the will-maker's reasons for the provisions in the will. That information will be used as part of the factual basis for the claim, and will inform the court who should be served with a notice of proceedings.
- C200 On receiving an order under *section 60*, an administrator may decline to provide certain information on the ground of privilege. If any of the beneficiaries or claimants wish to dispute a claim of privilege they will do so according to the usual process (see *Evidence Law: Privilege* (1994, NZLC R23), chapter 6; Draft Evidence Code s 14). Section 11A of the Family Protection Act 1955 extended the privileges normally available to administrators when it was first passed in 1959. But the provisions of the Commission's proposed Draft Evidence Code on privilege (see *Evidence Law: Privilege* (1994, NZLC R23), Parts II and III; Draft Evidence Code ss 3, 5 and 11) and the present general law (Evidence Amendment Act (No 2) 1980 s 35) now cover the same ground. Section 11A is not therefore brought forward in this legislation.

Section 61

- C201 If no claim has been lodged, an administrator is not obliged to retain the estate assets, even if he or she knows that a claim might be made: *subsection (4)*. But if the administrator also knows that the person to whom a distribution is made intends to deal with the property with a view to defeating the claim, then the administrator can be made personally liable for the distribution.
- C202 Once a claim has been lodged in court, no further distributions may be made: *subsection (2)*. *Subsection (3)* ensures that administrators need not always provide the notice to beneficiaries required by *subsection (2)* with every payment in a series of periodic payments.
- C203 It is accepted that the estate may well have been distributed during the three-year limitation period provided in *section 59*. But the property so distributed, or its value, may be recovered from the beneficiaries under the Administration Act 1969 ss 49–51. *Subsection (1)* provides that the distribution is no bar to proceeding.

62 Application treated as made by all possible applicants

- (1) The court may treat an application for an award or a property division order filed by a person as an application on behalf of all persons who might apply for an award or order.
- (2) An application is to be treated for the purposes of section 59 as an application on behalf of all persons on whom the application is served and all persons whom the court directs should be represented by persons on whom the application is served.
- (3) A person who is entitled to apply for an award need not be served with an application or provision made for that person to be represented on an application unless the court considers that the person should be served or represented.

Definitions: *award, court, property division order*, s 8

Origin: Family Protection Act 1955 s 4(2)

63 Applications by administrators

- (1) An administrator of the estate of a deceased person may
 - (a) apply for an award or property division on behalf of a person who is not of full age or mental capacity in any case where that person might apply; or
 - (b) apply to the court for advice or directions whether the administrator should so apply.
- (2) The court may treat an application for advice or directions as an application on behalf of a person for the purpose of avoiding the effect of the time limitation in section 59.

Definitions: *administrator, award, court, property division order*, s 8

Origin: Family Protection Act 1955 s 4(4)

64 Evidence

In any proceeding under this Act, whether at first instance or on an appeal, the court may receive any evidence that it thinks appropriate, whether the evidence would be otherwise admissible in a court or not.

Definitions: *court*, s 8

Origin: Matrimonial Property Act 1976 s 36

Section 62

- C204 This section ensures that, as far as possible, all claims are brought in the single set of proceedings, and are disposed of at the same time. It follows corresponding provisions in the Family Protection Act 1955 s 4.
- C205 *Subsection (1)* provides that an application by one person may be treated as an application by all people who may apply under the Draft Act. However, only those who are served with proceedings, and those whom the court directs should be represented, will be bound by any award the court makes.
- C206 For the purposes of time limitations on bringing claims, the date of the first application is treated as the date when all applications are brought: *subsection (2)*. Time limitation periods stop then. This is useful because, when the first application is made, it may be necessary for beneficiaries in the estate to respond with their own claim. But for the application they might have been content with the provision made for them in the will. That provision may be reduced as a result of the award the applicant seeks. So the beneficiary should not be time-barred from responding with their own claim, as long as the initial claim is in time.
- C207 *Subsection (3)* makes it clear that it is for the court to decide who is to be served or represented. Until an order is made for service, it is sufficient for the applicant to serve notice of the application on the administrator.

Section 63

- C208 If a person is not of full age or capacity, the administrator may apply on their behalf, or apply to the court for directions about what is to be done: *subsection (1)*. If either of these applications is made, the time limitation period on bringing claims in section 59 will stop running: *subsection (2)*.

Section 64

- C209 Courts which hear testamentary claims are not bound by the normal rules of evidence. This section follows a similar provision in the Matrimonial Property Act 1976 s 36.

65 Costs

- (1) A court is not obliged to order that the estate pay its own costs or the costs of any party to a proceeding under this Act but may order that costs are paid by the party who does not succeed in the proceeding.
- (2) A court is not obliged to order that an unsuccessful claimant or applicant pay the costs of any other party or parties if that claimant or applicant had sufficient and reasonable grounds to make a claim or initiate a property division having regard to his or her knowledge or means of knowledge of relevant facts.
- (3) A court may take into account any unreasonable failure of a claimant, applicant or beneficiary to settle a claim or reduce the scope, length or complexity of the proceeding when considering the matter of costs.

Definitions: **court**, s 8

Section 65

- C210 The courts generally have power to decide whether any party should be ordered to pay or contribute to the costs of the proceedings. In proceedings under the Family Protection Act 1955, the courts have tended to order that costs be met out of the estate, even where a party is unsuccessful. This section is designed to alter that emphasis, without abrogating the general principle that costs are in the court's discretion.
- C211 *Subsection (1)* provides that whenever a party brings or defends proceedings unsuccessfully, consideration must be given to whether that party should be ordered to pay the costs of the estate and the other parties.
- C212 *Subsection (2)* qualifies that rule for cases where the claimant had reasonable grounds to bring proceedings, having regard to what he or she knows of the facts.
- C213 *Subsection (3)* allows the court to take into account any unreasonable failure to settle a claim, or reduce its length and complexity, when making an order as to costs. This section might apply, for example, if a party refuses unjustifiably to submit a testamentary claim to the processes of mediation. It can be invoked against either the successful or the unsuccessful party.

66 Waiver, compromise and agreement

- (1) A person may at any time agree
 - (a) to waive or compromise any claim for an award or property division order of any kind that the person has or might have against the estate of another person;
 - (b) on the status, ownership or division of any property (or future property) which might be affected by a proceeding under this Act.
- (2) An agreement under this Act is enforceable if it
 - (a) is in writing; and
 - (b) is signed by each party and the signature of each party is witnessed; and
 - (c) contains or has attached a certificate signed by a solicitor certifying that the solicitor has given independent advice to the applicant or potential applicant who appears to the solicitor to understand clearly the effect and implications of the agreement.
- (3) A court may enforce an agreement under this section although the agreement does not comply with subsection (2) if the court is satisfied that the agreement
 - (a) was made and represents the true intent of the parties to the agreement; and
 - (b) is not vitiated by undue influence.
- (4) Despite subsections (2) and (3), a court may refuse to enforce an agreement to waive or compromise a claim or property division if the court considers it would be unjust to enforce it after considering
 - (a) whether the agreement was fair and reasonable when it was made; and
 - (b) the time that has elapsed since the agreement was made; and
 - (c) whether the agreement is fair and reasonable in the light of any changes in the circumstances since it was made.
- (5) An agreement to waive or compromise an application for a property division that relates to all or a substantial part of partnership property is to be taken, unless the agreement provides or implies otherwise, to constitute a waiver or compromise of a partner's claim to support.
- (6) This section does not apply to a support claim of a child under 25 years of age.

Definitions: award, court, partnership property, property division order, support claim, s 8

Origin: Matrimonial Property Act 1976 s 21(1)–(10)

Section 66

- C214 With the exception of one class of claim, any testamentary claim may be waived or compromised, either before the will-maker's death or afterwards: *subsection (1)*. This is a change from the present law under the Family Protection Act 1955. It is in line, however, with the Matrimonial Property Act 1976 s 21.
- C215 *Subsection (2)* adopts the formal requirements laid down in the Matrimonial Property Act 1976 for matrimonial property agreements. The agreement must be in writing, signed by both parties, and contain a certificate signed by a solicitor certifying that the claimant has been given independent advice on the effect and implications of the document.
- C216 Where the formal requirements are complied with, the agreement may nevertheless not be enforced by the court, after considering whether it was fair and reasonable when made, the time that has elapsed since it was made, and whether it is still fair and reasonable in the light of any new circumstances: *subsection (4)*. This provision too follows the Matrimonial Property Act 1976 s 21(10).
- C217 Where the formal requirements are not met, the agreement may still be enforced if the court is satisfied that the agreement was in fact made and represents the true agreement of both parties, and is not vitiated by undue influence: *subsection (3)*. This approach is more favourable to informal agreements than the corresponding provision in the Matrimonial Property Act 1976 s 21(4). That section allows enforcement if non-compliance has not "materially prejudiced the interests of any party to the agreement".
- C218 The "prejudice" test is too strict for disputes arising after death. First, in making arrangements which principally affect their children and other relatives, partners often see no need to get separate solicitors. Secondly, lack of writing will almost inevitably make finding out the truth harder for the successors of a claimant than it would for the claimant themselves. Yet an agreement fairly entered into is likely to be a better basis for determining the successors' rights than the principles set out in the Act. The cost of ascertaining it is therefore justified. Thirdly, it is doubtful whether successors should be able to repudiate such agreements simply because they might have worked out badly for one of the partners had both lived. "Prejudice" as between two domestic partners is often irrelevant to the issues which arise between one partner and the estate of the other.
- C219 The class of claim which is excepted from the general rule permitting waiver and compromise is the support claim of the child under 25 years of age: *subsection (6)*. This exception is based on considerations of public policy relating to the support of children, and also the risk of undue influence as between parents and adolescent children.

PART 7
MISCELLANEOUS

67 Regulations

The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:

- (a) prescribing the nature and extent of the information required to be provided in respect of a claim or application under this Act;
- (b) prescribing the procedure for the recovery by administrators of non-probate assets under sections 48 and 49;
- (c) providing for such matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for its due administration.

Definitions: **non-probate assets**, s 48

Origin: Matrimonial Property Act 1976 s 53

68 Proceedings not determined before death of party

- (1) Where a proceeding has been brought by a spouse under the Matrimonial Property Act 1976 and that proceeding has not been determined before the death of one of the spouses, the proceeding is to be continued as if the proceeding were an application for a property division order under this Act.
- (2) In the case of a proceeding continued under subsection (1) as an application for a property division order by the administrator of the estate of a deceased spouse against a surviving spouse, the court may make any order that it might have made under the Matrimonial Property Act 1976 if the spouse had not died.
- (3) Where a proceeding has been brought by a de facto partner by virtue of a constructive trust, a contract or a restitutionary claim in respect of a matter that could have been brought as a property division application if one partner had died before the proceeding had commenced, the proceeding is to be continued as if the proceeding were an application for a property division under this Act.
- (4) Where a proceeding has been brought for maintenance under the Family Proceedings Act 1980 on or after the dissolution of a marriage and that proceeding has not been determined before the death of one of the spouses, the proceeding is to be continued as if the proceeding were a support claim under this Act.
- (5) Where a proceeding has been brought under the law of contract in respect of a benefit provided by a person to another person or under the law of restitution (unjust enrichment) by a person who anticipates provision for benefits conferred and that proceeding has not been determined before the death of one of the parties, the proceeding can be continued as if the proceeding were a contribution claim under this Act.
- (6) Subsection (5) applies subject to sections 36(3) and 37(3).

Definitions: **contribution claim**, **court**, **estate**, **property division order**, **support claim**, s 8; **de facto partner**, s 9

Section 67

C220 This section provides for the making of regulations.

Section 68

C221 This section concerns cases where proceedings are brought by a claimant during the lifetime of the parties, and one party dies before the proceedings are disposed of. At that point in these proceedings, the Draft Act should apply. This may arise in proceedings brought by spouses under the Matrimonial Property Act 1976 or Family Proceedings Act 1980, by de facto partners under the general law, and by contributors. The proceedings will be transferred to the appropriate jurisdiction under the Draft Act.

69 Repeals and consequential amendments

- (1) The Law Reform (Testamentary Promises) Act 1949 [1949, No. 33] and the Family Protection Act 1955 [1955, No. 88] are repealed.
- (2) The enactments specified in Schedule 4 are amended in the manner indicated in that schedule.

Section 69

C222 The Draft Act replaces the Law Reform (Testamentary Promises) Act 1949, the Family Protection Act 1955, and the Matrimonial Property Act 1963 (as preserved by the Matrimonial Property Act 1976 s 57(4)). It also redefines the relationship between testamentary claims and the provision of welfare benefits and subsidies under the Social Security Act 1964. Consequential amendments are made to various provisions relating to the administration of estates in *Schedule 4*. At present, *Schedule 4* does not provide for all necessary consequential amendments.

SCHEDULE 1
PRIVITY OF PROMISE PROVISIONS

See section 32

1 Definitions

In this Schedule, in relation to a promise to which section 32 applies,

beneficiary means a person (other than the promisor or promisee) on whom the promise confers, or purports to confer, a benefit;

promisee means a contributor to whom the promise is made;

promisor means a recipient of a benefit by whom the promise is made.

2 Application of the Contracts (Privity) Act 1982

Where a claim is brought by a beneficiary in respect of a promise to which section 32 applies, the provisions of the Contracts (Privity) Act 1982 apply to the extent that the promise is

- (a) enforceable as a contract made between the deceased person and the promisee; and
- (b) enforced by the promisee
 - (i) before the death of the deceased; or
 - (ii) against the estate of the deceased under section 37(3).

3 Availability of defences

In a claim brought by a beneficiary in respect of a promise to which section 32 applies, other than a claim to which clause 2 applies, the administrator of the deceased person's estate may advance

- (a) any defence which would have been available against the promisee;
- (b) any accord and satisfaction, or contract of settlement made by the promisee in relation to the obligation;
- (c) any set-off or counterclaim arising out of or in connection with the promise, as if the promise had been made for the benefit of the promisee and the promisee had subsequently brought a proceeding to enforce the promise.

4 Enforcement of promise

Despite clause 3, the court may order that such provision be made as appears just in respect of the promise to which section 32 applies if the beneficiary satisfies the court that

- (a) the beneficiary, or a person acting in the interests of the beneficiary, was aware of the promise; and
- (b) the beneficiary's circumstances have so changed, since the promise was made and knowledge of the promise was acquired, that it would be inequitable not to make provision in respect of the promise.

5 Restricted application of clauses 3 and 4

Clauses 3 and 4 do not apply to actions taken or defences or set-offs arising after

- (a) the beneficiary has begun a proceeding against the deceased person's estate to enforce the promise; or
- (b) the parties have submitted to arbitration any matter relating to the promise.

6 Availability of defences

This schedule does not affect any defence, set-off or counterclaim that might be available at law or in equity as between the beneficiary and the deceased person's estate.

SCHEDULE 2
APPEAL PROVISIONS

See section 39

1 Right of appeal

If a Family Court has made or refused to make an award or property division order in a proceeding under this Act, or has otherwise finally determined or dismissed a proceeding under this Act, a party to the proceeding or any other person prejudicially affected may, within 28 days after the making of the award, order or decision or, within such further time as the court may allow in accordance with section 73(1) of the District Courts Act 1947, appeal to the High Court in accordance with Part V of that Act (except subsections (1), (3), and (5) of section 71A) and those provisions apply with any necessary modifications.

2 Security for appeal

The court appealed from may, on the *ex parte* application of the appellant, order that security under section 73(2) of the District Courts Act 1947 is not required to be given under that section.

3 Further appeals to Court of Appeal

The provisions of the Judicature Act 1908 relating to appeals to the Court of Appeal against decisions of the High Court apply with respect to any award or decision of the High Court under this schedule.

4 Further appeals to Her Majesty in Council

Subject to the rules governing appeals to Her Majesty in Council against a decision of the Court of Appeal or of the High Court, such an appeal may be made in a proceeding under this Act to Her Majesty in Council.

5 Rehearing or further evidence on appeal

The High Court or the Court of Appeal may rehear the whole or any part of the evidence, or may receive further evidence, if it thinks that the interests of justice so require.

SCHEDULE 3
EXTENSIONS OF TIME

See section 59(2)

- 1 Extension when knowledge is delayed**
A person may make an application for an award or a property division order against the estate of a deceased person within 3 years after the day when the person learned that the deceased had died and had not satisfied the person's claim or entitlement by testamentary disposition or otherwise.
- 2 Extension when alternative dispute resolution is sought**

 - (1) A person may make an application for an award or a property division order against the estate of a deceased person within 3 years after the date the person learned that the deceased had died and had not satisfied the person's claim or entitlement by testamentary disposition or otherwise plus any period during which a person or body having statutory authority to seek resolution of disputes or another court or arbitrator was attempting to resolve the claim or entitlement.
 - (2) If 2 or more of the periods referred to in subclause (1) overlap, the period of the overlap is not to be taken into account twice.
- 3 Extension for persons under 18 years of age**
A person who is under the age of 18 years when that person learns that a person has died and has not satisfied the person's claim or entitlement against the estate of that deceased person by testamentary disposition or otherwise may make a claim or initiate a property division against the estate of the deceased person within 3 years after reaching the age of 18 years.
- 4 Extension because of incapacity or impairment**

 - (1) A person may make an application for an award or a property division order against the estate of a deceased person within 3 years after the day when the person learned that the deceased had died and had not satisfied the person's claim or entitlement by testamentary disposition or otherwise plus any period during which the person was incapable of or substantially impeded in managing the person's affairs with respect to the claim or entitlement for any period or periods of 28 consecutive days or more because of

 - (a) the person's physical or mental condition; or
 - (b) the lawful or unlawful detention of the person; or
 - (c) war or warlike operations or circumstances arising from them affecting the person.
 - (2) If 2 or more periods referred to in subclause (1) overlap, the period of the overlap is not to be taken into account twice.

5 Cumulative time extensions

- (1) A person may establish the period of extended time for making an application for an award or a property division order under this Act by adding the following periods:
- (a) the period before which the person learned that the deceased person had died and had not satisfied the person's claim or entitlement against the estate of that deceased by testamentary disposition or otherwise; and
 - (b) the period or periods described in clauses 2 and 4 that may be added to the 3 year period; and
 - (c) the period between the date when the person learned that the deceased had died and had not satisfied the person's claim or entitlement against the estate of that deceased by testamentary disposition or otherwise and the date on which the person reached the age of 18 years; and
 - (d) the 3 year period after the date when the person learned that a person had died and had not satisfied the person's claim or entitlement against the estate of that deceased by testamentary disposition or otherwise.
- (2) If 2 or more periods referred to in subclause (1) overlap, the period of the overlap is not to be taken into account twice.

6 Extension after acknowledgment or part payment

- (1) A person may make an application for an award or a property division order against the estate of a deceased person within 3 years after the date the administrator of the estate of the deceased
- (a) acknowledged to the person a liability to that person under this Act; or
 - (b) made a payment to that person in respect of liability to the person under this Act, or
 - (c) made a payment to that person under a will subsequently found to have been revoked or in accordance with an interpretation of a will subsequently determined to have been wrong in law or in accordance with the law of intestacy when a will is subsequently found to exist;
- in reliance on which the person did not bring a claim within the period allowed by section 59(1).
- (2) For the purposes of this clause, payment or part payment of interest is to be regarded as an acknowledgment of liability to pay both the interest and the principal in respect of which the interest was paid.

SCHEDULE 4
ENACTMENTS AMENDED

See section 69(2)

Social Security Act 1964 (1964/136)

section 69F

Insert subsections (3A) to (3D)

“(3A) The Director-General may include in the financial means assessment of a person to whom this section applies an additional sum calculated in accordance with the formula

$$a - b - c - d$$

where a, b, c and d represent the following

- a half the property owned by that person and that person's spouse immediately before the death of that person's spouse,
- b the property owned by that person immediately before the death of that person's spouse,
- c the property that person received from that person's spouse by reason of the death of that person's spouse,
- d the amount or value received by that person as a result of claims made against the estate of that person's spouse;

and valuations are to be made (except in the case of item d)

- (a) as at the day immediately after the death of the person's spouse; and
- (b) deducting all debts and other valid claims (other than claims and entitlements under the Testamentary Claims Act 199- and claims by that person or his or her spouse against each other or each other's estate) outstanding on that day.

(3B) An amount included in the financial means assessment under subsection (3A) is to be reduced to the extent that the person who is the subject of the assessment proves to the satisfaction of the Director-General

- (a) that there is good reason to believe that, if the person had made a claim against the estate of the deceased spouse immediately after that spouse's death, it would not have been successful or would have resulted in a lesser award than the sum calculated under subsection (3A); or
- (b) that it would be unreasonable at the date of the assessment to expect the person to bring a claim for an award equivalent to the amount calculated under subsection (3A) because of one or more of the following
 - (i) the time that has elapsed since the death of that person's spouse; or
 - (ii) the extent that any remedies open to the person have become exhausted by the expiry of any relevant limitation period; or
 - (iii) the actual disposition of the deceased spouse's estate and the reasons why that disposition ought not to be disturbed; or
 - (iv) the benefits that the person received from the estate or from the deceased spouse during the deceased spouse's lifetime; or
 - (v) any other relevant factors.

- (3C) No amount is to be included under subsection (3A) in the financial means assessment of a person
- (a) while that person is pursuing diligently a proceeding against the estate of that person's spouse for an amount equivalent to the sum calculated under that subsection; or
 - (b) if all claims which that person could have made against that person's spouse have been determined by a court or settled by way of a compromise in good faith.
- (3D) The Director-General may include in the financial means assessment of a person to whom this section applies a further additional sum being an amount of interest which in the opinion of the Director-General would have been earned on any amount included under subsection (3A) or (3B) calculated from the later of
- (a) the date of death of that person's spouse; or
 - (b) the date of the financial means assessment."

section 73

Repeal the whole section

Substitute:

"73 Limitation where applicant entitled to claim under Testamentary Claims Act 199–

- (1) Notwithstanding anything to the contrary in this Part of this Act, the Director-General may, in the Director-General's discretion, refuse to grant any benefit (other than New Zealand superannuation, or a veteran's pension, not subject to an income test), or may grant any such benefit at a reduced rate or may cancel any such benefit already granted, in any case where any person, being a relative of the applicant, has died and the applicant has, in the opinion of the Director-General failed without good and sufficient reason to begin a proceeding under the Testamentary Claims Act 199– against the estate of the relative for an award or order under that Act and to prosecute with all due diligence any proceeding so begun by that person or on that person's behalf or treated as if made on that person's behalf.
- (2) In any such proceeding, the Director-General is entitled to appear and show cause why an award or provision or further provision should be made for the applicant from the estate of the relative.
- (3) In this section, "relative" means a person out of whose estate the applicant is entitled to make an application for an award or order under the Testamentary Claims Act 199–.
- (4) In this section a reference to a proceeding under the Testamentary Claims Act 199– does not include an application for a support award
 - (a) by a surviving partner of the relative under section 22, except to the extent of the difference between 50% of the combined assets of the relative and the surviving partner, and (if it is a lesser sum) the surviving partner's property division entitlement; and
 - (b) by a child of the relative under paragraph (c) of section 25 of that Act."

Estate and Gift Duties Act 1968 (1968/35)

section 31A

Insert after " Act 1976"

"or a property division order under the Testamentary Claims Act 199-".

Administration Act 1969 (1969/52)

section 47(1)

Repeal paragraphs (a), (b), (ca) and (d).

section 49(1)

Insert in paragraph (a), (b), and (c) after "section 47 of this Act applies," in each paragraph

"or any order to which the Testamentary Claims Act 199- applies,".

section 49(3)(a)

Delete "for an order under the Family Protection Act 1955 or the Law Reform (Testamentary Promises) Act 1949"**Substitute** "the Testamentary Claims Act 199-".**Delete** in the second place where it occurs "for an order under the Family Protection Act 1955"**Substitute** "or the Testamentary Claims Act 199-".

section 49(4)

Insert after "section 47 of this Act applies"

", or any order to which the Testamentary Claims Act 199- applies,".

Stamp and Cheque Duties Act 1971 (1971/51)

section 11

Insert in subsection (2) after paragraph (o)

"(oa)The Testamentary Claims Act 199-:".

Insert after subsection (2)

"(3) No stamp duty shall be payable on any instrument in so far as that instrument waives or compromises a claim under the Testamentary Claims Act 199- nor on any disposition made in accordance with such an instrument.".

Matrimonial Property Act 1976 (1976/166)

section 57

Repeal subsection (4).

APPENDIX A

New Zealand Families Now

- A1 **T**HIS APPENDIX provides some information about New Zealanders and their family arrangements. Most of this information is drawn from the last (1991) five-yearly census.

Population, life expectancy and ethnicity

- A2 The following information is derived from *New Zealand Official Yearbook 1995* (Statistics New Zealand, Wellington, 1995), 111–131:

New Zealand's total population as at 31 December 1995 was 3 642 500. New Zealand men had a general life expectancy in 1992–1994 of 73.4 years. New Zealand women had a general life expectancy in 1992–1994 of 79.1 years.

Recent data indicates that heart disease, cancer and cerebrovascular diseases (in that order) continue to be the three leading causes of death in New Zealand, and together account for over three-fifths of all deaths among the adult population in any year. Respiratory diseases claim another 10 percent. Motor-vehicle accidents cause another 3 percent of all deaths in a year, with teenagers, and those in their early twenties accounting for over four-fifths of these fatalities.

The ethnic groupings of New Zealand's population in 1991 were as follows

Grouping	Percentage of population
New Zealand European	79.5%
New Zealand Māori	13.0%
Pacific Island	5.0%
Asian	2.0%
Other	0.5%

Families in New Zealand

- A3 The following statements are quoted from *New Zealand Now: Families* (Statistics New Zealand, Wellington, December 1994), 8:

The number of two-parent families in New Zealand is declining. In 1971 they accounted for two-thirds of New Zealand families, but by 1991 just under half of all families included two parents.

The nuclear family of a legally-married couple with at least one child [under 16 years of age], where the husband is the sole bread-winner and the wife the homemaker, accounted for only 13.5 percent of all families in 1991.

The number of families without children at home increased by 96 000 or 46 percent between 1976 and 1991. These families accounted for 17 percent of all families in 1991, compared with 9 percent in 1976.

One-parent families more than doubled in number between 1976 and 1991. These families accounted for 35 percent of all families in 1991, up slightly from 32 percent in 1986.

In recent years the number of de facto couple families (where partners cohabit or live together without having formally married) has risen sharply. In 1981 the number of de facto couple families with dependent children was 19 818, but by 1991 this had grown by 58 percent to 31 320.

Between 1981 and 1991 the total number of children in New Zealand families declined by 45 000, and the number of dependent children by 26 000.

One-child families are now the most common type of family in New Zealand, accounting for two in five families with children in 1991.

Family formation

- A4 The following statements are quoted from *New Zealand Now: Families* (Statistics New Zealand, Wellington, December 1994), 22–23:

Although legal marriage has been a traditional pathway to the formation of families, the proportion of New Zealanders marrying has declined. In 1991, the general marriage rate (the number of marriages per 1 000 estimated mean not-married population aged 16 years and over) was 22, less than half the peak level of 45 in 1971.

A rising proportion of New Zealanders has never married. Between 1971 and 1991 the proportion of women aged 20–24 years who had never married increased from 36 to 78 percent. The corresponding rise for men was from 63 to 90 percent.

Marriage has become an event that occurs later in life, reflecting a shift back to the pattern that prevailed before World War II. Since the early 1970s the average age at first marriage has increased by over 3 years to 25 years for women and 27 years for men.

Paralleling the drop in the number of marriages, the nature and structure of families has also been affected by a rapid increase in divorce. In 1992, the divorce rate was 12 divorces per 1 000 married women, compared with about 8 per 1 000 at the start of the 1980s and with about three per 1 000 in the early 1960s.

Divorces today are less likely to involve children. The proportion of divorces involving children (those under 18 years of age) declined during the 1970s and 1980s, from 78 percent in 1978 to 52 percent in 1991.

The increase in divorce and separation has been the major contributor to the growth in the number of one-parent families in recent years. Of all sole parents in 1991, over half were divorced or separated, and only 19.5 percent were widowed. In 1971, the majority of sole parents were widows.

Between 1971 and 1991, the proportion of marriages which were remarriages for one or both partners doubled from 16 to 34 percent. Despite this increase, the chances of a previously married person marrying for a second or subsequent time has decreased.

Average family size has declined steadily over the past 2 decades. The total fertility rate of 2.18 births per 1 000 women in 1992 was almost half that of 1972.

In contrast to the overall decline in fertility, there has been an increase in childbearing outside marriage. Since the mid-1970s, the ex-nuptial birth rate has increased from 37 per 1 000 women who were not married to 52 per 1 000 in 1992. However, there is evidence that many of these births resulted from de facto relationships.

There has been a shift in childbearing from early to later parenting. In 1992, over a third of all childbearing was to women in their thirties as compared with one-fifth in the early 1980s.

The changing age structure of New Zealand's population has had and will continue to have a substantial impact on the nature and structure of the family. The most fundamental change is the movement towards an older society. In the 20 years between 1971 and 1991, the median age of New Zealand's population increased from 26 to 32 years.

De facto couples

A5 The following statements are quoted from *New Zealand Now: Families* (Statistics New Zealand, Wellington, December 1994), 37:

Between 1981 and 1991, the proportion of New Zealanders (over the age of 15) living with de facto partners increased from 3.8 to 6.2 percent. Eleven percent of couples living together in 1991 were in de facto relationships, as were 7 percent of couples with dependent children.

People in their twenties are the most likely to be living with de facto partners – 14 percent were in de facto marriages in 1991.

Women enter into de facto marriages at younger ages than men. Greater proportions of women than men live in de facto marriages in their late teens and early twenties but this pattern is reversed in older age groups.

The increase in de facto marriages has coincided with a fall in the proportions of people who are formally married – a trend which has been most marked amongst people in their twenties.

Twenty-four percent of people who were divorced and 17 percent who were separated were living with de facto partners in 1991, considerably higher than the proportions of never-married people. However, the fastest growth in the rate of de facto marriages between 1981 and 1991 was amongst people who had never formally married.

Eleven percent of Māori were living with de facto partners in 1991, almost twice the rate of non-Māori. However, the fastest growth in the rate of de facto marriages between 1981 and 1991 was amongst non-Māori and non-Pacific Island people.

Four out of 10 de facto couples have children, compared with six out of 10 married couples.

Amongst families with dependent children, de facto couples tend to have fewer children than married couples – almost half have just one child, compared with a third of married couples. However, de facto couples are more likely to have at least one child of preschool age.

Children

- A6 The following statements are quoted from *New Zealand Now: Children* (Statistics New Zealand, Wellington, 1995), 29:

The proportion of children living in one parent families increased from 12 to 22 percent between 1981 and 1991.

Forty percent of Māori children lived in sole parent families in 1991, compared to 28 percent of Pacific Island children and 15 percent of European children.

The proportion of children living in families headed by de facto couples increased from 6 to 9 percent between 1981 and 1991. Māori and Pacific Island children and those aged up to four years are the most likely to live in this situation.

Children in two-parent families have more siblings than those in one parent families. Māori and Pacific Island children have more siblings than European children.

Children in sole parent families were more likely to have parents who were relatively young or relatively old, compared to children in two-parent families.

Of children who lived in sole-parent families, boys and older children were more likely to live with the father.

The proportion of children in sole-parent families who had lost a parent through death or separation dropped from 79 to 61 percent between 1981 and 1991, while the proportion of never-married sole parents increased from 13 to 35 percent over the decade.

Three out of four children living with their families in 1991 were living in houses owned by their parents.

Young adults

- A7 The following statements are quoted from *New Zealand Now: Families* (Statistics New Zealand, Wellington, December 1994), 67:

Young adults are leaving home at later ages. Between 1981 and 1991, the proportion of people aged 15–24 living with their parents increased from 51 to 57 percent.

Women tend to leave home earlier than men because they form relationships at younger ages.

The proportion of young adults who live with their parents drops with age, from virtually all 15-year-olds to just over half of 20-year-olds and just under one-quarter of 24-year-olds. The most rapid decline occurs between the ages of 17 and 18.

Young Māori leave home earlier than young adults from other ethnic groups. Pacific Island people aged 20–24 are much more likely than members of Māori and “Other” ethnic groups to live with their parents.

People aged 15–24 years who have never been married are the most likely to live with their parents, while those who are currently married are least likely to.

The increase in educational participation beyond the minimum school leaving age has undoubtedly played a role in increasing the overall proportion of young adults living with their parents, since students are more likely than non-students to live at home.

The longer time young people spend staying with parents is reflected in the 12 percent increase in the number of families with adult children, from 195 000 in 1981 to 220 000 in 1991.

Māori and Pacific Island families with young adults living at home are larger on average than families from other ethnic groups, and are more likely to have other dependent children.

Artificial reproductive technologies

- A8 The Report of the Ministerial Committee on Assisted Human Reproduction – Navigating Our Future (Department of Justice, Tribunals Division, 1994), 6 states:

It would seem that the most comprehensive data on [the] prevalence [of infertility] comes from Canada. If New Zealanders are similar to Canadians, and using data from our 1991 census of Households and Dwellings, estimates can be obtained using the same methods as those used by the Canadian Royal Commission [on New Reproductive Technologies (1994) Vol 1, 195–197]. ... These [infertile] couples represent between 50–60 000 New Zealand adults, voters and taxpayers who are directly affected by infertility.

APPENDIX B

Proposals for Priorities Between Claims

A9 **W**HEN THERE IS insufficient property to satisfy all claims against the will-maker's estate, it is necessary to resolve the order in which the available property will be allocated to claims (see *Example 16*, para A11). Claims against the estate include not only the testamentary claims against the estate proposed in this paper (contributors' claims, property divisions and support claims), but also creditors' claims against the estate under the general law (of contract, estoppel, trusts and restitution, paras 291–292).

A10 The following two sets of propositions are a guide to how the courts will resolve the relative priorities of testamentary and creditors' claims against the estate under our proposed legislation (see Draft Act, Part 5, *Subpart 5*, ss 55–56). They are tentative only at this stage, pending a Government decision on what will happen under proposed new legislation governing the respective priorities of partnership property applicants and creditors. They may also alter in line with further proposed legislation governing claims between living de facto partners.

Ranking of testamentary claims as against creditors' claims

1 *Contributors' claims* rank

- 1.1 equally with personal liabilities of the will-maker under the general law; but
- 1.2 as with constructive trust claims under the general law, the court would have power, when it considers it just, to permit contributors to make proprietary or tracing claims against specific assets or property comprised in the estate, which would confer priority over other creditors.

2 *Property divisions* rank so that

- 2.1 the provisions of the Matrimonial Property Act 1976 ss 19 and 20(1) apply, that is
- 2.2 the court would have power to recognise proprietary claims against specific assets or property comprised in the estate, and
- 2.3 the provisions of the Matrimonial Property Act 1976 s 20(2) apply (protected interest of \$61 000 – SR 1992/97 – in matrimonial home or its equivalent);
- 2.4 but otherwise property divisions would rank after creditors.

3 *Support claims* rank after

- 3.1 creditors' claims, and
- 3.2 contributors' and property division claims.

Ranking of testamentary claims between themselves

4 *Contributors' claims rank*

- 4.1 as against other contributors' claims, proportionately (but may gain priority under 1.2);
- 4.2 as against property divisions, in priority (subject to 2.2); and
- 4.3 as against support claims, always in priority.

5 *Property divisions*

- 5.1 as against contributors' claims, have no priority (subject to 2.2);
- 5.2 as against other property divisions:
 - a where relationships are successive, the first to arise has priority; and
 - b where relationships are contemporaneous,
 - i each division is made against the pool of property the court can justly attribute to each relationship, failing which
 - ii each division ranks proportionately to the contributions of each partnership; and
- 5.3 as against support claims, always have priority.

6 *Support claims*

- 6.1 as against contributors' claims, have no priority;
- 6.2 as against property divisions, have no priority; and
- 6.3 as against other support claims, rank proportionately.

A11 *Example 16:*

Will-maker A leaves all her estate worth \$300 000 to her de facto partner C. She leaves nothing to

- (a) her ex-husband B, who advanced the money to buy the bach she owns, and who has an unsatisfied property division (on balance) of \$100 000;
 - (b) her minor children, E and F, aged 13 and 17, who have support claims of \$25 000 and \$15 000 respectively;
 - (c) her adult son D, who has spent a lot of time painting and improving her bach, and whose contributor's claim is valued at \$30 000.
- (a) D as a contributor ranks first (1.1). B's property division ranks second (5.1). It takes priority (5.2.a) over C's property division since it is first in time. E and F's support claims rank last, but take precedence over C's (6). Between themselves E and F's support claims rank in proportion (25:15) if the balance after the meeting the other claims is insufficient (6.3).
- (b) B may seek to advance his claim over D's by alleging a constructive trust over the bach (2.2). To this, D might respond by advancing his own constructive trust claim (1.2). If successful in this, they would both share in the proceeds of the bach in proportion to the value of their relative contribution to it. (This assumes that their contributions were greater than or equal to the value of the bach. Otherwise there would be a balance left for the other claimants.)
- (c) B may also seek to advance his case by relying on the matrimonial home exception from creditors' claims, assuming A had assets which could be attributed to the (non-existent) matrimonial home (2.3). This would take priority over D's personal contribution claim (1.1). It would not, however, take priority over any constructive trust claim D would have: see (b) above.

APPENDIX C

Pattern of State Support and Tax for Spouses and De Facto Partners

- A12 **T**HIS APPENDIX provides a brief description of the way a person's position under State support and tax law is affected by that person having a spouse or de facto partner, assuming the spouse or de facto partner has assets or income.
- *Invalid, Sickness and Unemployment Benefits* generally abate (sometimes to nothing) according to the joint income of spouses or de facto partners if they are living together (but, with the exception of supplementary benefits, are not tested according to spouses' or partners' joint assets). If a beneficiary deprives himself or herself of assets, the Director-General of the Department of Social Welfare may refuse to grant, or may terminate or reduce the rate of a benefit. There is no provision preventing the *spouse* of a beneficiary from depriving himself or herself of assets during lifetime by making gifts to persons other than the beneficiary.
 - The Department of Social Welfare has power to reduce a *Domestic Purposes Benefit* if a custodial parent does not seek child support from a liable parent under the Child Support Act 1991. When spouses separate during lifetime, the Department of Social Welfare also has a similar express discretion to refuse to grant, terminate or reduce benefits if a beneficiary omits to bring a potential support claim against a spouse: Social Security Act 1964 s 74(e). The Family Proceedings Act 1980 s 62 also provides, when a beneficiary chooses to make a support claim against a former spouse, that the support payable by the former spouse must be assessed as if the beneficiary is receiving no social welfare benefits.
 - Personal *New Zealand Superannuation* entitlements drop to a lower level when someone is married or in a relationship in the nature of marriage, but are unaffected by the size of that person's income: Social Welfare (Transitional Provisions) Act (No 2) 1990 First Schedule, cls 1(a)–(c).
 - A spouse's *New Zealand Superannuation Surtax* is affected only by what he or she earns, not by what he or she could potentially claim from his or her spouse as a share of the property of the marriage relationship or by way of support (see Appendix D for the combined effect of our proposals and support for the elderly). The general pattern of taxation is that spouses and de facto partners are unable to amalgamate their incomes for tax purposes: they usually pay tax separately. But the levels of exempt income for the purposes of the *New Zealand Superannuation Surtax* are higher for unmarried persons than for married ones: Income Tax Act 1994 s JB4.¹⁹⁷
 - User-charges are not required for all *Health and Disability Services*. When user-charges are required for health and disability services they are not set

¹⁹⁷ Since this section of the paper was prepared, the Government has put to the Superannuation Accord parties and publicly announced two important proposals for changes to the superannuation surtax; see footnote 200.

at a higher level for persons in a marriage relationship. Yet the Health Entitlement Cards Regulations SR 1993/169 cls 2 and 8 assess a person's entitlement to a Community Service Card (allowing the cardholder reduced user-charges for health and disability services) on the basis of "family income", which includes the income of that person's spouse or de facto partner. The income threshold for disqualification from Health Entitlement Cards for persons not party to a marriage or de facto relationship is more than half of the "family income" threshold for those who are party to a marriage or de facto relationship.

- The *Residential Care Subsidy* for those who are 65 or older is means-tested under the Social Security Act 1964 s 69F. The means and assets of the will-maker and his or her spouse in care are assessed jointly. During lifetime a will-maker whose spouse is in care and receiving the subsidy is treated as contributing income he or she earns (in excess of \$28 927 joint income per annum) and assets he or she holds (over and above threshold joint assets of \$40 000 and the couple's house and car) towards the cost of his or her spouse's care (up to a maximum of \$33 072 per year): Social Security Act 1964 s 69F and Twenty-Seventh Schedule, Parts I and II.

The joint income and joint asset thresholds allow will-makers whose spouses are in care to retain significant levels of assets, and even more is exempted when a will-maker whose spouse is in care has dependent children. Yet when a will-maker makes inadequate provision on death for the proper maintenance and support of his or her spouse receiving subsidised care, and the spouse in care does not claim support, the amount of subsidy paid may be reduced or diminished: Social Security Act 1964 s 73. This may place considerable pressure on the spouse in care to make a support claim against the will-maker's estate, particularly if the estate is large.

At present the Department of Social Welfare cannot include in the means test of a spouse or de facto partner in care the right he or she has to a share of the property accumulated during a marriage-relationship with the will-maker.

- Provider charges for *Home-based Disability Support Services* supplied to persons who are not children nor entitled to a Health Entitlement Card are also to be assessed by reference to a means-test under provisions to be inserted in the Social Security Act 1964: a new s 69G and a new Twenty-Eighth Schedule. These provisions will be inserted by cls 32 and 49 of the Social Welfare Reform Bill 1994. For this means-test the income of the person receiving home-based disability services includes the income of his or her spouse, or de facto partner of the opposite sex: cl 32(4) read with Social Security Act 1964 s 63. The Bill was read for the second time on 12 September 1995, and as at 26 July 1996 had not been read by the House for a third time: *Parliamentary Bulletin*, 96.16, 29 July 1996, 38.

Conclusion

- A13 The broad pattern of tax and welfare law shows that the State seldom expects a partner to exhaust support which might be forthcoming from the other partner's separate assets before seeking State welfare, at least where the couple are not living together (see paras 120–129). However, no clear and invariable pattern emerges.

APPENDIX D

Effect of Proposals on Support for the Elderly

Introduction

- A14 **T**HIS APPENDIX DESCRIBES the impact of the Commission's proposals on the entitlement of older people to State support. Where two people who live together receive welfare or superannuation benefits, and one of them dies, how do testamentary claims affect their rights to these benefits?
- A15 The major features of the present support system for the elderly are
- New Zealand Superannuation (which is \$249.50 gross per week for a single person, \$368.86 per week for a married couple), and
 - two subsidies¹⁹⁸ for older people living in long-stay continuing care which establish:
 - a provider subsidy to meet any costs of care over a “cap” of \$636 per week, and
 - in cases of financial need only, a consumer subsidy to meet all or part of the remaining costs.
- A16 Superannuation, and the second of the two subsidies, are affected by the beneficiary's means and assets, and are directly relevant to the issue. The first subsidy (meeting the costs of long-stay continuing care over and above the “cap”) remains unaffected by the existence of a testamentary claim by or against the will-maker.

¹⁹⁸ Although the ultimate source of funding is central government, the mechanics of these subsidies are complex. Regional Health Authorities (RHAs) meet the cost of care, over and above what the older person contributes. This is funded out of the RHA's general allocation from government, which considers (but does not specifically credit) the costs involved when setting the RHA's funding. Beneficiaries are means-tested by the staff of the Department of Social Welfare (DSW), and that determines how much (if anything) the beneficiary is required to pay. The DSW may in appropriate cases make arrangements to “lend” beneficiaries money so that they can meet residential care charges. As we understand it, no money is in fact lent to the beneficiaries or to the RHA. What happens is that the DSW approves the beneficiary paying no charge or a lesser charge for residential care. The RHA meets the cost of the resulting shortfall as they do the cost of the subsidy. Any money later paid back by the beneficiary, however, is paid into the consolidated fund, and not the account of the RHA.

New Zealand Superannuation

- A17 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.
- A18 While both partners are alive and receive New Zealand Superannuation, they will pay (in addition to their ordinary income tax) a special tax surcharge of 25% of their additional combined income over \$135¹⁹⁹ per week, or (separately) \$67.50 per week for each partner.
- A19 The couple can arrange the ownership of their capital and income so that they get the maximum taxation advantage. For example, the less well off can combine their incomes for surcharge purposes so that they pay no surcharge at all. The better off, with income well in excess of \$120 per week, can ensure that all their income-earning assets are held by one partner. The remaining partner's superannuation is unaffected by the surcharge.
- A20 On the death of one partner the survivor (usually) acquires all or most of the assets of the marriage. There will no longer be an opportunity to put all the earning assets into the hands of the other surcharge-payer partner. On the other hand, the superannuation payments and exempt income levels are somewhat higher (before deduction of tax a married person whose spouse is also receiving superannuation is entitled to \$184.33 per week, whereas an unmarried person living alone is entitled to \$249.50: Social Welfare (Transitional Provisions) Act 1990 s 6, First Schedule, cls 1(a), 1(c).
- A21 But there is nothing to prevent the couple organising their affairs on death in any way they like. The surviving partner is not required to make any testamentary claim which is available. There is no restriction on trusts or other arrangements designed to ensure that the survivor receives the full amount of superannuation. The surcharge is based on what a person in fact earns, not on what he or she might earn if they enforced all their legal rights.
- A22 It follows that neither the present testamentary claims law, nor the Commission's proposals, can or should affect this state of affairs. The courts, like the testator, should be able to take into account benefits which the surviving spouse will derive from superannuation (see paras 95–100).

Example 17:

A and B are married. All the assets are held in A's name. They are worth \$100 000 on A's death. A leaves only \$30 000 to B and the rest to a discretionary trust, the capital being payable to A's niece on B's death. B does not seek recourse either to her trust, nor does she make a testamentary claim.

B's Superannuation Surtax is levied only on income (if any) derived from investing the \$30 000 she actually receives, after B's exemption has been deducted.

¹⁹⁹ From 1 July 1996, rising to \$150 from 1 July 1997. For a single person the amount will become \$90 per week on 1 July 1996 and \$100 per week on 1 July 1997: Tax Reduction and Social Policy Bill 1996 and Income Tax Act 1976 Amendment Act (No 4) 1996.

The Draft Act will continue to permit couples to arrange their affairs so as to rely on the receipt of New Zealand Superannuation to the greatest extent possible.²⁰⁰

Subsidy to meet costs of long-stay continuing care under the "cap"

- A23 To avoid confusion, we should explain that the term "beneficiary", as used here, describes the person in receipt of the benefit. From the point of view of testamentary claims, the "beneficiary" has two other roles:
- as a potential claimant in the estate of his or her wife, husband or de facto partner; and
 - (on his or her own death), as a will-maker who is expected to meet the claims of his or her carers, dependants and family members.
- A24 Being able to make a testamentary claim has a considerable impact on a surviving partner's right to the subsidy for long-stay residential care, because the subsidy is a means-tested benefit rather than a universal entitlement. This long-stay continuing care subsidy differs in three basic ways from the entitlement to New Zealand Superannuation:
- the subsidy is directly means-tested (not paid out and later tax surcharged on the basis of the beneficiary's actual income);
 - the beneficiary's assets (apart from the last \$6 500) as well as his or her income must be applied to the cost of his or her care (see also para A18); and
 - the beneficiary is expected
 - not to make gifts or trusts which diminish his or her ability to meet the costs of his or her care, and
 - to make a claim under the Family Protection Act 1955 in any case where his or her spouse has previously died without making adequate provision for them.

²⁰⁰ Since this section of the paper was prepared, the Government has put to the Superannuation Accord parties and publicly announced two important proposals for changes to the Superannuation Surtax:

- That the thresholds for the Surtax on income in addition to New Zealand Superannuation be raised (beyond the higher thresholds already effective on 1 July 1996 and 1997: see footnote 199), so that from 1 April 1997 the Surtax applies only to income in addition to New Zealand Superannuation of more than \$198 per week (\$10 296 per year) for a single person and more than \$297 per week (\$15 444 per year) for a couple. This proposal was put to (and received majority support from) Superannuation Accord parties. On 31 July 1996 the Government introduced a Bill to implement it. If enacted, this Bill would raise the thresholds (slightly further than proposed initially) so that from 1 April 1997 the Surtax applies only to income in addition to New Zealand Superannuation of more than \$198.58 per week (\$10 326) for a single person and \$302.29 per week (\$15 719.28 per year) for a couple.
- That the Surtax on income in addition to New Zealand Superannuation be replaced by an abatement system which will reduce (at the same 25% rate as the surtax) entitlements to New Zealand Superannuation itself once the additional thresholds are reached. This proposal will take some time to implement, but work will be undertaken and referred to the group reviewing retirement policies in 1997. The impact of this proposal on the principles discussed in this section could be profound, but cannot be indicated precisely until the implementation and detail of this proposal become certain.

(Joint Press Statement of the Rt Hon W F Birch, Minister of Finance, and the Hon P J Gresham, Minister of Social Welfare, 29 May 1996; "Surtax Bill in Parliament Today", *The Dominion*, 31 July 1996, 1)

The subsidy will be means-tested accordingly (irrespective of the resources the beneficiary actually holds).

- A25 SPOUSES – BENEFITS AND CLAIMS – If a beneficiary's spouse or de facto partner dies while they are in care and all the couple's property passes to the beneficiary, this property will of course be included in the asset-testing assessment. Knowing this, a spouse or partner may be inclined to leave less (perhaps even none) of his or her property to the beneficiary. But the beneficiary will, under the Commission's proposals, have a right to claim in the estate. Following the present law, it may be expected that those administering the asset-testing regime will wish to ensure that the beneficiary makes the claim.
- A26 The Commission proposes that spouses' and de facto partners' property entitlements (see chapters 4 and 5) should be treated as a claim as of right, and should automatically be included in the asset-testing regime (for the reasons given in para 107). The practical effect would be that the beneficiary is credited with one-half of the couple's combined assets, unless it can be shown that he or she was entitled to some lesser sum.
- A27 However spouses' and de facto partners' support claims proposed in chapters 4 and 5 should usually be seen as personal (for the reasons set out in paras 120–129). The welfare authorities should not be able to include the potentiality of such a claim as an asset of the beneficiary. Nor should they be able to put pressure on the beneficiary to take proceedings to enforce a support claim.
- A28 This means that if the beneficiary is in care when the partner dies, half the couple's assets can be preserved to meet the testamentary obligations of the beneficiary's spouse or partner. This is not unreasonable because, during any lengthy period of care, the couple's assets will most likely have been diminished under the asset-testing regime. The income and assets of the spouse or partner will have been included as beneficiary income, except for the couple's income not exceeding \$28 927 per year and the couple's assets exceeding \$40 000 and the couple's house and car.

Example 18:

A and B are married. The couple's assets, worth \$300 000, are again in A's name alone. A goes into long-stay continuing care, and for over 2 years A pays \$30 000 each year for his care. This reduces the couple's assets to \$240 000. A then dies, leaving a life-interest only to B with the capital going to their children.

In this example, B has a property division of \$120 000 against A's estate. This division may be taken into account as part of B's notional assets by the Department of Social Welfare for the purposes of the long-stay residential care subsidy. But B's support claim is not to be taken into account unless she chooses to make it. If B goes into long-stay care on A's death, she will receive no subsidy from the RHA towards the cost of long-stay residential care until 4 years after A's death (when the \$120 000 will have been exhausted).

- A29 OTHER CARERS AND DEPENDANTS – BENEFITS AND CLAIMS – An older person in care may have responsibilities for the support of 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.
- A30 Various administrative arrangements have been introduced to reduce some of the harsh effects of the asset-testing regime on other people who may have been living with, and caring for or dependent on, the beneficiary before the

beneficiary entered care. These arrangements have recently been extended in these ways:

- If a dependant of the beneficiary was living in the beneficiary's 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 beneficiary is secured by an interest-free mortgage on the house. This now applies after the death of the beneficiary, as well as before.
- The beneficiary may make gifts totalling \$5 000 per year before going into care without being treated as having diminished the estate.
- The beneficiary, after entering into care, may now give up to \$25 000 to a person who has cared for the beneficiary during the previous five-year period. This is by way of recognition from the State for having – presumptively – saved the taxpayer the expense of residential care during that period.

A31 These administrative dispensations, very properly, do not give the dependant or carer any direct right to the beneficiary's assets. They merely take away the asset-testing consequences which would otherwise follow if such arrangements are made. The arrangements can only be made,

- when the beneficiary is alive and competent, by the beneficiary;
- when the beneficiary is not competent, then (unusually) by the beneficiary's personal representative or attorney, assuming that the representative
 - has power to make the arrangements, or
 - is authorised to do so by the court;
- when the beneficiary is dead,
 - under the beneficiary's will, or
 - with the consent of those entitled under the will, or
 - by reason of a successful testamentary claim.

A32 It should not be assumed that the beneficiary, their family, or the court is necessarily obliged to make such arrangements for a dependant or carer. It may be that the care was given without any intention that there should be special recognition. Neither the beneficiary nor their family may wish to give continued support to a carer or dependant left in the house after the beneficiary goes into long-stay care or dies.

A33 The Commission's present proposals fill in the gap, at least for contributors. On the death of a beneficiary, carers or dependants (other than spouses or de facto partners) should be eligible for a testamentary claim award allowing them the benefit of property exempted from asset testing by the Government's administrative requirements if

- they have contributed to the beneficiary's estate, or have been promised a testamentary gift as recognition of benefits conferred on the beneficiary (see chapter 9); or
- they are the beneficiary's children who are
 - under the age of 20, or
 - under 25 and undertaking education or training, or
 - disabled when under 25 (see chapter 6).

A34 In other cases a carer or dependant eligible under the Government's administrative criteria would not be able to make a statutory claim. That person would have to rely on the goodwill of the beneficiary or, failing that, the people entitled under the beneficiary's will.

Example 19:

A, who is very elderly, has been supported for the last 15 years by his daughter C. C lives with him, receiving only a welfare benefit. A 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 C remains in the house. On his death the house is encumbered by a mortgage of \$30 000 to the Department of Social Welfare. In his will, A leaves all his property to C and his 5 other children equally. The children cannot agree on what is to be done.

C brings a contributor's claim against A's estate, which the court values at \$75 000. The sum of \$25 000 is taken from the bank account and applied to C's claim. This sum is allowed as the \$25 000 gift dispensation, which recognises that C's contribution to her father's care saved the taxpayer the expense. C requires another \$50 000 to meet her claim in full. The estate's obligation to pay this sum is converted by the court into a specific award giving C 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 balance of its claim, and any residue is paid (according to the will) to A's 6 children in equal shares.

APPENDIX E

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