

Pūrongo | Report 145

He arotake i te āheinga ki ngā rawa a te tangata ka mate ana

Review of succession law: rights to a person's property on death



Te Aka Matua o te Ture | 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 Aotearoa New Zealand. Its purpose is to help achieve law that is just, principled and accessible and that reflects the values and aspirations of the people of Aotearoa New Zealand.

Te Aka Matua in the Commission's Māori name refers to the parent vine that Tāwhaki used to climb up to the heavens. At the foot of the ascent, he and his brother Karihi find their grandmother Whaitiri, who guards the vines that form the pathway into the sky. Karihi tries to climb the vines first but makes the error of climbing up the aka taepa or hanging vine. He is blown violently around by the winds of heaven and falls to his death. Following Whaitiri's advice, Tāwhaki climbs the aka matua or parent vine, reaches the heavens and receives the three baskets of knowledge.

Kia whanake ngā ture o Aotearoa mā te arotake motuhake

Better law for Aotearoa New Zealand through independent review

The Commissioners are:

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The Māori language version of this Report's title was developed for Te Aka Matua o te Ture | Law Commission by Kiwa Hammond and Maakere Edwards, of Aatea Solutions Limited. The title was finalised in conjunction with the Commission's Māori Liaison Committee.

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17 November 2021

Tēnā koe Minister

NZLC R145 – He arotake i te āheinga ki ngā rewa a te tangata ka mate ana | Review of Succession Law: Rights to a person's property on death

I am pleased to submit to you the above report under section 16 of the Law Commission Act 1985.

Nāku noa, nā

A handwritten signature in blue ink, reading 'Amokura Kawharu'.

Amokura Kawharu

Tumu Whakarae | President



Foreword

This Report completes a significant body of reform work Te Aka Matua o te Ture | Law Commission has undertaken regarding family property law in Aotearoa New Zealand.

In 2019, the Commission completed a review of the Property (Relationships) Act 1976. That review was immediately followed by this Review of Succession Law. The former looked at how couples should divide their property when a relationship ends on separation. The Review of Succession Law examines the rights relating to the property of someone who dies.

These reviews have required us to examine how conventional principles of property law should engage with the fluid and often difficult realities of life when families transition through a separation or bereavement. They have also provided an opportunity for us to consider ngā tikanga Māori and how they relate to state law. Whakapapa, whanaungatanga, mana, and aroha, for example, are at the centre of whānau life.

It is clear that succession law, much of it drafted generations ago, requires reform. The law as it is no longer reflects the diversity of family relationships in Aotearoa New Zealand. Nor does it reflect contemporary understandings of te Tiriti o Waitangi | the Treaty of Waitangi.

This Report concludes that in the context of succession, the Crown's kāwanatanga responsibilities under te Tiriti require weaving new succession law that reflects tikanga Māori and other values shared by New Zealanders. Contemplating the contribution of tikanga Māori to the development of state law is a necessary aspect of the law reform exercise and, we think, is consistent with the ongoing evolution of values and attitudes in Aotearoa New Zealand. In recommending reform, the Commission has taken this approach as far as we think is currently possible in light of constraints posed by the pervasive nature of aspects of state law. We also conclude that, given te Tiriti, tikanga Māori should continue to govern succession to taonga.

We recommend that a new Inheritance (Claims Against Estates) Act should be introduced as the principal source of law applying to entitlements and claims against an estate. Alongside this, there should be clear rules for distributing an intestate estate that replace the current rules in the Administration Act 1969.

In developing our recommendations, we have been mindful that the law should be as easy to navigate as possible for those who wish to understand their rights and obligations and should promote efficient and effective dispute resolution. Given the diversity of families and the variety of issues that can arise, property law concepts and judicial discretion must be applied in some instances. Nevertheless, many of our recommendations are to support parties to reach their own resolution with the support they need to understand their rights and obligations. We have emphasised facilitating resolution by tikanga Māori for those wishing to exercise this option.

We are grateful for the views of all those who have engaged with us as we have asked afresh what our law should be. We are confident that our recommendations will lay the foundations for better succession law for Aotearoa New Zealand.



Amokura Kawharu

Tumu Whakarae | President

Acknowledgements

Te Aka Matua o te Ture | Law Commission gratefully acknowledges the contributions of all who have helped us in this review. Since the start of the project in 2019, we have received invaluable assistance from many individuals and organisations. We acknowledged these contributions in the Issues Paper published in April 2020.

We acknowledge again the generous contribution to the review made by our Expert Advisory Group. Members of the Group shared their expertise on the issues arising from current succession law and engaged in rigorous discussion of our preliminary policy proposals. Members of the Group were Bill Patterson, Patterson Hopkins; Greg Kelly, Greg Kelly Law; Mānia Hope, Barrister; Professor Emerita Nicola Peart, University of Otago; and Theresa Donnelly, Perpetual Guardian.

We thank Jack Wass, Barrister, and Dr Maria Hook, University of Otago, for testing with us our reform proposals on cross border matters. We are also grateful to Jeremy Johnson, Barrister, and Stephen McCarthy QC, for their helpful interrogation of our approach to contribution claims.

We acknowledge the individuals who have engaged with us to share an ao Māori perspective on succession. We are grateful to those tikanga and legal experts who attended and contributed to wānanga on the tikanga relevant to succession. We also thank Tai Ahu (Waikato-Tainui, Ngāti Kahu (Te Paatu)) for assisting us in our understanding of tikanga and succession as we prepared this report.

We acknowledge and appreciate the ongoing support and guidance from the Māori Liaison Committee to the Commission.

Finally, we thank the individuals and organisations who kindly shared their expertise and experiences with us through taking the time to make a submission on the Issues Paper or consultation website.

We emphasise nevertheless that the views expressed in this report are those of the Commission and not necessarily those of the people who have helped us.

Nō reira, ko tēnei mātou e mihi nei ki a koutou, kua whai wā ki te āwhina i a mātou. Tēnā koutou, tēnā koutou, tēnā koutou katoa.

The Commissioner responsible for this project is Helen McQueen. The legal and policy advisers who have worked on this report are John-Luke Day, Susan Paul, Tāneora Fraser and Tom White.

While the Hon Justice Whata held a warrant as a Law Commissioner from 11 October 2021, he did not participate in this project which was largely completed prior to that date.

Kia mau ki te ara whanaunga

Hold firm the various strands of whānau relationships so they remain strong

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Executive summary

GOOD SUCCESSION LAW

1. This Review of Succession Law examines the body of rules that governs how a person's property is distributed when they die. The review requires consideration of the Property (Relationships) Act 1976 (PRA), the Family Protection Act 1955 (FPA) and the Law Reform (Testamentary Promises) Act 1949 (TPA). It also includes the rules governing the distribution of intestate estates under the Administration Act 1969. The succession to whenua Māori under Te Ture Whenua Maori Act 1993 (TTWMA) does not form part of this review.
2. This Report begins with consideration of what it means to develop good succession law. We conclude that the current law governing entitlements to and claims against estates is old, out of date and inaccessible. Reform is required to achieve simple and clear law. Reform is also required to reflect te ao Māori perspectives in succession.
3. Our view of te Tiriti o Waitangi | Treaty of Waitangi requires us to focus on how kāwanatanga might be exercised in a responsible manner, including how the exercise of tino rangatiratanga might be facilitated in specific circumstances. In the context of succession, we conclude that responsible kāwanatanga requires us to facilitate tino rangatiratanga through recognising tikanga Māori where that is necessary to enable Māori to live according to tikanga, to weave new law that reflects tikanga Māori and other values shared by New Zealanders and finally to recognise the limits of kāwanatanga.
4. This approach requires tikanga Māori to be considered in both defining and responding to a policy "problem". In some areas, this has been difficult to implement, given the pervasive nature of aspects of state law. We conclude that it is the tikanga of the relevant whānau that will be most important.
5. We also conclude that the exercise of responsible kāwanatanga requires that tikanga Māori be able to continue to govern succession to taonga and the appropriate role of state law in relation to taonga should be limited to facilitating the resolution of disputes in accordance with tikanga Māori. We discuss these matters further in Chapters 3, 12 and 13.
6. We identify several criteria that good succession law should satisfy. Good succession law should:
 - (a) be simple, accessible and reflect New Zealanders' reasonable expectations;
 - (b) be consistent with fundamental human rights and international obligations;
 - (c) balance mana and property rights (including testamentary freedom) with obligations to family and whānau in order to promote whanaungatanga and other positive outcomes for families, whānau and wider society; and
 - (d) facilitate efficient estate administration and dispute resolution.

7. We recommend that a new statute should be enacted as the principal source of law in place of Part 8 of the PRA, the FPA and the TPA. It should be titled the Inheritance (Claims Against Estates) Act (the new Act). The intestacy regime should be revised in line with our recommendations in Chapter 7 but remain in the Administration Act. There is merit in considering whether the new Act and other statutes relevant to testate and intestate succession could be consolidated into one statute.

SUCCESSION AND TAONGA

8. Taonga are knowledge and identity markers for Māori. They may be described in various ways including that they are highly prized and valuable objects, resources, techniques, phenomena or ideas. Taonga remind the living of their obligations to the living and future generations. Taonga have associated intangible attributes such as mana, tapu, kōrero mauri and utu. Where a taonga strongly reflects these attributes, it may have its own mauri which must be respected. For these sorts of taonga, the holder of the taonga exercises a kaitiaki role on behalf of the group. Where a taonga has fewer of the attributes, individuals may exert more influence over the taonga.
9. We conclude that taonga should be treated in a way that respects the tikanga relating to taonga grounded in mātauranga Māori. State law should not determine the substantive question of succession to taonga. The Wills Act 2007, the Administration Act and the new Act should ensure that succession to taonga is determined by the tikanga of the relevant whānau or hapū. In our view, this approach actively protects “te tino rangatiratanga o ... o ratou taonga katoa” and is the best way for the Crown to responsibly exercise its kāwanatanga to that effect.
10. To exclude taonga from succession under state law, taonga must be defined. We prefer a definition that references the tikanga of the relevant whānau or hapū. This reflects our view that what constitutes a taonga should be determined by the tikanga of the relevant whānau or hapū. It is a factual inquiry that must be undertaken considering both the relevant tikanga and the circumstances of the case.

RELATIONSHIP PROPERTY ENTITLEMENTS

11. Part 8 of the PRA provides that, when a partner to a qualifying relationship dies, the surviving partner is entitled to a division of the couple's relationship property instead of whatever provision is available for them under the deceased's will or in an intestacy. The rules that apply to the division of relationship property when couples separate apply, with some modifications, to the division of relationship property on death. The policy basis for Part 8 of the PRA is that a surviving partner should be no worse off on the death of their partner than if the couple had separated.
12. In tikanga Māori, marriage was traditionally a relationship equally as important for the whānau and hapū as the spouses because it provided links between different whakapapa lines and gave each new members. However, while marriage was highly valued, it was not given absolute precedence over other relationships because of the importance of whakapapa. The operation of whanaungatanga, aroha and manaakitanga mean whānau take care of their members, including undoubtedly a bereaved partner. This is likely to manifest itself in care not only for the partner but for any children of the relationship and likely involve whānau of both partners.

13. We conclude that the new Act should continue a surviving partner's entitlement to a division of relationship property. We are satisfied with the policy basis for this approach and consider it aligns with the reasonable expectations of New Zealanders.
14. A relationship property division under the new Act should occur differently to division under the current rules of Part 8 of the PRA:
 - (a) The option A/option B process through which a partner formally elects a division of relationship property should not be continued in the new Act. Instead, a partner should have a right to apply to the court for a relationship property division within 12 months of the grant of administration.
 - (b) Whereas the PRA revokes any gift to a surviving partner under the deceased's will when they elect a relationship property division, we recommend the partner should generally still receive the gifts. Whatever property is then needed to "top-up" the surviving partner's entitlement to the full extent of their relationship property interest should be awarded from the estate. We consider this approach is likely to be more consistent with the deceased's testamentary intentions and easier for the personal representatives to administer.
 - (c) Key changes we recommended in the PRA review should be brought into the new Act including changes concerned with the classification of relationship property and the relationships that should qualify for relationship property division.

FAMILY PROVISION CLAIMS

15. Under the FPA, a family member of the deceased can challenge the provision left to them under the deceased's will or in an intestacy on the grounds it is inadequate for their "proper maintenance and support". The courts have applied the statute by asking whether the deceased has breached the "moral duty" they owed to make proper provision. The courts have held that adequate support, as a standalone concept, can require financial provision from an estate as recognition of belonging to the family, even if the claimant has no financial need.
16. In tikanga, whānau occupies a central place. Rights and obligations are sourced from whakapapa, whanaungatanga, manaakitanga and aroha. These obligations can include financial and moral support as well as an obligation to take responsibility for each other's actions. The whānau is also crucial for discussing and settling familial issues relating to child rearing and succession. One of the primary obligations of the whānau as a whole is to the welfare of tamariki and mokopuna.
17. The practice of whāngai, where a child is raised by someone other than their birth parents, usually another relative, is firmly rooted in whanaungatanga. The rights of whāngai to succeed according to tikanga varies amongst whānau, hapū and iwi.
18. We conclude the FPA requires reform. The objectives of the statute are not sufficiently clear to satisfy modern legislative drafting standards. Instead, the law relies heavily on judicial discretion to assess whether there has been a breach of "moral duty". It is unsatisfactory to have a legal test expressed in these terms. In many cases, reasonable minds will differ on the "moral" way of distributing an estate among family. Feedback from submitters showed strongly divergent views on when it should be appropriate to disrupt a deceased's testamentary intentions to grant further provision to family members. Aotearoa New Zealand's increasing cultural diversity and the need to enable te ao Māori perspectives

no doubt add to the differences of opinion. In addition, the courts have been reluctant to accept arguments that tikanga Māori should determine the scope of a deceased's moral duty.

19. We recommend the repeal of the FPA. In its place, the new Act should allow certain family members of the deceased to apply to the court for a family provision award.

Family provision awards for partners

20. A deceased's surviving partner from a qualifying relationship should be eligible to claim family provision. The court should make an award where the partner has insufficient resources to maintain a reasonable, independent standard of living. The court should take into account the provision available from the deceased on the deceased's death. The court should have regard to the economic disadvantages arising from the relationship for the surviving partner. The court should have discretion to determine the amount of a family provision award to a surviving partner, having regard to a list of factors expressed in the new Act, including the tikanga of the relevant whānau.

Family provision awards for children

21. In respect of the rights of the deceased's children and grandchildren to claim family provision, we are unable to present a single recommendation for reform. Through our research and consultation, it is evident that opinions in Aotearoa New Zealand are divided on the question of whether adult children should be eligible to seek further provision from a parent's estate. Instead, we put forward two options for reform for the Government to consider.
22. Under Option One, the deceased's children and grandchildren of all ages should be eligible to claim family provision. A court should grant an award when the deceased has unjustly failed to:
 - (a) provide for the child and grandchild who is in financial need; or
 - (b) recognise the child or grandchild.
23. Under Option Two, only the deceased's children under 25 years of age or those who are disabled would be eligible to claim. For a child under 25, a court should make an award when, taking into account whatever provision is available to the child from the deceased on the deceased's death, the child does not have sufficient resources to enable them to be maintained to a reasonable standard and, so far as is practical, educated and assisted towards attainment of economic independence. For children who are disabled, the disability must have reduced the person's independent function to the extent that they are seriously limited in the extent to which they can earn a livelihood. A court should make an award when, taking into account whatever provision is available to the child from the deceased on the deceased's death, the child does not have sufficient resources to enable them to maintain a reasonable standard of living.
24. For both options, the court should have discretion to determine the amount of a family provision award, having regard to a list of factors expressed in the new Act, including the tikanga of the relevant whānau.
25. For both options, we recommend a child of the deceased should be defined to include an "accepted child" and whāngai. An accepted child would be a child for whom the deceased had assumed, in an enduring way, the responsibilities of a parent. The extent to which a

whāngai should be entitled to family provision should be informed by the tikanga of the relevant whānau.

CONTRIBUTION CLAIMS

26. Under the current law, a person who provides benefits to someone who later dies may have claims they can bring against the deceased's estate in respect of their contributions. For example, they may claim an award under the TPA, breach of contract, a constructive trust over the estate, estoppel, unjust enrichment or quantum meruit.
27. In tikanga, utu, take-utu-ea, whanaungatanga and whakapapa and mana may be relevant to contributions to a deceased. Utu involves the idea of reciprocity, which provides for the ongoing maintenance of relationships. Utu sits within the take-utu-ea framework, which is a framework for assessing breaches of tikanga and what the appropriate utu is to reach a state of ea, or resolution. Whanaungatanga and whakapapa concern the nature of the relationship between the contributor and the deceased. From an ao Māori perspective the appropriate response to contributions is relative to the increase in mana caused by the contributions and not the contributions themselves.
28. The main problem with the current law is its complexity and uncertainty. The multiple claims arising from similar factual situations can lengthen litigation and increase costs. Predicting outcomes and awards can be difficult, which can discourage parties from settling claims out of court.
29. For these reasons, we proposed in the Issues Paper to codify the current law through a single statutory cause of action that would apply in respect of contributions to a deceased or their estate. We have not, however, carried through the proposal as a recommendation. Feedback from consultation, while broadly supportive of the intention behind the proposal, questioned the extent to which the law could be codified and also raised the risk of unintended consequences.
30. We therefore conclude the new Act should restate a revised testamentary promise cause of action. The cause of action should respond in much the same way as the TPA to hold a deceased to their promise to make testamentary provision to someone from whom they have received substantial work or services. Other causes of action in common law and equity would continue to operate outside the new Act.

INTESTACY ENTITLEMENTS

31. Intestacy occurs when the whole or part of the deceased's estate is not disposed of by will. Dying intestate is relatively common in Aotearoa New Zealand. It is estimated that around half of those aged 18 or over do not have a will. Rates of will-making are lower in Māori, Pacific peoples and Asian communities.
32. Section 77 of the Administration Act sets out the rules for distributing intestate estates consisting of all property other than whenua Māori. Broadly, the rules prioritise the intestate deceased's partner and children, followed by parents, siblings, grandparents, aunts and uncles (by blood) and cousins. When none of the specified family members are alive to succeed, the Crown will take the estate as bona vacantia (ownerless goods). Intestate succession to whenua Māori is governed by TTWMA.

33. The intestacy provisions in the Administration Act are old and have not been recently updated. We are concerned the distribution of intestate estates provided for under section 77 does not:
 - (a) reflect contemporary public attitudes and expectations;
 - (b) respond to the growing number of blended families;
 - (c) align with a surviving partner's relationship property entitlements; and
 - (d) conform to modern legislative drafting standards.
34. Additionally, the intestacy regime does not reflect tikanga Māori. For example, certain relationships like whāngai are not recognised.
35. We conclude that the intestacy regime should be reformed. Revised provisions governing the distribution of intestate estates should be continued in the Administration Act (new intestacy provisions). The objective of the new intestacy provisions should be to reflect what most people who die intestate would do with their estate had they made a will. The Crown should facilitate tino rangatiratanga in relation to the intestacy regime, principally through excluding taonga from the state law rules of intestate succession, making provision for tikanga to determine when people in whāngai relationships should succeed in an intestacy, and facilitating tikanga-based resolution processes for whānau wishing to agree to a different distribution of the estate than that provided in state law.
36. Where the deceased intestate (the intestate) is survived by a partner from a qualifying relationship, we recommend that the partner should continue to succeed. We recommend, however, that the prescribed amount to which the partner is entitled when there are descendants or parents of the intestate should be repealed. Instead, a surviving partner's entitlement should be based in all cases as a proportion of the estate regardless of the size of the estate. In addition, the surviving partner should take the intestate's "family chattels", which should have the same definition as "family chattels" under the new Relationship Property Act we recommended in the PRA review.
37. Where the intestate is survived by their partner but no children or descendants, the partner should continue to take the entire estate. Where, however, the intestate is survived by their partner and children, we recommend the introduction of new rules to respond to the growing numbers of blended families. The rules should provide that, where the intestate's children are from the relationship with their surviving partner, the partner should take the entire estate. Where the intestate has one or more children from another relationship, the partner should take the family chattels and 50 per cent of the remaining estate. The intestate's children should share evenly in the remaining 50 per cent. The rationale for this approach is that, where the partner is also the parent of the children, it is reasonable to expect they will pass the intestate's wealth to the children by providing for them during their life and/or on their death. It also avoids fragmenting the estate in a way that may negatively affect the surviving partner. If the surviving partner is not the parent of the intestate's children, it is less likely that the partner would act as a conduit for the intestate's children. There is more reason to ensure that the children receive entitlements from the estate at the time of the intestate's death.
38. Where the deceased is survived by their children but no surviving partner, we recommend the rule continue that the children share evenly in the whole estate. Where a child died before the intestate, we recommend that that child's share is distributed evenly between their own children (the deceased's grandchildren). This is known as per stirpes/by family

distribution and is the current law. We consider this should continue to apply to all situations where a descendant's parent has predeceased the intestate.

39. The children who are eligible to succeed in an intestacy should include the individuals considered by law to be the intestate's children. Stepchildren and other classes of children for whom the intestate may have accepted parental responsibilities should not be included. Although the intestate may have wished to provide for these accepted children, extending the definition of child or descendant would overcomplicate the law, create practical uncertainties and establish an unreasonable responsibility for administrators.
40. People in whāngai relationships should be eligible to succeed in an intestacy when this accords with the tikanga of the relevant whānau. The share of the estate that the individual will receive should be determined according to the default intestacy rules.
41. Where the intestate leaves no partner nor descendants, we recommend that the estate is distributed to the intestate's parents. If there are no surviving parents, the siblings of the intestate should share the estate, passing to the siblings' descendants according to per stirpes/by family distribution. If there are no surviving siblings or their descendants, the intestate's grandparents or their descendants should share the estate.
42. Where no relative eligible to succeed in an intestacy survives the intestate, the Crown should continue to take the estate as bona vacantia. It is rare for estates to vest in the Crown as bona vacantia. The Crown should continue to have discretion to distribute the estate to certain parties upon application. We recommend that this includes other organisations, groups or people. This should enable hapū and iwi, charities or other community groups to apply to The Treasury to receive that money.

AWARDS, PRIORITIES AND ANTI-AVOIDANCE

Property claimable

43. Under the current law, a surviving partner's relationship property entitlements will be met from the relationship property of the estate. Awards the court makes under the FPA and TPA are sourced rateably across the estate. However, under the PRA, FPA and TPA, the court has discretion to exonerate any part of the estate from an award.
44. We recommend that these rules should continue with some modification. As recommended in Chapter 4, a relationship property award to a surviving partner should "top-up" the gifts they receive under a will to the full extent of the surviving partner's relationship property interest. This top-up amount should be sourced from the relationship property of the estate unless the court orders otherwise.

Priorities

45. Under the current law, awards under the PRA are made from the net estate after creditors' claims are satisfied, subject to a partner's protected interest in the family home, which takes priority over the deceased's unsecured creditors. Similarly, awards under the FPA are made from the net estate. In contrast, awards under the TPA are made from the gross estate. Those with successful claims against an estate under other statutes, common law and equity will be regarded as unsecured creditors of the estate. As such, they will take priority over awards under the PRA and FPA.

46. We recommend the general priority given to creditors should continue. In addition, we recommend that awards under the testamentary promise cause of action under the new Act should be met from the net estate.
47. Awards under the PRA take priority over FPA claims and TPA awards. The FPA and TPA do not address which awards are to take priority over the other. The courts have taken the view, however, that neither Act takes priority, instead resolving the question on a case-by-case basis. We recommend this order of priority should continue under the new Act.

Anti-avoidance

48. The court's power to make awards under the FPA and TPA only applies to the property of the estate. Under the PRA, the court has powers to make relationship property orders by accessing trust property in some circumstances and recovering property disposed of to defeat a partner's rights.
49. There are, however, several ways in which the property a person owned during their life will not form part of their estate when they die. For instance, the property the deceased co-owned as joint tenant will accrue to the remaining joint tenant(s) by survivorship on the deceased's death. The deceased may have disposed of property before their death, such as transferring property on trust, which had they not, would have remained in their estate on their death. Because the court's powers are generally limited to the property of the estate, awards to claimants under the PRA, FPA and TPA may be frustrated by property falling outside the estate.
50. We conclude that having no or limited ability to recover property from outside the deceased's estate undermines the rights that the new Act would purport to give claimants. Some form of anti-avoidance is therefore justified. We recommend the new Act contain provisions that would enable the court to recover property where the property:
 - (a) has been disposed of with intent to defeat an entitlement or claim under the new Act; or
 - (b) was a property interest the deceased owned as joint tenant that has accrued to the remaining joint tenant(s) by survivorship with the effect of defeating an entitlement or claim.
51. The first ground is based on long-standing provisions in other legislation, including the PRA, that allow for the recovery of property disposed of to defeat others' rights. The second ground responds to the particular defeating effect caused by joint tenancies. Joint tenancies can be a mechanism for ensuring a designated person receives a benefit from the deceased in a similar way to if the deceased had made a gift in their will to that person. The caselaw shows that joint tenancies often defeat rights against a deceased's estate. Joint tenancies were also raised as a particular issue in consultation.
52. When either ground applies, the court should have power to order that the recipient of the property:
 - (a) transfer the property or part of it to the estate; or
 - (b) pay reasonable compensation to the estate.
53. The court would only recover the property necessary to satisfy the award it wished to make under the new Act. The court should not order the recovery of property under the anti-avoidance provisions if a recipient of the property received it in good faith and provided valuable consideration. The court should also have discretion whether to order

the recovery of property where the recipient received it in good faith, and it is unjust to order that the property be recovered.

USE AND OCCUPATION ORDERS

54. Individuals who relied on the deceased for housing or household items may suffer hardship when personal representatives are required to distribute the estate under the terms of the deceased's will or the intestacy regime.
55. Under the PRA, the court has powers to grant a surviving partner occupation of the family home or other premises forming part of the relationship property. It may also vest a tenancy in one partner. The court has additional powers to grant a partner temporary use of furniture, household appliances and household effects.
56. We recommend that similar powers should exist under the new Act. A court should be able to grant an occupation order to a surviving partner or a principal caregiver of any minor or dependent child of the deceased. Where the deceased left any minor or dependent child, the new Act should contain a presumption in favour of granting a temporary occupation or tenancy order to the principal caregiver of the child for the benefit of that child. The order will allow the partner or children use of the home for a period as they transition to a life in which they are not dependent on the deceased's estate for accommodation support. In exercising its powers, the court should consider the best interests of the deceased's minor or dependent children as a primary consideration. This approach is consistent with the recommendations in the PRA review, the requirements of the United Nations Convention on the Rights of the Child and the tikanga relating to whanaungatanga, manaakitanga and aroha that requires the needs of tamariki are met.
57. While the home over which an occupation order is sought will often be part of the deceased's estate, it is possible that in some instances it will not be. To strengthen the court's powers to address surviving partners' and minor and dependent children's accommodation needs following the deceased's death, we include recommendations for the court's powers to extend to homes held as joint tenancies and homes held on trust.
58. We recommend the court should have the power to make furniture orders in favour of a surviving partner or a principal caregiver of any minor or dependent child of the deceased, either independently of or ancillary to any occupation or tenancy order. When making furniture orders, the court should consider the best interests of the child as a primary consideration.
59. When the court makes a use or occupation order, it is appropriate for the court to have discretion to order that the recipient of the order pay occupation rent. Occupation rent compensates those beneficiaries or claimants who have had their entitlements under the will or intestacy deferred and is an effective means of achieving balance between the different parties' interests.

CONTRACTING OUT AND SETTLEMENT AGREEMENTS

60. Part 6 of the PRA provides that partners and those contemplating entering a relationship may enter an agreement that governs the division of their relationship property rather than the following the provisions of the Act (contracting out agreements). Partners may also enter an agreement to settle any differences that have arisen between them concerning property (settlement agreements). To enter a valid contracting out or settlement

agreement, the PRA requires partners to follow procedural safeguards, requiring the agreement to be in writing and each partner to obtain independent legal advice from a lawyer who then witnesses and certifies the agreement. The court retains residual power to set aside agreements that would cause serious injustice.

61. In contrast, the courts have held that people cannot contract out of the FPA because it is paramount as a matter of state policy and potential claimants cannot surrender their rights through agreements. Nevertheless, we understand that parties routinely enter deeds of family arrangement to settle FPA claims.
62. Allowing people to contract out of entitlements and claims regarding an estate recognises the mana of the parties to the agreement. It is also important that the state law relating to contracting out and settlement agreements does not impose undue barriers for parties wishing to resolve matters pursuant to tikanga.
63. It is problematic, in our view, that the current law prevents parties from contracting out and settling matters under the FPA, but then allows it for matters under the PRA. This law undermines parties' freedom to arrange their affairs in the manner they wish, promoting a certain outcome. The law can also create anomalies, such as allowing a partner to claim property through the FPA that is designated as the deceased partner's separate property under a contracting out agreement. It is also unclear how the PRA's provisions relating to contracting out apply when partners enter mutual wills arrangements.
64. In general, we favour an approach that enables adults to contract out of the entitlements and claims they may have in respect of someone's estate. We believe this approach is consistent with the principles underpinning contemporary state law in Aotearoa New Zealand that adult parties generally have autonomy to arrange their property matters with each other in the way they would like.
65. Consequently, we recommend that partners or people contemplating entering a relationship should be able to enter contracting out agreements that deal with relationship property entitlements and family provision claims under the new Act. Recognising that these agreements will involve parties who do not approach one another as contracting parties at arm's length, the parties should comply with the following procedural safeguards in order for the contracting out agreement to be valid:
 - (a) The agreement must be in writing.
 - (b) Each party to the agreement must have independent legal advice before signing the agreement.
 - (c) The signature of each party to the agreement must be witnessed by a lawyer.
 - (d) The lawyer who witnesses the signature must certify that, before the party signed, the lawyer explained to that party the effect and implications of the agreement.
66. We recommend the new Act should make no express provision for contracting out of adult children's family provision claims. This will not preclude parties from entering agreements. Instead, parties will be able to enter agreements that do not otherwise comply with the procedural safeguards that we recommend should apply to contracting out agreements between partners. This approach will enable the court to consider the terms of any agreement between a parent and adult child when deciding whether to order family provision. There should, however, be no ability to contract out of family provision claims that may be brought by the deceased's minor children.

67. We recommend that mutual wills arrangements should be subject to same procedural safeguards as contracting out agreements regarding claims against estates. That is, if the parties agree not to revoke their wills or deal with property inconsistently with them, that agreement should be recorded in writing, their signatures should be witnessed, and the lawyers advising each partner should certify the agreement. The advantage of this approach is that it ensures consistency with the contracting out requirements that partners should observe when making agreements about their entitlements and rights to each other's estates. It will also resolve many of the arguments that currently arise about whether the parties have in fact entered a mutual wills arrangement.
68. When parties are in a dispute relating to entitlements or claims under the new Act or entitlements in an intestacy, we recommend that there should be the ability to settle the dispute by agreement without the need for court involvement. We do not recommend that the legislation should impose procedural safeguards in the same way as for contracting out agreements. Instead, it should be a matter of judgement for the parties, particularly the personal representatives, as to how the agreement should be entered, as it is under the current law. If, however, the dispute involves parties who are unascertained, minors or persons deemed by law to lack capacity, we recommend that the new Act should prescribe a process consistent with the alternative dispute resolution provisions of the Trusts Act 2019.
69. For both contracting out and settlement agreements under the new Act, we recommend that the court retains power to vary or set aside agreements that would cause serious injustice. A court should also be able to recover property that is the subject of a contracting out agreement or settlement agreement if it would be captured by the anti-avoidance provisions we recommend in Chapter 8.

JURISDICTION OF THE COURTS

70. Every application under the PRA must be heard by te Kōti Whānau | Family Court (the Family Court). Under the FPA and TPA, however, the Family Court and te Kōti Matua | High Court (the High Court) have concurrent first instance jurisdiction. Claims under the FPA and TPA that relate only to Māori freehold land must be made in te Kooti Whenua Māori | Māori Land Court (the Māori Land Court).
71. The High Court has jurisdiction to determine proceedings relating to testamentary matters and matters relating to the estate of deceased persons, including matters relating to intestate estates. The Māori Land Court has jurisdiction in relation to intestacy over Māori freehold land.
72. There is a fundamental question about which court or courts are the most appropriate to hear and determine claims under the new Act. We recommend that the Family Court and High Court should have concurrent jurisdiction to hear and determine all claims under the new Act. We favour the Family Court having first instance jurisdiction because of the family nature of succession matters. However, there may be situations where it is appropriate for the High Court to hear matters at first instance, such as where the proceedings are complex or contain matters for which the High Court currently holds exclusive jurisdiction. If proceedings relating to the same matter are before both Courts, the High Court should hear the claim. Both Courts should have the power to transfer proceedings to the High Court and the new Act should contain directions on when proceedings should be transferred to the High Court.

73. We recommend that the High Court and the Family Court have concurrent jurisdiction to hear and determine matters relating to eligibility in intestacies. The High Court should continue to hold exclusive jurisdiction for all other issues concerning the administration of an intestate estate and other related matters.
74. We recommend that the new Act should permit appeals as of right against interlocutory decisions that can have a significant impact on the parties' rights and obligations. For all other interlocutory decisions, claimants should obtain leave to appeal from the Family Court or High Court. This recognises that, in exceptional cases, an interlocutory decision of a procedural nature may also affect parties' substantive rights and liabilities, while also minimising risks that parties unduly protract proceedings with appeals.
75. For matters involving taonga, we recommend that the Family Court, High Court and Māori Land Court have concurrent jurisdiction. This recommendation is supported by our recommendations that, where needed, Family Court and High Court judges should continue to receive education on tikanga Māori and that the courts be able to appoint a person to inquire into and advise on matters of tikanga Māori. We also recommend that the Family Court and the High Court have power to transfer proceedings or a question in any proceedings to the Māori Land Court.
76. We received feedback supporting an extended role for the Māori Land Court in relation to granting probate and letters of administration. The Government should consider whether the Māori Land Court should have greater jurisdiction to grant probate and letters of administration regarding matters already before the Māori Land Court where the applications to grant probate and letters of administration are uncontested.

RESOLVING DISPUTES IN COURT

Limitation periods

77. Currently, parties generally have 12 months to commence proceedings under the PRA, FPA and TPA. We conclude that significant changes to the limitation periods for commencing proceedings are not required. We recommend that applications under the new Act should be made within 12 months of the grant of administration in Aotearoa New Zealand subject to the Court's ability to extend that time provided that the application is made before final distribution of the estate. Final distribution should be deemed to have occurred where all estate assets are transferred to those beneficially entitled.
78. Where an estate can be lawfully distributed without a grant of administration, slightly different rules should apply. Generally, the applications should be made within 12 months of the date of death. Personal representatives should continue to be protected against personal liability from claimants under the new Act where they distribute any part of the estate in the circumstances prescribed in section 47 of the Administration Act. This protects personal representatives when they make distributions six months after the grant of administration or when they are distributed with the consent of that person.

Disclosure of information

79. We recommend that the new Act should include an express duty on personal representatives to assist the court, including by requiring personal representatives in proceedings to place before the court all relevant information in their possession or knowledge. In proceedings for the division of relationship property, the surviving partner

and the personal representative should have a duty to disclose each partner's assets and liabilities. To assist parties to make available all appropriate information, we recommend that affidavit forms are created for applications under the new Act.

Evidence

80. Currently an anomaly exists about how evidence is given in TPA proceedings. In the High Court, evidence is presumed to be given orally unless the judge directs otherwise. In FPA and PRA proceedings and in TPA proceedings in the Family Court, evidence is usually given by affidavit. We recommend that affidavit evidence is preferred across all claims under the new Act unless a judge directs otherwise.

Representation of minors, unascertained parties and persons deemed by law to lack capacity

81. It is not always clear under the current law how the interests of minors, unascertained parties or parties deemed by law to lack capacity should be given effect. We think that it is important that these parties have their interests represented. The court should appoint representatives for such parties in proceedings under the new Act to facilitate this.

Costs

82. Costs in proceedings are at the discretion of the court. Historically, in FPA proceedings it was common for the court to order costs to be paid from the estate. That approach has been criticised for sometimes encouraging unmeritorious claims. We consider that the court's current flexible approach to awarding costs is appropriate for the proceedings under the new Act. The new Act should confirm the court's power to make cost orders as it thinks fit.
83. The new Act should also confirm the court's power to impose costs for non-compliance with procedural requirements. Parties to proceedings should be helped to understand what is required of them and should have it signalled to them the potential repercussions for failing to meet these requirements.
84. In the PRA review, we recommended the establishment of a scale of costs for relationship property proceedings. We see merit in such a scale being established for claims under the new Act too.

Tikanga Māori and dispute resolution in court

85. We have received feedback that many Māori feel that the Māori Land Court is a more attractive forum for resolving disputes than the general courts. This can be attributed to a range of factors but the expertise of judges and staff in tikanga and te reo Māori in particular can make the Māori Land Court a supportive and positive place to go for dispute resolution. There is a drive to improve diversity amongst the judiciary and to educate judges to understand and appreciate te ao Māori through education programmes such as the ones offered by Te Kura Kaiwhakawā | Institute of Judicial Studies. Education on tikanga Māori, including on tikanga Māori specific to whānau, should be an important aspect of education for Family Court and High Court judges who are not already knowledgeable in these areas. Additionally, the courts should be able to appoint a person to inquire into such matters the court considers may assist it to deal effectively with the matters before it, including matters of tikanga Māori, and this power should be specified in the new Act.

RESOLVING DISPUTES OUT OF COURT

86. A significant proportion of claims against estates are resolved out of court. There are good reasons to promote the resolution of matters outside of court. It is generally quicker and less expensive. It can result in better outcomes for the families involved because resolution processes can focus on reaching agreement rather than adversarial court proceedings. The most common ways of resolving disputed claims against estates out of court are:
- (a) party or lawyer-led negotiation;
 - (b) mediation;
 - (c) arbitration; and
 - (d) judicial settlement conferences.
87. The Trusts Act provides that the trustees or the court may refer a matter to an “ADR process”, even if there is no provision in the terms of the trust that would allow for it. If a matter is one in which the only parties are the trustees or beneficiaries, it can be referred to ADR even if there are beneficiaries who are unascertained or are deemed by law to lack capacity. The court must appoint a representative who must act in the best interests of those beneficiaries. Except in relation to arbitral awards, the court must approve an ADR settlement in order for it to take effect.
88. Part 3A of TTWMA provides for a statutory mediation process to assist parties to resolve any disputed issues quickly and effectively between themselves in accordance with the law, and as far as possible, in accordance with the relevant tikanga of the whānau or hapū, for both the process and the substance of the resolution. The mediator can follow any procedures the mediator thinks appropriate.
89. Differences between the PRA, FPA and TPA regarding out-of-court resolution mean that it is unclear whether parties are able to comprehensively settle claims against an estate without going to court. There are also questions regarding the recognition of tikanga-based dispute resolution in the new Act and safeguards for parties who are unascertained, minors or persons who are deemed by law to lack capacity.
90. In our view, out-of-court resolution may be particularly beneficial for the types of family disputes that would arise under the new Act. A process that allows the parties to arrive at an agreed settlement may be more helpful at diffusing family hostilities than an adversarial court process. Out-of-court resolution processes may also allow other family matters to be addressed that may not be strictly relevant to the legal issues before the court. We therefore recommend that the new Act should expressly endorse out-of-court dispute resolution and tikanga-based resolution. In addition, the new Act and the Administration Act should provide that parties can enter an agreement to settle any differences arising between them (see Chapter 10).
91. We recommend the new Act prescribe a process that is consistent with the alternative dispute resolution provisions of the Trusts Act for parties who are unascertained, minors or persons deemed by law to lack capacity. The process will require the court to appoint representatives for those parties to look after their best interests. The representative would be able to agree on their behalf to participate in an out-of-court resolution process and agree to any settlement reached. Court approval of the settlement should be required (unless the settlement is an arbitral award) and the court should be able to vary or set aside any agreement that would cause serious injustice.

92. Our recommendations about settlement agreements mean that parties could engage in an out-of-court or tikanga-based dispute resolution process of their own accord, without court involvement, and come to a resolution. It may also be beneficial for the Government to consider whether the mediation process under Part 3A of TTWMA could have broader application.

ROLE OF PERSONAL REPRESENTATIVES

93. “Personal representatives” is the term we use to refer to executors of a will or administrators of an intestate estate. Personal representatives have a duty to administer the estate and distribute it according to the deceased’s will or the intestacy regime.
94. Personal representatives have a duty to be even-handed between beneficiaries. However, the extent of their duty to notify potential claimants is not clear under the current law. We recommend that this is clarified in the new Act. The new Act should require a personal representative to give notice in a prescribed form to a surviving partner or any person that the personal representative could reasonably apprehend was in an intimate relationship with the deceased at the time of death. The prescribed notice should contain information about relationship property entitlements and family provision claims, criteria for qualifying relationships, relevant time limits and obtaining independent legal advice. We think that a similar duty should apply in respect of children if the Government accepts Option Two of our family provision proposals limiting eligible children to those under 25 or who meet the definition of disabled within the new Act.
95. Personal representatives will be the named defendants in proceedings against the estate but the role that they are expected to take may differ depending on the nature of the claim. For example, in FPA proceedings, the personal representative is generally expected to maintain a neutral role but, in PRA and TPA proceedings, they are often expected to actively defend claims. In our view the varied nature of claims makes it difficult to prescribe in statute the role that personal representatives should take in all proceedings. We instead recommend that the new Act includes a duty on personal representatives to place before the Court all relevant information in their possession or knowledge.
96. At times, personal representatives may have a conflict of interest. It is not unusual, for example, for a personal representative to be a claimant against the estate or a beneficiary who intends to defend a claim as a beneficiary. In most cases, personal representatives and their legal counsel will know how to manage the conflict consistently with their legal duties and there is no need for the new Act to provide further guidance. In some cases, the court will need to intervene to remove or replace a personal representative. The current process for doing so is cumbersome because it requires a separate application to the High Court under the Administration Act. We recommend that this power be contained within the new Act so both the High Court and the Family Court are able to remove or replace personal representatives where necessary or expedient.

CROSS-BORDER MATTERS

97. Conflicts of laws may arise when the deceased has property in more than one country or is closely connected to more than one country. Currently, Aotearoa New Zealand’s choice of law rules for administration and succession are primarily governed by common law. Matters of administration (including claims under the TPA) are governed by the law of the country in which the assets are located and a grant of administration is made. Succession

to movable property is determined by the law of the deceased's domicile whereas succession to immovable property is determined by the law of the country where the property is situated. This includes claims under the FPA. Similar rules set out in the PRA apply to relationship property disputes, however, the PRA is silent on which country's laws apply when the PRA does not apply. This creates uncertainty and risks leaving gaps in the law if no other country's law applies.

98. The distinction between movable and immovable property is heavily criticised. It prevents the succession of an estate being dealt with under a single legal regime. In FPA cases it can frustrate the court's ability to award the level of provision the court thinks fit. In intestacy, it might result in a windfall to a partner because the partner is entitled to more than one statutory legacy.
99. It can be difficult to identify the deceased's domicile and may come as a surprise in some cases, particularly because acquiring a new domicile relies on the individual's intention to reside permanently in that country. The different treatment between the TPA and the FPA also places artificial constraints on courts when making awards.
100. We conclude that the law that should be applied to the succession of a deceased's estate should be the law of the deceased's last habitual residence, the country with which the deceased had the closest and most stable connection. This would be determined with reference to an overall assessment of the specific circumstances of the case, including the deceased's social, professional and economic ties to the country. The inquiry should engage the most relevant law for that case to give effect to the interests of the deceased, of people close to the deceased and of creditors. Disputes over relationship property following the death of a partner should also be governed by the law of the deceased's last habitual residence to avoid fragmenting the law governing a deceased's estate.
101. We recommend that habitual residence is used instead of domicile when determining the relevant law applying to the construction or interpretation of a will and the capacity to make a will or take under a will. We also recommend that the Government considers substituting "domicile" with "habitual residence" in section 22 of the Wills Act 2007.
102. We think that it is important for courts to have some flexibility to interpret or adapt rules where the combination of choice of law rules or decisions taken in different jurisdictions produces an unacceptable outcome that would differ from the common outcome in a purely domestic case. We also recommend that courts retain the power to refuse to apply a foreign rule where doing so would be contrary to public policy.
103. Consistent with our recommendations in the PRA review, we consider that partners should be entitled to agree that the law of a nominated country should apply to some or all of their property on death. Agreements should need to satisfy certain requirements, including that the agreement is valid under the law of the country that is chosen under the agreement, or under the law of the country with which the relationship had its closest connection. Courts would also retain discretion not to give effect to a valid agreement where doing so would be contrary to public policy.
104. The choice of law rules should not apply to whenua Māori or taonga, meaning that the succession to these should always be determined according to the law of Aotearoa New Zealand.
105. If property is situated outside Aotearoa New Zealand and is immovable (for example, land), a court should be able to make orders against a person rather than against the property directly. The court may order the person to transfer property or pay a sum of money to

another party. We recommend that the new Act confirms that the *Moçambique* rule has no application in matters covered under that Act. We do not recommend bespoke jurisdictional rules be included within the new Act, nor do we recommend that the new Act or the Wills Act refer to the application of renvoi.

OTHER REFORM MATTERS

The need for education about the law relating to succession

106. The low levels of awareness and understanding of the law relating to succession, both among the public and professional advisers, has been a key theme emerging from our research and consultation throughout this review. We think there is a need for greater awareness and education about the law related to succession and the importance of making wills. We recommend the Government consider ways to improve awareness and understanding of the law and the new Act.

Power to validate wills

107. Section 14 of the Wills Act provides the High Court with the power to validate a document that appears to be a will but does not comply with the validity requirements within the Wills Act. The reference to “document” in section 14 is criticised because it has generally prohibited the validation of audio or visual recordings of testamentary intentions. We recommend the Government consider reviewing the validation powers under section 14.

Ōhākī

108. Loosely understood as an oral will, the Māori practice of ōhākī has not been recognised in state law. This fails to recognise tikanga as an independent source of rights and obligations in Aotearoa New Zealand. We recommend the Government consider recognising ōhākī as an expression of testamentary wishes enforceable under state law.

Sections 18 and 19 of the Wills Act

109. Sections 18 of the Wills Act revokes a will in its entirety when a person marries or enters a civil union and has not made that will in contemplation of the marriage or civil union. Section 18 presumes that the will would no longer reflect the person’s testamentary intentions, failing to take into account that today many couples are in a de facto relationship before they get married. We recommend that section 18 is repealed.

110. When a couple divorces, section 19 of the Wills Act revokes certain dispositions and powers given to the former spouse in the will on the assumption that the deceased would no longer want these to apply. We think this is a reasonable assumption to make. Section 19, however, does not apply to dispositions made to de facto partners. We recommend section 19 be amended to apply two years after the point when the partners in any qualifying relationship type ceased to live together in a relationship. This is because we have heard that it is not uncommon for couples to separate but not get around to formally divorcing or updating their wills.

Multi-partner relationships

111. The PRA is based on the notion of “coupledom”. Although the Act has special rules for when a partner maintains two separate relationships, it does not apply to multi-partner

relationships. Multi-partner relationships may share many of the hallmarks of a qualifying relationship. However, we do not recommend any change at this time to recognise multi-partner relationships in the property sharing regime. We think that such changes would need to be considered within a broader context about how family law should recognise and provide for adult relationships that do not fit the mould of an intimate relationship between two people. We recommend further research and consultation be undertaken.

Distributing an estate without probate or letters of administration

112. Section 65 of the Administration Act provides that certain entities, such as superannuation funds, banks, or the employer of the deceased, can pay money to certain relatives of the deceased, such as a surviving partner, without the need for a grant of administration. The amount of money cannot exceed the prescribed amount, currently \$15,000. Additionally, Public Trust and Trustee companies have powers to distribute estates without a grant of administration, where the total value of the estate does not exceed \$120,000. We have heard that the administration process is complex and costly, and people would like to see these monetary thresholds increased. We recommend that the Government consider whether to increase the threshold for distributing estate money without a grant of administration.

Social security and the Family Protection Act

113. Section 203 of the Social Security Act 2018 enables Te Manatū Whakahiato Ora | Ministry of Social Development to refuse to grant a benefit, grant a benefit at a reduced rate or cancel a benefit already granted where a person has failed to take steps to advance a tenable FPA claim. It is an historic power that is now rarely used and we recommend it be repealed.
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Recommendations

CHAPTER 2: GOOD SUCCESSION LAW

R1

A new statute called the Inheritance (Claims Against Estates) Act (the new Act) should be enacted as the principal source of law applying to entitlements and claims against an estate in place of Part 8 of the Property (Relationships) Act 1976, the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949, which should be repealed.

R2

The intestacy regime should remain in the Administration Act 1969 at present, but Part 3 of that Act should be repealed and new intestacy provisions enacted that conform to modern drafting standards and recommendations R30-R51 below.

R3

The Government should consider drafting the new Act in contemplation that the matters currently covered in the Administration Act 1969, the Wills Act 2007, the Simultaneous Deaths Act 1958 and the Succession (Homicide) Act 2007 will be incorporated into the new Act in the future.

R4

The new Act should:

- a. reflect the Crown's obligations under te Tiriti o Waitangi to exercise kāwanatanga in a responsible manner, including facilitating the exercise of tino rangatiratanga by Māori, in the context of succession;
- b. be simple, clear and accessible law that meets the reasonable expectations of New Zealanders;
- c. reflect the New Zealand Bill of Rights Act 1990 and Aotearoa New Zealand's commitments under international instruments;
- d. appropriately balance sustaining mana and property rights (including testamentary freedom) with obligations to family and whānau, in order to promote whanaungatanga and other positive outcomes for families, whānau and wider society; and
- e. promote efficient estate administration and dispute resolution.

CHAPTER 3: SUCCESSION AND TAONGA

R5

State law should not determine the substantive question of succession to taonga. The new Act should provide that succession to taonga is determined by the tikanga of the relevant whānau or hapū and that taonga should not be available to meet any entitlement or claim under the new Act or entitlement under the new intestacy provisions.

R6

In the context of state succession law, taonga should be defined within a tikanga Māori construct, but excluding all land. Taonga should be limited to items that are connected to te ao Māori.

CHAPTER 4: RELATIONSHIP PROPERTY ENTITLEMENTS

R7

A surviving partner from a qualifying relationship should have a right under the new Act to choose a division of relationship property on the death of their partner.

R8

The option A/option B election process in Part 8 of the Property (Relationships) Act 1976 should not be continued in the new Act.

R9

If a surviving partner chooses a relationship property division and there is a will, they should keep whatever gifts are made for them under the will. They should then receive from the estate whatever further property is needed to ensure they receive the full value of their relationship property entitlement.

R10

Where it is necessary to avoid undue disruption to a surviving partner's life, a court should have discretion to replace property the surviving partner would otherwise receive under the will with particular items of relationship property provided the surviving partner does not receive property of a value greater than their relationship property interest in the estate.

R11

To be eligible to choose a division of relationship property, the surviving partner should have been in a qualifying relationship with the deceased, being a:

- a. marriage;
- b. civil union; or
- c. de facto relationship of three years or more.

R12

The new Act should include a presumption that two people are in a qualifying de facto relationship when they have maintained a common household for a period of at least three years as recommended in the PRA review (R26). The presumption should be rebuttable by evidence that the partners did not live together as a couple, having regard to all the circumstances of the relationship and the matters currently prescribed in section 2D(2) of the PRA.

R13

When the partners have not maintained a common household for three years or more, the burden of proof of establishing that a qualifying de facto relationship exists should be on the applicant partner, as recommended in the PRA review (R27).

R14

A qualifying de facto relationship should include a de facto relationship that does not satisfy the three-year qualifying period if it meets the additional eligibility criteria that:

- a. there is a child of the relationship and the court considers it just to make an order for division; or
- b. the applicant has made substantial contributions to the relationship and the court considers it just to make an order for division.

(See R29 in the PRA review.)

R15

Where partners have separated prior to death, the surviving partner should remain eligible to claim under the new Act provided no longer than two years have elapsed between the partners ceasing to live together in the relationship and the time a partner dies. The court should have discretion to allow an application when separation occurred more than two years before death.

The time period in which partners must apply for a relationship property division on separation when neither partner has died should be made consistent with the rules that apply to relationships ending on death.

R16

The new Act should provide for contemporaneous relationships in a stand-alone provision that:

- a. applies whenever property is the relationship property of two or more qualifying relationships (contested relationship property); and
- b. requires a court to apportion contested relationship property in accordance with the contribution of each relationship to the acquisition, maintenance and improvement of that property.

(See R33 in the PRA review.)

R17

A surviving partner's relationship property entitlements should be based on the classification and division rules recommended in the PRA review (R8–R16) that would apply when partners separate, including that:

- a. property acquired before the relationship or as a gift or inheritance should be separate property, including the family home;
- b. the burden of proof of establishing whether property is separate property should be on the party that owns the property; and
- c. the court should have discretion to order unequal division of relationship property where there are extraordinary circumstances that make equal sharing repugnant to justice.

CHAPTER 5: FAMILY PROVISION CLAIMS

R18

The Family Protection Act 1955 should be repealed. In its place, the new Act should provide that certain family members of the deceased may claim family provision awards.

R19

A court should make a family provision award to a surviving partner where, taking into account the provision available from the deceased on the deceased's death, a surviving partner has insufficient resources to maintain a reasonable, independent standard of living, having regard to the economic disadvantages arising from the relationship for that partner.

R20

A partner should have been in a qualifying relationship as defined in recommendations R11–R15 to be eligible to claim family provision.

R21

In determining the amount of a family provision award to a partner, the court should take into account:

- a. the extent of the economic disadvantages the partner suffers from the relationship;
- b. the duration of the relationship;
- c. the partner's responsibilities for any children of the deceased;
- d. the partner's current and likely future employment situation; and
- e. the tikanga of the relevant whānau.

R22

In determining the amount of a family provision award to a partner, the court should have discretion whether to take into account any means-tested social security assistance a surviving partner receives.

R23

A child of the deceased eligible to claim family provision should be defined in the new Act to include:

- a. any individual for whom the deceased is considered by law to be the child's parent;
- b. an accepted child, being a child for whom the deceased had assumed, in an enduring way, the responsibilities of a parent; and
- c. a whāngai.

R24

A grandchild eligible to claim family provision should be defined in the new Act to include:

- a. a child considered by law to be a child of the deceased's child;
- b. a child of a whāngai of the deceased; and
- c. a whāngai of the deceased's child or whāngai.

R25

Because of the divided opinions in Aotearoa New Zealand, no option for reform will represent a consensus view on the circumstances in which a deceased's children should be eligible to claim family provision. Consequently, the Government should consider implementing one of the following two options for reform regarding children's claims.

Option One: Family provision awards for all children and grandchildren of the deceased

A court should make a family provision award to a child or grandchild of the deceased where, despite whatever provision is available to the child or grandchild from the deceased on the deceased's death, the deceased has unjustly failed to:

- a. provide for the child or grandchild who is in financial need; or
- b. recognise the child or grandchild.

In determining whether to make an award and the amount of an award, the court should take into account:

- a. the size of the estate and the demands on it;
- b. the relative financial means and needs of the claimant and other beneficiaries;
- c. whether the deceased has given inadequate or no consideration to the strength and quality of the claimant's relationship with the deceased over their lifetime;
- d. whether the will can be seen to be irrational or capricious;
- e. the reasons (if any) given by the deceased for making their will;

- f. any disability or other special needs of the claimant and of other beneficiaries in the estate; and
- g. the tikanga of the relevant whānau.

For applications made by a grandchild, the court should take into account the provision made to the grandchild's parents from the deceased.

A court should not take into account any means-tested social security assistance a claimant receives.

Option Two: Family provision awards for children under 25 years and disabled children

Children under 25 years

A court should make a family provision award to a child of the deceased aged under 25 years when, taking into account whatever provision is available to the child from the deceased on the deceased's death, the child does not have sufficient resources to enable them to be maintained to a reasonable standard and, so far as is practical, educated and assisted towards attainment of economic independence.

In determining a family provision award for a child, the court must make the best interests of the child a primary consideration, taking into account:

- a. the child's age and stage of development, including the level of education or technical or vocational training reached;
- b. any other actual or potential sources of support available to the child, including support from a surviving parent (including any family provision award made to that parent that reflects their responsibilities for the child), a trust or provision from the estate of another deceased parent;
- c. the amount of support provided by the deceased to the child during the deceased's life or on their death;
- d. the actual and potential ability of the child to meet their needs; and
- e. the tikanga of the relevant whānau.

A court should not take into account any means-tested social security assistance a claimant receives.

Disabled children

A court should make a family provision award to a disabled child of the deceased when, taking into account whatever provision is available to the child from the deceased on the deceased's death, the child does not have sufficient resources to enable them to maintain a reasonable standard of living.

Disability should include any long-term physical, mental, intellectual or sensory impairments that have reduced the person's independent function to the extent that they are seriously limited in the extent to which they can earn a livelihood.

A disabled adult child should be eligible if they had been wholly or partly dependent on the deceased for support immediately prior to death, or if the child's disability arose prior to them reaching 25 years.

In making a family provision award to a disabled child, the court should take into account:

- a. the child's age and stage of development, including the level of education or technical or vocational training reached;
- b. the possibility of recovery from disability;
- c. any other actual or potential sources of support available to the child, including support from a surviving parent (including any family provision award made to that parent that reflects their responsibilities for the child), a trust or provision from the estate of another deceased parent;
- d. the amount of support provided by the deceased to the child during the deceased's life or on their death;
- e. the actual and potential ability of the child to meet their needs; and
- f. the tikanga of the relevant whānau.

A court should not generally take into account any means-tested social security assistance a disabled child receives, but the court should have a residual discretion to take state assistance into account.

Children aged over 25 years or who are not disabled would be ineligible to claim family provision.

R26

The Government should consider whether and, if so, how family provision under the new Act should relate to succession of Māori freehold land under Te Ture Whenua Maori Act 1993.

CHAPTER 6: CONTRIBUTION CLAIMS**R27**

The Law Reform (Testamentary Promises) Act 1949 should be repealed. In its place, a testamentary promise cause of action should be available under the new Act. Other causes of action at common law or equity arising from contributions made towards a person who has since died should continue to operate outside the new Act.

R28

A court should grant a testamentary promise award to a claimant where:

- a. the claimant has rendered services to or performed work for the deceased during the deceased's lifetime;
- b. the services or work must have been substantial in that they required the claimant to contribute significant time, effort, money or other property or to suffer substantial detriment;

- c. the claimant must not have been fully remunerated for the work or services;
- d. the deceased expressly or impliedly promised to make provision in their will for the claimant in return for the work or services; and
- e. the deceased has failed to make the promised testamentary provision or otherwise fully remunerate the claimant.

R29

The quantum of an award should be the amount promised by the deceased, subject to the court's overriding discretion to grant an award that is reasonable in the circumstances.

CHAPTER 7: INTESTACY ENTITLEMENTS

R30

Individuals considered by law to be the children of the intestate should remain eligible to succeed in an intestacy.

R31

Stepchildren and other classes of children for whom the intestate accepted parental responsibilities (other than whāngai) should remain ineligible to succeed in an intestacy.

R32

Where there is no adoption under the Adoption Act 1955, the eligibility of people in whāngai relationships to succeed in an intestacy should be determined according to the tikanga of the relevant whānau. The share of the estate that the individual will receive should be determined according to the default intestacy rules.

The Government should consider the effect that adoption under the Adoption Act should have on the intestate succession rights of people in whāngai relationships where there has been an adoption under state law. Until that time, the rights of the individuals to inherit in an intestacy should continue to be determined according to state law where a tamaiti whāngai has been adopted under the Adoption Act.

R33

Children in utero at the time of the intestate's death who are later born alive should continue to be eligible to succeed in an intestacy, and children born from posthumous reproduction should continue to be ineligible to succeed in an intestacy.

R34

The term "descendants" should be used in the new intestacy provisions in place of the term "issue."

R35

The definition of personal chattels used in the new intestacy provisions should be amended to be consistent with the definition of family chattels in the PRA, including the recommended change in the PRA review, so that the definition is amended to refer to those items “used wholly or principally for family purposes” (see R11 in the PRA review).

R36

Heirlooms and items of special significance should not be expressly excluded from the definition of family chattels in an intestacy.

R37

The same criteria that qualify a partner to relationship property entitlements (R11–R14) should apply to qualify a partner to succeed in an intestacy.

R38

Separated surviving partners should remain eligible to succeed in an intestacy provided no more than two years have elapsed since the surviving partner and the intestate ceased living together as a couple.

R39

Where a partner has died within two years of separation, and the couple has divided their relationship property by entering an agreement that does not conform to the new Act’s requirements, the surviving partner should remain eligible to succeed in an intestacy. The court should, however, retain power to give effect to a non-compliant settlement agreement if non-compliance has not caused material prejudice to the parties.

R40

The per stirpes/by family distribution of intestate estates should continue.

R41

The intestacy regime should continue to take no account of property that does not fall into the estate.

R42

A minor who is eligible to succeed in an intestacy should continue to take a vested interest held on trust until they reach 18 years.

R43

The prescribed amount which a surviving partner of the intestate takes in an intestacy when there are descendants or parents of the intestate should be repealed.

R44

Where an intestate is survived by a partner, no descendants but one or more parent, the intestacy regime should provide that the partner takes the entire estate.

R45

A surviving partner of an intestate should take the whole of the estate where all the intestate's children are of that relationship. Where one or more of the intestate's children are of another relationship, the intestate's partner should take the family chattels and 50 per cent of the remaining estate, and the intestate's children should share evenly in the remaining 50 per cent.

R46

Where an intestate is survived by descendants but no partner, the intestate's children should share the estate evenly. Per stirpes/by family distribution should apply to the shares available to descendants.

R47

Where an intestate is not survived by a partner or any descendants, the intestate's parents should share the estate evenly. If the intestate is survived by only one parent, that parent should take the whole estate.

R48

Where an intestate is survived by siblings, nieces and nephews but no partner, descendants or parents, the intestate's siblings should share the estate evenly. Per stirpes/by family distribution should apply to the shares available to nieces and nephews or their descendants.

R49

Where an intestate is not survived by any partner, descendants, parents, siblings or siblings' descendants, the current distribution method between grandparents and their descendants according to the parental lines should apply.

R50

Where the intestate is not survived by any of the relatives listed above (partner, descendants, parents, siblings, siblings' descendants, grandparents, grandparents' descendants), the Crown should take the estate as bona vacantia.

R51

The Crown should have discretion to distribute any or all of the estate to the following parties on application:

- a. Dependants of the intestate (whether kindred or not).
- b. Any organisation, group or person for whom the intestate might reasonably be expected to have made provision.
- c. Any other organisation, group or person.

CHAPTER 8: AWARDS, PRIORITIES AND ANTI-AVOIDANCE**R52**

A surviving partner's relationship property entitlements under the new Act should be met from the relationship property of the estate. The court should have discretion to order that the entitlements be met from the whole or part of the estate.

R53

Family provision awards should be met rateably against the whole estate. The court should have discretion to order that awards are met from only part of the estate.

R54

Testamentary promise awards should be met rateably against the whole estate. The court should have discretion to order that awards are met from only part of the estate.

R55

Creditors' rights should take priority over all entitlements and claims under the new Act.

R56

If an estate has insufficient property to fully satisfy relationship property awards, family provision awards and testamentary promise awards, the new Act should give relationship property awards priority. The new Act should not prescribe an order of priority between family provision awards and testamentary promise awards but instead enable the court to determine priority in each case.

R57

Where there is insufficient property in an estate to meet all entitlements and awards under the new Act, the Court should have power to recover property to the estate from a third party when that property:

- a. has been disposed of with intent to defeat an entitlement or claim under the new Act; or
- b. was owned by the deceased as joint tenant and it has accrued to the remaining joint tenant(s) by virtue of survivorship with the effect of defeating an entitlement or claim.

R58

The court should have power to order that:

- a. the recipient of the property transfer the property or part of it to vest in the estate; or
- b. the recipient of the property pay reasonable compensation to the estate.

R59

The court should not order the recovery of the property or the payment of compensation if the recipient of the property received it in good faith and provided valuable consideration. The court should have discretion whether to order the recovery of property or the payment of compensation where the recipient received it in good faith and it is unjust to order that the property be recovered.

R60

Claimants under the new Act should be able to apply to the court directly for the recovery of property from a third-party recipient. Personal representatives' rights to apply for a division of relationship property on behalf of the estate should be repealed.

R61

A surviving partner should retain the additional rights they have to recover property to satisfy relationship property claims based on recommendations in the PRA review (R58–R66).

R62

A surviving partner should be able to lodge a notice of claim over land of the estate in which they claim a relationship property interest.

CHAPTER 9: USE AND OCCUPATION ORDERS

R63

The new Act should provide the court with powers to make:

- a. occupation orders;
- b. tenancy orders; and
- c. furniture orders

in favour of a surviving partner, a principal caregiver of any minor child of the deceased or a dependent child of the deceased.

For the purposes of granting occupation, tenancy and furniture orders, a child of the deceased should include:

- a. an accepted child, being a child for whom the deceased had assumed, in an enduring way, the responsibilities of a parent; and
- b. a whāngai.

R64

The court should have power to grant an occupation order over any property of the estate, as well as:

- a. property the deceased owned as a joint tenant that would accrue to the remaining joint tenant(s) by survivorship; and
- b. property held on trust where the deceased or any minor or dependent child of the deceased are beneficiaries of the trust (including as a discretionary beneficiary).

R65

The court should consider the best interests of any minor or dependent children as a primary consideration. Where the deceased left any minor or dependent child, the new Act should contain a presumption in favour of granting a temporary occupation or tenancy order to the principal caregiver of the child for the benefit of the child. A court may decline to make an order if it is satisfied that an order is not in the child's best interests or would otherwise result in serious injustice.

R66

The new Act should expressly refer to the court's powers to award occupation rent when appropriate in the circumstances as a condition of any occupation order.

R67

The property available for a furniture order should extend to other types of property that would come under the new Act's definition of family chattels.

CHAPTER 10: CONTRACTING OUT AND SETTLEMENT AGREEMENTS

R68

Partners and people contemplating entering a relationship, who are informed of their rights, should be able to enter contracting out agreements that deal with relationship property entitlements and family provision claims under the new Act (contracting out agreements).

R69

A contracting out agreement under the new Act should be void unless it complies with the following procedural safeguards:

- a. The agreement must be in writing.
- b. Each party to the agreement must have independent legal advice before signing the agreement.
- c. The signature of each party to the agreement must be witnessed by a lawyer.
- d. The lawyer who witnesses the signature must certify that, before the party signed, the lawyer explained to that party the effect and implications of the agreement.

R70

If a contracting out agreement does not comply with the formalities in R69 a court should have power to give effect to the agreement if non-compliance has not caused material prejudice to the parties.

R71

Contracting out agreements should be subject to any other law that makes a contract void, voidable or unenforceable.

R72

A court should be able to set aside or vary a contracting out agreement if satisfied that giving effect to it would cause serious injustice. In deciding whether the agreement would cause serious injustice, the court should have regard to the matters currently set out in section 21J of the PRA, the best interests of any minor or dependent children of the deceased and the tikanga of the relevant whānau. For the purposes of determining whether to set aside or vary an agreement, a child of the deceased should include:

- a. an accepted child, being a child for whom the deceased had assumed, in an enduring way, the responsibilities of a parent; and
- b. a whāngai.

R73

Contracting out agreements should be subject to the new Act's anti-avoidance provisions recommended in R57-R62.

R74

There should be no ability to contract out of family provision claims with minor children or adult children who are deemed by law to lack capacity.

R75

An agreement between former partners on their separation that purports to be a full and final settlement of relationship property claims should be presumed to be a full and final settlement of the surviving partner's entitlements and claims under the new Act unless the agreement provides otherwise.

R76

Mutual wills agreements should be subject to the same procedural safeguards as contracting out agreements regarding claims against the other's estate.

R77

The new Act and the Administration Act 1969 should clarify that parties may enter agreements to settle any difference arising between them in relation to relationship property entitlements, family provision claims, testamentary promise claims and intestacy entitlements under the new Act and the intestacy regime (settlement agreements). The legislation should impose no procedural safeguards for parties to observe when entering settlement agreements.

R78

Settlement agreements should be subject to any other law that makes a contract void, voidable or unenforceable.

R79

A court should be able to set aside or vary a settlement agreement if satisfied that giving effect to it would cause serious injustice. In deciding whether the agreement would cause serious injustice, the court should have regard to the matters currently set out in section 21J of the PRA, the best interests of any minor or dependent children of the deceased, and the tikanga of the relevant whānau.

R80

Settlement agreements should be subject to the new Act's anti-avoidance provisions recommended in R57-R62.

CHAPTER 11: JURISDICTION OF THE COURTS

R81

Te Kōti Whānau | Family Court and te Kōti Matua | High Court should have concurrent first instance jurisdiction to hear and determine claims under the new Act, subject to both Courts having the power to remove the proceedings to te Kōti Matua | High Court.

R82

Te Kōti Whānau | Family Court and te Kōti Matua | High Court should have concurrent jurisdiction to hear and determine questions concerning the eligibility of individuals to succeed in an intestacy. Te Kōti Matua | High Court should continue to hold jurisdiction for other issues concerning the administration and distribution of an intestate estate.

R83

The new Act should permit appeals as of right against interlocutory decisions that can have a significant impact on the parties' rights and obligations, namely:

- a. occupation, tenancy and furniture orders;
- b. transfers of the proceedings to te Kōti Matua | High Court;
- c. orders for disclosure of information; and
- d. applications regarding the removal of a notice of claim.

R84

Te Kōti Whānau | Family Court should have jurisdiction to hear and determine any matter within the general civil and equitable jurisdiction of te Kōti-ā-Rohe | District Court pursuant to sections 74 and 76 of the District Court Act 2016. Claims heard and determined in te Kōti Whānau | Family Court should not be subject to the financial limit imposed on te Kōti-ā-Rohe | District Court.

R85 Te Kooti Whenua Māori | Māori Land Court, te Kōti Whānau | Family Court and te Kōti Matua | High Court should have concurrent jurisdiction to hear and determine succession matters involving taonga.

R86 Te Kōti Whānau | Family Court and te Kōti Matua | High Court should have the power to transfer proceedings or a question in proceedings to te Kooti Whenua Māori | Māori Land Court.

R87 The Government should consider further the appropriate rights of appeal for matters relating to taonga.

R88 The Government should consider whether the te Kooti Whenua Māori | Māori Land Court should have jurisdiction to grant applications for probate and letters of administration regarding estates for which te Kooti Whenua Māori | Māori Land Court has jurisdiction in relation to succession to Māori freehold land where the applications for probate or letters of administration are uncontested.

R89 The Government should consider the jurisdiction of te Kooti Whenua Māori | Māori Land Court to hear and determine family provision and testamentary promise claims in the new Act.

CHAPTER 12: RESOLVING DISPUTES IN COURT

R90 Applications for relationship property awards, family provision awards and testamentary promise awards under the new Act should be made within 12 months from the grant of administration in Aotearoa New Zealand.

R91 Where an estate can be lawfully distributed without a grant of administration, applications for relationship property awards, family provision awards and testamentary promise awards should be made within the later of:

- a. 12 months from the date of the deceased's death; or
- b. 12 months from the grant of administration in Aotearoa New Zealand (if the grant is made within six months of the deceased's death).

R92

A court should have discretion to grant an extension to bring a claim under the new Act provided the application for extension is made before the final distribution of the estate.

R93

The new Act should provide that final distribution of an estate will occur when all estate assets are transferred to those beneficially entitled rather than when the personal representative has finished their administrative duties and is holding the property on trust.

R94

Personal representatives should be protected against personal liability from claimants under the new Act where they distribute any part of the estate in the circumstances prescribed in section 47 of the Administration Act 1969.

R95

The new Act should include an express duty on personal representatives to assist the court, similar to that in section 11A of the Family Protection Act 1955. As part of that duty, on any application under the new Act, personal representatives should have an obligation to place before the court all relevant information in their possession or knowledge concerning:

- a. members of the deceased's family;
- b. the financial affairs of the estate;
- c. any transaction or joint tenancy between the deceased and a third party in respect of which an application has been made to recover property from the third party to meet a claim;
- d. persons who may be claimants under the Act; and
- e. the deceased's reasons for making the testamentary dispositions and for not making provision or further provision for any person.

R96

In proceedings for the division of relationship property, the surviving partner and the personal representative should have a duty to disclose each partner's assets and liabilities, and this should be expressed in the new Act.

R97

Affidavit forms should be created for the applications under the new Act to ensure appropriate information is made available.

R98

Unless a judge directs otherwise, affidavit evidence should be preferred for all claims under the new Act irrespective of the court in which the proceeding is commenced.

R99

When any minor child or adult deemed by law to lack capacity wishes to claim or may be affected by a claim under the new Act, the court should appoint a representative for that party. The court must similarly appoint a representative for any unascertained party who may be affected by a claim under the new Act. These representation orders should be made at the time of giving directions for service.

R100

The new Act should contain a provision expressly referring to the court's power to make cost orders as it thinks fit.

R101

The new Act should make express provision for the court to impose costs for non-compliance with procedural requirements.

R102

A separate scale of costs should be established for proceedings under the new Act (which may be the scale of costs recommended in R107 of the PRA review).

R103

Any Rules Committee established, as recommended by the Commission in the PRA review in R102, should consider whether to develop rules in respect of claims under the new Act.

R104

Education on tikanga Māori, including on tikanga Māori specific to whānau, should be an important aspect of education for Family Court and High Court judges who are not already knowledgeable in these areas.

R105

The courts should be able to appoint a person to inquire into such matters the court considers may assist it to deal effectively with the matters before it, including matters of tikanga Māori, and this power should be specified in the new Act.

CHAPTER 13: RESOLVING DISPUTES OUT OF COURT

R106

The new Act should expressly endorse out-of-court dispute resolution and tikanga-based dispute resolution.

R107

The new Act should prescribe a process for out-of-court resolution involving parties who are unascertained, minors or persons deemed by law to lack capacity. The court should appoint representatives for parties who are unascertained (such as beneficiaries yet to be born), minors or persons deemed by law to lack capacity when:

- a. a person makes a claim against an estate under the new Act that may affect the interests of any parties who are unascertained, minors or persons who are deemed by law to lack capacity; or
- b. any minor or person who is deemed by law to lack capacity wishes to bring a claim under the new Act.

R108

A representative for parties who are unascertained, minors or persons who are deemed by law to lack capacity should be able to agree to participate in an out-of-court resolution process and agree to any settlement reached. The representative should act in the best interests of the parties they represent.

R109

The court should be required to approve any settlement that involves unascertained parties, minors or persons deemed by law to lack capacity. It should also be able to vary or set aside any agreement that would cause serious injustice.

R110

The same process set out at R107–R108 for appointing representatives should apply for arbitrations involving parties who are unascertained, minors or persons deemed by law to lack capacity. However, outcomes reached by arbitration should not require approval by the court.

CHAPTER 14: ROLE OF PERSONAL REPRESENTATIVES

R111

The new Act should require personal representatives to give notice within three months of a grant of administration to:

- a. the deceased's surviving partner; and/or
- b. any person who the personal representatives reasonably apprehend was in an intimate relationship with the deceased at the time of death.

The notice should be in a prescribed form and contain information about:

- a. relationship property entitlements;
- b. family provision claims;
- c. relevant time limits; and
- d. obtaining independent legal advice.

R112

If the Government decides to implement Option One from R25 so that all children and grandchildren of the deceased are eligible claimants for family provision, personal representatives should not be required to give notice to the children and grandchildren.

R113

If the Government decides to implement Option Two from R25 so that the deceased's children who are under 25 or are disabled are eligible claimants for family provision, personal representatives should be required to give notice within three months of the grant of administration to:

- a. the guardian of any of the deceased's children aged under 18; and
- b. children aged 18 or older who may be eligible to claim family provision.

The notice should be in a prescribed form. It should set out information about family provision, relevant time limits and obtaining independent legal advice.

R114

Personal representatives' duties to give notice should be satisfied when they have taken reasonable steps to search for and give notice to the required recipients.

R115

Where the estate can be distributed without personal representatives being appointed, there should be no notice requirements. However, trustee companies who administer estates having filed an election to administer the estate should observe the notice requirements.

R116

Personal representatives should not be required to give notice to potential testamentary promise claimants.

R117

The new Act should not prescribe the role personal representatives are to take in proceedings, except to provide a duty to place before the court information as recommended in R95.

R118

No provision should be made within the new Act for how personal representatives are to manage conflicts of interest, instead the general law on personal representatives' duties should continue to apply. The new Act should, however, contain a power for both te Kōti Matua | High Court and te Kōti Whānau | Family Court to remove or replace personal representatives where necessary or expedient.

CHAPTER 15: CROSS-BORDER MATTERS**R119**

With the exceptions of succession to Māori land (under Te Ture Whenua Maori Act 1993) and succession to taonga (discussed in Chapter 3), all matters of succession should be governed by the new choice of law rules, which should be expressed in statute. The multilateral choice of law rules should identify the most appropriate system of law to govern the issue in question, whether that is New Zealand law or foreign law, with the exception of formal validity, which would continue to be governed by section 22 of the Wills Act 2007.

R120

The applicable law for determining matters of succession should be the law of the deceased's last habitual residence. This should include successions with or without a will, relationship property claims on death and other claims against estates. Habitual residence should be defined in legislation, drawing on the definition in the European Union Succession Regulation, with the objective of identifying the country to which the deceased had the closest and most stable connection.

R121

The construction or interpretation of a will should be governed by the law intended by the will-maker. This should be presumed to be the law of their habitual residence unless there is a clear indication that the will-maker intended a different law to be applied.

R122

The applicable law for determining capacity to make a will should be the law of the deceased's habitual residence at the time of making the will, whereas the applicable law for determining capacity to take under the will should be the law of the deceased's habitual residence at the time of death.

R123

A rule of adaptation should be available and prescribed in statute.

R124

A New Zealand court should have the power to refuse to apply a foreign rule where doing so would be contrary to public policy.

R125

The Government should consider replacing the reference to "domicile" with "habitual residence" in section 22 of the Wills Act 2007.

R126

During their lifetime, partners should be entitled to agree that the law of a nominated country should apply to some or all of their property on death. These agreements should be subject to the same validity requirements recommended in R137 and R138 of the PRA review.

R127

The court should also retain a residual discretion to set aside a choice of law agreement if applying the law of another country or giving effect to the agreement would be contrary to public policy.

R128

The court should have broad powers to give effect to relationship property orders, family provision awards and testamentary promise awards. These should expressly include the power, in relation to property situated outside Aotearoa New Zealand, to order a party to a proceeding to transfer property or pay a sum of money to another party.

R129

The courts should continue to determine the application of renvoi in a particular case when relevant but the application of renvoi should not be referred to in statute.

R130

The new Act should confirm the broad subject-matter jurisdiction of te Kōti Whānau | Family Court and te Kōti Matua | High Court but should not otherwise include bespoke jurisdictional rules.

R131

The new Act should confirm that the Moçambique rule has no application in matters covered by that Act.

CHAPTER 16: OTHER REFORM MATTERS

R132

The Government should consider ways to improve awareness and understanding of the law related to succession and the new Act.

R133

The Government should consider reviewing the validation powers in section 14 of the Wills Act 2007, including whether the High Court should have the power to validate audio or visual recordings as a will or other expression of testamentary wishes.

R134

The Government should consider recognising ōhākī as an expression of testamentary wishes enforceable under state law.

R135

Section 18 of the Wills Act 2007 should be repealed.

R136

Section 19 of the Wills Act 2007 should be amended to apply two years after the point when the partners in any relationship type ceased to live together in a relationship.

R137

The definition of de facto relationship in the Wills Act 2007 should be amended to refer to two people who “live together as a couple”, consistent with the definition in the Property (Relationships) Act 1976.

R138

The Government should consider undertaking research to identify the nature and extent of multi-partner relationships in Aotearoa New Zealand and how multi-partner relationships should be recognised and provided for in the law.

R139

The Government should consider whether to increase the monetary threshold for distributing an estate without a grant of administration.

R140

Section 203 of the Social Security Act 2018 should be repealed.

CHAPTER 1

Introduction

- 1.1 State succession law is a body of rules that governs how a person's property is distributed when they die. This review focuses on rights to a deceased person's property whether the deceased left a will or died intestate. Succession to the estate often occurs at a time of grieving. Family and whānau members or others can be upset to find how the deceased has organised their affairs or how the law applies when no will has been made. Māori may find that state law in these circumstances conflicts with tikanga Māori, resulting in outcomes that do not reflect tikanga or whānau wishes. Important and difficult questions arise about balancing respect for the mana and wishes of an individual and obligations to family, whānau and others.
- 1.2 Te Aka Matua o te Ture | Law Commission (the Commission) recently reviewed relationship property rights on separation.¹ In the review of the Property (Relationships) Act 1976 (PRA review), we explained that the context for dividing property on the death of a partner is different to the context for dividing property on separation as there may be tensions between the competing interests of all those potentially affected by the death of that person. Those affected may include not only the surviving partner but children and other family and whānau members of the deceased as well as other people. To complete our review of the PRA, the Government asked the Commission to review the division of relationship property on death, along with claims that can be made against the estate.
- 1.3 We have considered parts of Aotearoa New Zealand's succession law that have not been comprehensively reviewed in decades. Much of the key legislation was drafted in the mid-20th century. Since that time, Aotearoa New Zealand has undergone significant social change, affecting the relationships New Zealanders enter and what they think family means. The need for law-making to properly consider the Crown's obligations under te Tiriti o Waitangi | Treaty of Waitangi is also better recognised by the Crown. The law has not kept pace with these changes or the reasonable expectations of New Zealanders.
- 1.4 This Report sets out our findings and makes recommendations for change.

OUR REVIEW

- 1.5 The terms of reference for the review of succession law were published in December 2019. They required us to consider who should be entitled to claim property from a

¹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019).

deceased person's estate, with a particular focus on the deceased's partner and other members of the family. In particular, we considered the following statutes:

- (a) Property (Relationships) Act 1976.
- (b) Family Protection Act 1955.
- (c) Law Reform (Testamentary Promises) Act 1949.
- (d) The intestacy regime in Part 3 of the Administration Act 1969.

- 1.6 The terms of reference required us to consider how succession law should address areas of particular concern to Māori. We have not reviewed the regime for succession to whenua Māori under Te Ture Whenua Maori Act 1993 but have considered questions relating to succession generally that may be of particular concern to Māori. In doing so, we comment on aspects of Te Ture Whenua Maori Act.
- 1.7 The terms of reference did not include all aspects of administration and succession (such as the Wills Act 2007 and the remainder of the Administration Act), but we could not consider entitlements to and claims against estates in isolation from these other laws and some of our recommendations therefore relate to them.
- 1.8 In April 2021, we published our Issues Paper and consultation website. This followed extensive research and preliminary consultation.² We received 216 submissions. This included 182 submissions from members of the public, 15 submissions from legal practitioners, academics and other experts or professionals and 19 submissions from organisations, including government entities, law firms and community organisations. We held a second wānanga with tikanga and legal experts to consider our approach in the Issues Paper to matters of tikanga. In addition, we met with several organisations and individuals.
- 1.9 Throughout the review, we have been supported by an Expert Advisory Group and have sought guidance from the Commission's Māori Liaison Committee on those matters of particular interest to Māori. Tai Ahu (Waikato-Tainui, Ngāti Kahu (Te Paatu)) has assisted us with our understanding of tikanga and succession as we have prepared this Report, including undertaking interviews with kaumātua, which we refer to in later chapters.

THE SUCCESSION SURVEY

- 1.10 Te Whare Wānanga o Ōtākou | University of Otago (University of Otago), funded through the Michael and Suzanne Borrin Foundation, has surveyed public attitudes and values towards succession issues (the Succession Survey).³ The Succession Survey involved

² We reviewed the extensive work of the Commission on succession matters in the 1990s. See Te Aka Matua o te Ture | Law Commission *Succession Law: Testamentary Claims – A discussion paper* (NZLC PP24, 1996); Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996; and Te Aka Matua o te Ture | Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997). We issued a survey to lawyers who work in succession law in April 2020 and received 23 responses (the Practitioner Survey). We undertook this Practitioner Survey as our initial plans for preliminary public engagement could not proceed due to the COVID-19 pandemic. In June 2020, we held an initial wānanga with tikanga and legal experts to consider the tikanga relevant to succession. We engaged Te Amokura Consultants Ltd to facilitate our engagement with Māori as we prepared the Issues Paper. We held several online hui with various groups including whānau members and Māori Land Court staff.

³ Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values – A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021).

interviews with a nationwide, statistically representative sample of the population, with “booster” targets for Māori, Pacific peoples and Asian populations. Interviewees were asked for their views on matters such as:

- (a) the importance of testamentary freedom;
- (b) the rights of family members, particularly financially independent adult children, to challenge the deceased’s will;
- (c) who should inherit in an intestacy and in what proportions; and
- (d) attitudes towards relationship property rights on death.

1.11 We refer to the results of the Succession Survey throughout this Report.

MATTERS ADDRESSED IN THIS REPORT

1.12 This Report is the culmination of a two-year review. We make 140 recommendations addressing a range of issues.

1.13 In developing these recommendations, we have recognised that reform can be achieved in a variety of ways and that legislation is not an exclusive solution.⁴ In considering each issue, we have therefore also considered:⁵

- (a) whether the courts should be left to develop and determine the law on the issue;⁶
- (b) whether, instead of legislative reform, the issue could be addressed through greater education of the public and professionals; and
- (c) whether the issue is a broader policy problem that might benefit from separate examination.

1.14 We also recognise that it is important when making law reform proposals to ensure, as far as practicable, that they do not have unintended consequences. Where we have not identified significant practical issues with the current law, the potential for introducing unintended consequences may weigh against proposing reform.

1.15 In this Report we discuss matters of capacity in terms of current law, including suggesting that lacking capacity should be defined consistently with the Trusts Act 2019.⁷ However, the Commission has commenced its review of the law relating to adult decision-making capacity, Ngā Huarahi Whakatau, and we expect that recommendations from that review

⁴ See Lord Toulson “Democracy, Law Reform and the Rule of Law” in Matthew Dyson, James Lee and Shona Wilson Stark (eds) *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Hart Publishing, Oxford, 2016) 127; David Ormerod “Reflections on the Courts and the Commission” in Matthew Dyson, James Lee and Shona Wilson Stark (eds) *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Hart Publishing, Oxford, 2016) 326; and Ellen France, Judge of the Supreme Court of New Zealand “Something of a Potpourri: A Judge’s Perspective on Law Reform” (address to Te Aka Matua o te Ture | Law Commission’s 30th Anniversary Symposium, Wellington, 3 November 2016).

⁵ See Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [1.18]–[1.33].

⁶ This recognises that the constitutional role of interpreting the provisions of legislation and applying those provisions to the particular facts of the case rests with the courts: see Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Brookers, Wellington, 2021) at [2.5.6] and [21.2.2]–[21.2.3]. In doing so, the courts are able to resolve issues of interpretation and develop the law in a way that promotes the legislation’s purpose and principles and ensures it works as Parliament intended.

⁷ See Chapter 12.

will address whether capacity should be understood in a more nuanced way than is presently set out in law.⁸

- 1.16 Following on from this chapter, this Report is organised into three parts:
- (a) Part One examines the basis for good succession law in contemporary Aotearoa New Zealand.
 - (b) Part Two addresses the entitlements to and claims against estates.
 - (c) Part Three considers making and resolving claims against estates.

Part One: Good succession law in contemporary Aotearoa New Zealand

- 1.17 Chapter 2 draws together the threads of what makes good succession law for contemporary Aotearoa New Zealand, explaining the foundation that underpins the recommendations for reform we make in the following chapters. Importantly, we conclude that *kāwananatanga* should be exercised in a responsible manner in relation to succession, including facilitating the exercise of *tino rangatiratanga* by Māori. We recommend in this chapter that a new statute called the Inheritance (Claims Against Estates) Act (the new Act) should be enacted as the principal source of law applying to entitlements and claims against an estate.

Part Two: Entitlements to and claims against estates

- 1.18 Chapter 3 addresses how succession to *taonga* should be governed by *tikanga* Māori rather than state law.
- 1.19 Chapter 4 addresses a surviving partner's relationship property entitlements under the deceased's will or in an intestacy.
- 1.20 Chapter 5 considers the obligations of the deceased to family and *whānau* and what claims for "family provision" from the estate the new Act should permit.
- 1.21 Chapter 6 examines what claims against an estate should be available in the new Act in respect of the contributions a person has made towards the deceased.
- 1.22 Chapter 7 considers how estates should be distributed when a person dies intestate.

Part Three: Making and resolving claims against estates

- 1.23 Chapter 8 examines what property should be claimable under the new Act, the respective priorities between entitlements and claims under the new Act and what anti-avoidance mechanisms the new Act should incorporate to access property that may fall outside an estate.
- 1.24 Chapter 9 addresses how the new Act should provide for the court's power to grant individuals use and occupation orders over an estate.
- 1.25 Chapter 10 considers how the new Act should provide for agreements people may make during their lifetime that determine rights against their estates when they die and agreements by parties wishing to settle disputes.

⁸ Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakataua a ngā Pakeke* | Review of Adult Decision-making Capacity Law: Terms of Reference (October 2021).

- 1.26 Chapter 11 addresses the jurisdiction of the courts to hear and determine claims under the new Act.
- 1.27 Chapter 12 considers the law and procedure that applies to the resolution of disputes in court.
- 1.28 Chapter 13 considers the law and procedure that applies to the resolution of disputes out of court.
- 1.29 Chapter 14 addresses the duties that should fall on personal representatives when claims are made against an estate under the new Act.
- 1.30 Chapter 15 examines cross-border elements to entitlements and claims against an estate.
- 1.31 Chapter 16 covers a range of other reform issues, including the need for education about the law relating to succession, the revocation rules under sections 18 and 19 of the Wills Act when people enter or leave marriages or civil unions, the court's power to validate wills under the Wills Act and the absence of recognition of *ōhākī* in state law.

OUR TERMINOLOGY AND OTHER MATTERS

- 1.32 Throughout this Report, we use several abbreviated or defined terms:
- (a) PRA — Property (Relationships) Act 1976.
 - (b) FPA — Family Protection Act 1955.
 - (c) TPA — Law Reform (Testamentary Promises) Act 1949.
 - (d) TTWMA — Te Ture Whenua Maori Act 1993.
 - (e) Estate — the property of a deceased person that passes to their personal representatives to be dealt with in accordance with the deceased's will or the intestacy regime.
 - (f) New Act — the new statute called the Inheritance (Claims Against Estates) Act we recommend should be enacted as the principal source of law applying to entitlements and claims against an estate in place of Part 8 of the PRA, the FPA and TPA.
 - (g) Intestacy regime — the regime for the distribution of wholly or partially intestate estates under Part 3 of the Administration Act 1969.
 - (h) Partner — a person in a qualifying relationship under the PRA, including a spouse, civil union partner or partner in a *de facto* relationship.
 - (i) Personal representatives — we use this term to refer to both executors, who are appointed under a will to carry out the terms of the will, and administrators, who have been granted letters of administration in respect of estates.
 - (j) PRA review — the Commission's review of the PRA concluding in the final report *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976*.⁹

⁹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019).

- (k) Relationship — for readability, we use the term “relationship” unless we are referring to a specific relationship type (marriage, civil union or de facto relationship).
 - (l) Succession Survey — the survey of public attitudes and values towards succession issues carried out by Te Whare Wānanga o Ōtākou | University of Otago, *Entitlements to Deceased People’s Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey*.¹⁰
- 1.33 When discussing te Tiriti o Waitangi | Treaty of Waitangi in this Issues Paper, we use “the Treaty” as a generic term that is intended to capture both the Māori text (te Tiriti o Waitangi) and the English text (the Treaty of Waitangi). When we are referring to the Māori text only, we either use the term “te Tiriti”, refer to “the Māori text” or make this clear in the context. When we are referring to the English text only, we refer to the “English text” or make this clear in the context. To the extent that the principles of the Treaty, which have developed through jurisprudence, substantively reflect the rights and obligations arising from the texts, the principles may also be captured by the term “the Treaty”. Otherwise, we specifically refer to “the principles of the Treaty” or to specific principles.
- 1.34 The Treaty and key Māori terms and concepts used in this Report are described in Chapter 2. Many kupu Māori are not defined in the Report because their meanings are well understood in contemporary Aotearoa New Zealand. We have used simple in-text definitions for those kupu Māori that are less well known.
- 1.35 When we refer to or summarise submissions received on the Issues Paper, we use the submitter’s language, with minor edits if needed for readability. For example, if a submitter refers to te Tiriti, we use that language irrespective of our general approach as set out above.
- 1.36 When we cite an Act or its provisions that do not use macrons on kupu Māori, such as TTWMA, we use the language as written in the Act. Similarly, when quoting submissions that do not use macrons, we use the language of the submitters without change.
- 1.37 Many court decisions under the PRA and FPA are anonymised through the use of fictitious names or the use of parties’ initials. Some decisions are not anonymised yet are still subject to publication restrictions.¹¹ To address this, we have replaced the names of parties with initials when our discussion of the facts of a case includes sensitive information that could identify vulnerable individuals.
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¹⁰ Ian Binnie and others *Entitlements to Deceased People’s Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021).

¹¹ Property (Relationships) Act 1976, s 35A; and Family Court Act 1980, ss 11B–11D.

Part One

**GOOD SUCCESSION LAW
IN CONTEMPORARY
AOTEAROA NEW ZEALAND**



CHAPTER 2

Good succession law

IN THIS CHAPTER, WE CONSIDER:

- the implications of te Tiriti o Waitangi | the Treaty of Waitangi for this review;
- a framework for considering te ao Māori and succession;
- the criteria for good succession law in Aotearoa New Zealand; and
- the need for a new Act addressing entitlements to and claims against estates.

INTRODUCTION

- 2.1 In the Issues Paper we discussed developing good succession law at a general level and with a focus on state law. We also acknowledged the significance of succession in te ao Māori and set out a framework for developing good succession law from an ao Māori perspective.¹
- 2.2 The existing state law of succession reflects societal attitudes and values prevalent at the time the laws were drafted in the mid-20th century.² Since then, Aotearoa New Zealand has undergone a period of significant social change. As we identified in the Issues Paper, Aotearoa New Zealand is more ethnically diverse, there is increasing diversity of family arrangements and life expectancy is progressively increasing and projected to keep increasing.³ While tikanga Māori has remained a constant as an independent source of rights and obligations in te ao Māori and the first law of Aotearoa, there is now broader

¹ In her submission on the Issues Paper, Professor Jacinta Ruru described the Issues Paper as a sophisticated path-setting engagement with ao Māori, tikanga Māori and te Tiriti o Waitangi, representing an exciting next-level engagement with ao Māori and Māori law. Te Hunga Rōia Māori o Aotearoa (THRMOA) described the Commission's approach as "ground-breaking".

² Except for the Property (Relationships) Act 1976, the Wills Act 2007 and the Succession (Homicide) Act 2007.

³ Te Aka Matua o te Ture | Law Commission *Review of Succession Law: Rights to a person's property on death | He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* (NZLC IP46, 2021) at [1.10]–[1.17]; and Te Aka Matua o te Ture | Law Commission *Relationships and Families in Contemporary New Zealand | He Hononga Tangata, he Hononga Whānau i Aotearoa o Nāiane* (NZLC SP22, 2017).

acknowledgement of its significance for Aotearoa New Zealand, including under te Tiriti o Waitangi | Treaty of Waitangi (the Treaty).⁴

- 2.3 In this chapter, we draw together these threads, explaining the foundation that underpins the recommendations we make in the following chapters for the reform of succession law. Our understanding of contemporary public attitudes and values has been informed by the results of our consultation and the Succession Survey.

CURRENT LAW

- 2.4 State law of succession is a body of law that governs how a person's property is distributed on their death. State succession law follows logically from the law that recognises property rights during a person's lifetime, such as rights to ownership, use and exclusion of others. These laws are well established in Aotearoa New Zealand, reflecting the English law that developed in the 18th century largely as a product of the rise of liberal individualism.⁵ Croucher and Vines have observed that: ⁶

The emphasis on the right to do what one liked with one's property reflected the social theory of the time — the importance of the individual, the emphasis on free will, the importance of contract, and the rise of capitalism.

- 2.5 The most common means of succeeding to the property of a deceased is by being named a beneficiary of their will. A will is a legal document that sets out the wishes of the will-maker for the distribution of their estate after they die. Where there is no will, the Administration Act 1969 sets out rules for how a person's estate is to be distributed (the intestacy regime).⁷
- 2.6 The deceased's will or the intestacy regime only governs the distribution of the deceased's estate. An estate does not include any property the deceased gave away during their lifetime, such as gifts or property the deceased settled on trust. Nor does an estate include property that passes independently of the will or intestacy regime, such as jointly owned property that passes to a co-owner by survivorship. Te Ture Whenua Maori Act 1993 provides a statutory regime for succession to Māori land.
- 2.7 State succession law in Aotearoa New Zealand provides an individual with considerable freedom to choose what will happen to their property on their death. Their decisions will be reflected in the terms of their will or the way they structure their affairs to include or exclude certain property from their estate. This is sometimes referred to as testamentary freedom.

⁴ When discussing te Tiriti o Waitangi | Treaty of Waitangi in this paper, we use "the Treaty" as a generic term that is intended to capture both the Māori text (te Tiriti o Waitangi) and the English text (the Treaty of Waitangi). When we are referring to the Māori text only, we either use the term "te Tiriti", refer to "the Māori text" or make this clear in the context. When we are referring to the English text only, we refer to "the English text" or make this clear in the context. To the extent that the principles of the Treaty, which have developed through jurisprudence, substantively reflect the rights and obligations arising from the texts, the principles may also be captured by the term "the Treaty". Otherwise, we specifically refer to "the principles of the Treaty" or to specific principles.

⁵ See Sylvia Villios and Natalie Williams "Family provision law, adult children and the age of entitlement" (2018) 39 *Adel L Rev* 249 at 250.

⁶ Rosalind F Croucher and Prue Vines *Succession: Families, Property and Death* (5th ed, LexisNexis Butterworths, Chatswood (NSW), 2019) at 23.

⁷ See Administration Act 1969, ss 75, 77 and 78–79.

- 2.8 Testamentary freedom is not absolute in existing succession law. A key competing objective of succession law has been to ensure that property passes from the deceased to their family members and others to whom they owe obligations. The law provides certain individuals with entitlements to, or the right to claim against, the deceased's estate despite how the deceased may have wanted their property to be distributed. The primary entitlements and claims are:
- (a) the entitlements of the deceased's surviving partner to relationship property under the Property (Relationships) Act 1976 (PRA);
 - (b) the rights of the deceased's family to claim provision from the estate under the Family Protection Act 1955 (FPA) for their proper maintenance and support;
 - (c) the rights of individuals who may have contributed to the deceased for which the law provides a remedy under the Law Reform (Testamentary Promises) Act 1949 (TPA) or through the common law or equity; and
 - (d) the entitlements of family members to the deceased's property if the deceased died intestate under the Administration Act.

NGĀ TIKANGA

- 2.9 Succession is an important matter for Māori.⁸ In te ao Māori, succession reflects the importance of whānau. Kin relationships together with their inherent reciprocal obligations provide the overall context for understanding succession from an ao Māori perspective.⁹
- 2.10 In the Issues Paper, we said that, for present purposes, tikanga is constitutionally significant to the development of the law in four mutually reinforcing respects:
- (a) First, as an independent source of rights and obligations in te ao Māori and the first law of Aotearoa.¹⁰

⁸ This was recognised in the Commission's 1990s work on succession, where significant work was undertaken by the Commission and external consultants on te ao Māori and succession. See Edward Taihakurei Durie "Custom Law" (paper prepared for Te Aka Matua o te Ture | Law Commission, January 1994); Joan Metge "Succession Law: Background Issues Relating to Tikanga Maori" (paper prepared for Te Aka Matua o te Ture | Law Commission, 1994); Joseph Williams "He Aha Te Tikanga Maori" (paper prepared for Te Aka Matua o te Ture | Law Commission (draft), 1998); and David V Williams "He Aha Te Tikanga Maori" (paper prepared for Te Aka Matua o te Ture | Law Commission (revised draft), 10 November 1998). The Commission retained consultants (Professor Patu Hohepa, Dr David Williams and Waerete Norman) to advise on succession as it relates to Māori families. A number of hui were conducted around Aotearoa New Zealand to assist the Commission to hear from Māori about succession issues. Hohepa and Williams drafted a paper published as Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996). See also Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 66–68.

⁹ For a broad-ranging discussion of social organisation among Māori, see Te Rangi Hiroa | Peter Buck *The Coming of the Maori* (Whitcombe and Tombs, Christchurch, 1949) at 331. In our Issues Paper we also acknowledged the place of death in te ao Māori in order to provide context for our discussion of tikanga relating to succession: Te Aka Matua o te Ture | Law Commission *Review of Succession Law: Rights to a person's property on death | He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* (NZLC IP46, 2021) at [2.39]–[2.42].

¹⁰ Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David V Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) 330 at 331 and 334; and Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 *Taumauri | Waikato L Rev* 1 at 2–5. See also *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, particularly the reasons given by William Young and Ellen France JJ at [166]–[169], Glazebrook J at [237], Williams J at [297] and Winkelmann CJ at [332].

- (b) Second, in terms of the Treaty rights and obligations that pertain to tikanga.
- (c) Third, where tikanga values comprise a source of the New Zealand common law¹¹ or have been integrated into law by statutory reference.¹²
- (d) Fourth, to give effect to Aotearoa New Zealand’s international obligations in relation to Māori as indigenous people, including under the UNDRIP.¹³
- 2.11 Professor Patu Hohepa emphasised the need to revisit tikanga Māori in order that its part in succession law reform is understood. He explained the centrality of tikanga in the following terms:¹⁴
- E kore e whakawaia
E whakangaro i te tikanga
Kei hiiritia e te ture
Waiho ki te ture tangata
- 2.12 Hohepa observed that, while surface changes may occur to things such as land tenure or social structures, they do so without sacrificing deep cultural principles because they have the underpinnings of cultural strength and continuity.¹⁵

¹¹ As recognised by te Kōti Mana Nui | Supreme Court in *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]–[95]; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [9] and [169]. In *Ellis v R* [2020] NZSC 89, submissions were sought on the application of tikanga on the question of whether the Court has jurisdiction to hear an appeal against conviction after the death of the appellant. The Court issued its judgment allowing the appeal to proceed, but reasons for that decision are to be provided with the judgment on the substantive appeal: at [5]. See also *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291 at [43]–[47] and [58].

¹² Statutes referencing tikanga include the Oranga Tamariki Act 1989 (see s 2 definitions of “tikanga Māori” and “mana tamaiti (tamariki)”); Resource Management Act 1991; and Taumata Arowai—the Water Services Regulator Act 2020. See also Christian N Whata “Evolution of legal issues facing Māori” (paper presented to Maori Legal Issues Conference, Legal Research Foundation, Auckland, 29 November 2013).

¹³ Aotearoa New Zealand affirmed the United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295 (2007) (UNDRIP) in 2010. The UNDRIP recognises the importance of protecting the collective rights of indigenous peoples and addresses the rights to self-determination, preservation of culture and institutions, participation in decision-making and consultation, and rights to lands and resources. As a declaration rather than a convention, the UNDRIP does not have legally binding force attached to it in international law. However, the UNDRIP is widely viewed as not creating new rights but rather elaborating on internationally recognised human rights as they apply to indigenous peoples and individuals, thus in this way having a binding effect: see Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Whaia te Mana Motuhake | In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 34–35 and 38–44; Te Rōpū Whakamana | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity — Te Taumata Tuatahi* (Wai 262, 2011) at 42 and 233–234; and Claire Charters “The UN Declaration on the Rights of Indigenous Peoples in New Zealand Courts: A Case for Cautious Optimism” in *UNDRIP Implementation: Comparative Approaches, Indigenous Voices from CANZUS — Special Report* (Centre for International Governance Innovation, 2020) 43 at 48–50. This is reflected in the right to self-determination in art 3 being characterised as “essential to the enjoyment of all human rights”: Melissa Castan “DRIP Feed: The Slow Reconstruction of Self-determination for Indigenous Peoples” in Sarah Joseph and Adam McBeth (eds) *Research Handbook on International Human Rights Law* (Edward Elgar Publishing, Cheltenham, 2010) 492 at 499; and see also Office of the High Commissioner for Human Rights *CCPR General Comment No 12: Article 1 (Right to Self-determination) The Right to Self-determination of Peoples* (13 March 1984).

¹⁴ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 16. Hohepa explains this as stating that tikanga should never be watered down or lost, otherwise it would be codified in law and left to languish in human-created laws.

¹⁵ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 17.

- 2.13 In our Issues Paper, we said that understanding the relationships between Māori and the tangible and intangible is important. We noted that certain tangible items may be more important to the collective than the individual. We also observed that, while succession in te ao Māori is also concerned with the intangible, we did not intend to consider succession to the intangible in this review.
- 2.14 We also described tikanga relevant to succession. We said it was our attempt to identify principles that must be understood in order to consider an ao Māori perspective, recognising that our discussion did not seek to be a comprehensive description.
- 2.15 Additionally, Māori, both individually and collectively, interpret tikanga in their own ways and place varying degrees of importance on particular values.¹⁶ The values:¹⁷
- ... do not represent a hierarchy of ethics, but rather a koru, or a spiral, of ethics. They are all part of a continuum yet contain an identifiable core.
- 2.16 We have heard that some Māori prefer not to discuss tikanga as involving values or principles. Rather, tikanga is just tikanga. We acknowledge that view but have found that we need to refer to values or principles so that later in this chapter we can articulate what we mean by weaving new law. In taking this approach, we are reassured by the expert evidence of Dr Te Kahautu Maxwell when he said:¹⁸
- There are a number of core values that underpin tikanga: whanaungatanga; mana; tapu; manaakitanga; and aroha. There are iwi variations of the core values, and therefore the above list is how I understand tikanga and see tikanga to being. Therefore, these core values are not prescribed and may differ from iwi to iwi. These core values are like a whariki; a woven mat, they must go together for tikanga to stand up. You must understand the core values for you to understand tikanga, because it is these core values that instruct you how to behave in the correct manner, which is tikanga.
- 2.17 We set out below the tikanga we understand to be relevant to succession, as described in the Issues Paper.

Tika

- 2.18 Hohepa has described tika as the “major principle” that overarches and guides formalities and practice in Māori society.¹⁹ Tika has a range of meaning from “right and proper, true, honest, just, personally and culturally correct or proper” to “upright”.²⁰ It forms the basis of the word tikanga. The practice of a particular tikanga therefore needs to be correct and right, or tika.

¹⁶ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 28.

¹⁷ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 29.

¹⁸ *Re Reeder (Ngā Pōtiki Stage 1 – Te Tāhuna o Rangataua)* [2021] NZHC 2726 at [48]. Dr Maxwell’s qualifications as an expert in mātauranga Māori and his evidence were not disputed: at [46]. See also the evidence of Moana Jackson, cited in Jacinta Ruru and Leo Watson “An Introduction to Māori land, Taonga and the Māori Land Court” (paper presented to Property Law Conference – Change, it’s inevitable!, Auckland, 28 June 2018) at 4, and referenced in Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 17.

¹⁹ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 16.

²⁰ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 16.

Whanaungatanga

- 2.19 Whanaungatanga has been described as “the glue that held, and still holds, the system together”.²¹ It has been said to be:²²

... the fundamental law of the maintenance of properly tended relationships. The reach of this concept does not stop at the boundaries of what we might call law, or even for that matter, human relationships. It is also the key underlying cultural (and legal) metaphor informing human relationships with the physical world — flora, fauna, and physical resources — and the spiritual world — the gods and ancestors.

- 2.20 Whanaungatanga includes the ideas that, in te ao Māori, relationships among people and with the natural and spiritual worlds are fundamental to communal wellbeing, and all individuals owe certain responsibilities to the collective.²³

- 2.21 The idea of belonging, which underpins the Māori perspective on succession, has its basis in whanaungatanga. Harry Dansey writes that the Māori attitude to death is influenced by the depth of feeling for relations. Not only is the notion of family extended but so are the rights and responsibilities of relationship.²⁴ Rights to belong to the hapū and participate in resources are crucial from a whanaungatanga perspective and help promote a sense of belonging.

Whakapapa

- 2.22 Māori history contains a detailed account of Māori origins from Papatūānuku and Ranginui to Tāne-mahuta, Tangaroa, Tūmatauenga, Haumia-tiketike, Tāwhiri-mātea, Rongo and their siblings across many generations and significant figures and stories to the tangata whenua of today.²⁵ This detailed history shows the power and importance of whakapapa to the Māori world view.

- 2.23 Whakapapa literally means “to place in layers”.²⁶ It has been described by Sir Apirana Ngata as:²⁷

... the process of laying one thing upon another. If you visualise the foundation ancestors as the first generation, the next and succeeding ancestors are placed on them in ordered layers.

²¹ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Taumauri | Waikato L Rev 1 at 4.

²² Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Taumauri | Waikato L Rev 1 at 4.

²³ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 30–31.

²⁴ Harry Dansey “A View of Death” in Michael King (ed) *Te Ao Hurihuri: Aspects of Maoritanga* (Reed Publishing, Auckland, 1992) 105 at 109.

²⁵ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 13–15.

²⁶ Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 504.

²⁷ Apirana T Ngata *Rauru-nui-ā-Toi Lectures and Ngati Kahungunu Origins* (Victoria University of Wellington, Wellington, 1972) at 6, cited in Joseph Selwyn Te Rito “Whakapapa: A framework for understanding identity” [2007] (2) MAI Review 1 at 1.

- 2.24 Whakapapa therefore details the nature of the relationships between all things.²⁸ Because all things come from Papatūānuku and Ranginui, all things are connected through whakapapa.²⁹
- 2.25 Whakapapa is crucial to succession for Māori because it underpins connections to whānau, tribal groups and whenua.³⁰ We have heard that a primary function of succession for Māori is to maintain whakapapa connections to their whenua, whānau, tūpuna (ancestors) and atua (revered ancestors or deities).

Mana

- 2.26 In a narrow sense, mana can be defined as “the integrity of a person or object”.³¹ In a wider sense, it is a measure of all things that are gathered from “ancestral and spiritual inheritance, prestige, power, recognition, efficacy, influence, authority and personal ability.”³²
- 2.27 It is often said there are three aspects of personal mana. Māori Marsden described them as mana atua (God-given power), mana tūpuna (power from the ancestors) and mana tangata (authority derived from personal attributes).³³
- 2.28 Although these aspects to mana are distinct (and reflect the different ways mana may manifest itself), it is said that the source of all mana is the atua Māori.³⁴ The whakataukī “[k]o te tapu te mana o ngā kāwai tūpuna” (“tapu is the mana of the kāwai tūpuna”) demonstrates that mana shares a very strong positive connection with tapu.³⁵

²⁸ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 30. See also Nin Tomas “Maori Concepts of Rangatiratanga, Kaitiakitanga, the Environment, and Property Rights” in David Grinlinton and Prue Taylor (eds) *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff Publishers, Leiden, 2011) 219 at 228.

²⁹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999) at 39.

³⁰ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 11.

³¹ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 19.

³² Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 18.

³³ Māori Marsden “God, Man and Universe: A Māori View” in Michael King (ed) *Te Ao Hurihuri: The World Moves On* (Hicks Smith, Wellington, 1975) at 194, as cited in Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 33. See also the comment from Māori Marsden in “Te Mana o Te Hiku o Te Ika” (1986), cited in Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at n 13, that “the triadic nature of mana is important because it explains the dynamics of Māori leadership and the lines of accountability between leaders and their people”, as cited in Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 33.

³⁴ Māori Marsden “God, Man and Universe: A Māori View” in Michael King (ed) *Te Ao Hurihuri: The World Moves on: Aspects of Maoritanga* (Hicks Smith, Wellington, 1975) at 191 and 194.

³⁵ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 51. The importance of this work lies in the significant expertise of the contributors to it, who include John Clarke (Director, Māori – Tāhū o te Ture | Ministry of Justice); Roka Paora, Te Ru Wharehoka and Te Ariki Morehu (Ngā Kaumātua Āwhina); Te Wharehuia Milroy and Wiremu Kaa (Māori Experts); Wilson Isaac, James Johnston, John MacDonald, Ani Mikaere, Moria Rolleston, Henare Tate, Merepeka Raukawa Tait, Iritana Tawhiwhirangi and Betty Wark (Māori Focus Group); and Ramari Paul, Hui Kahu, Jason Ataera and Chappie Te Kani (Tangata Whenua Student Work Programme).

- 2.29 Mana is important to succession for two reasons. What happens after death can have an impact on the mana of the deceased and the collective.³⁶ Mana tūpuna demonstrates the importance of the mana of those who have died to those who are living today. The mana of the deceased can also impact on how closely their wishes are followed after death.
- 2.30 Associate Professor Khylee Quince has observed that, in daily life, mana supported the institution of tapu as the basis of property entitlements. Quince states:³⁷

Personal property rights were acquired through the extension of personal tapu to objects. The degree of tapu signified the degree of entitlement to one person and the degree of prohibition against others. Mana was the means by which an individual could do this.

Tapu and noa

- 2.31 Tapu is a principle in te ao Māori that acts as a “corrective and coherent power”.³⁸ Hohepa has defined it as:³⁹
- ... the essence of sanctity, cultural protection, sacredness, set apartness. It is not only a possible source of protection for all things, it also has a ‘potential for power’.
- 2.32 Similar to mana, tapu can be traced to the tūpuna, then to the atua Māori, and then to Ranginui and Papatūānuku.⁴⁰ This gives rise to an “intrinsic tapu” that all people, places and things possess by virtue of their connection to the atua Māori.⁴¹ A hara (violation, offence) against tapu demand utu (reciprocity, retribution) for the hara. Because of these consequences, tapu is sometimes seen as a form of social control based on the avoidance of risk.⁴²
- 2.33 If tapu has the “potential for power”, then noa acts as a counter or antidote to that: it values the importance of ordinary, everyday human activity.⁴³ However, it is not useful to think of noa as the opposite of tapu or the absence of tapu. Rather, noa indicates that, following an incursion on tapu, a balance has been reached, a crisis is over and things are back to normal again.⁴⁴ One way to think of tapu and noa might be as complementary opposites operating on a spiritual level to restore balance.

³⁶ *Ellis v R* [2020] NZSC Trans 19 at 5, 8, 11 and 20.

³⁷ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 262.

³⁸ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World — Māori Perspectives on Justice* (March 2001) at 59.

³⁹ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 18.

⁴⁰ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 50.

⁴¹ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World — Māori Perspectives on Justice* (March 2001) at 52.

⁴² Mason Durie “The Application of Tapu and Noa to Risk, Safety, and Health” (paper presented to Challenges, Choices and Strategies, Mental Health Conference 2000, Wellington, 16 November 2000) at 3–4, cited in Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 37.

⁴³ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 36.

⁴⁴ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 36.

- 2.34 Tapu is relevant to succession because death and things closely associated with death are highly tapu.⁴⁵ Taonga (things valued and treasured) and other items that were in possession of the deceased may be tapu by association or have their own intrinsic tapu by association with the atua Māori. Whakapapa is intrinsically tapu because it connects people directly to the atua Māori and also to their mate (dead). Maintaining whakapapa connections and ensuring taonga and other items are treated appropriately are therefore vitally important, and sanctions may follow if the tapu of whakapapa is breached.

Utu

- 2.35 Utu establishes principles and protocols in which relationships are created and maintained. It can be thought of as “compensation, or revenge, or reciprocity”.⁴⁶ Utu is relevant to:⁴⁷

... both the positive and negative aspects of Māori life governing relationships within Māori society. It was a reciprocation of both positive and negative deeds from one person to another. Utu was a means of seeking, maintaining and restoring harmony and balance in Māori society and relationships.

- 2.36 Utu is closely linked with mana and tapu. Where utu is sought, the take (cause) was usually a breach of tapu or an increase or decrease in mana.⁴⁸ The extent and form of utu depends on the circumstances, making it highly contextual.
- 2.37 Utu can be linked to the analytical framework of take-utu-ea. The framework measures breaches of tikanga that require certain action to be taken in order to resolve the matter.⁴⁹
- 2.38 Utu is relevant to succession, because if there has been a take or hara that warrants utu, the obligation to respond does not die with the individual. That responsibility belongs to the collective, so if the individual dies, there is no ea (fulfilment, resolution).⁵⁰

Kaitiakitanga

- 2.39 Kaitiakitanga is an obligation on those who have mana to act unselfishly, with right mind and heart and with proper procedure.⁵¹ Mana and kaitiakitanga operate together as “right and responsibility”.⁵² Kaitiakitanga obligations exist over all taonga.⁵³ Rights to resources

⁴⁵ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 54.

⁴⁶ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 35.

⁴⁷ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World — Māori Perspectives on Justice* (March 2001) at 2–3.

⁴⁸ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World — Māori Perspectives on Justice* (March 2001) at 67.

⁴⁹ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 31.

⁵⁰ See *Ellis v R* [2020] NZSC Trans 19 at 58–59, 63 and 69–71.

⁵¹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity — Te Taumata Tuatahi* (Wai 262, 2011) at 23.

⁵² Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity — Te Taumata Tuatahi* (Wai 262, 2011) at 23.

⁵³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity — Te Taumata Tuatahi* (Wai 262, 2011) at 23.

are dependent on maintaining kaitiakitanga obligations over that resource.⁵⁴ Kaitiakitanga might thus be described as the reciprocal obligation to care for the wellbeing of a person or resources.⁵⁵

- 2.40 Maintaining kaitiakitanga obligations is vital to fostering a sense of belonging. Ensuring that kaitiakitanga rights and obligations can pass down to the next generation is a crucial part of succession in te ao Māori.

Aroha and manaakitanga

- 2.41 Aroha is usually understood as a literal translation of love. However, the meaning is wider. Hohepa describes aroha as having “a wide range of meaning from compassion and love to concern and sorrow.”⁵⁶ Aroha is an admirable attribute that has lasting effect and conveys that the values of care, respect and affection are important.⁵⁷ Dr Cleve Barlow observes that “[a] person who has aroha for another expresses genuine concern towards them and acts with their welfare in mind, no matter what their state of health or wealth”.⁵⁸ Aroha underpins the strengthening of kin relationships, including in the rituals of tangihanga.⁵⁹
- 2.42 Manaakitanga, literally translated, means to care for a person’s mana.⁶⁰ Manaakitanga is required no matter what the circumstances might be, so even if there is no aroha in the situation, the obligation still applies.⁶¹ An obvious place where manaakitanga is important is looking after guests, but the obligation is always present.⁶²
- 2.43 Aroha and manaakitanga are relevant to succession because, through these values, other values can be upheld.

Results of consultation

- 2.44 In the Issues Paper, we asked if we had appropriately identified the tikanga principles relevant to succession and whether there were any we had misunderstood or not included.
- 2.45 Few submitters to the Issues Paper commented directly on the tikanga principles we had identified. However, those that did, including Professor Jacinta Ruru, thought the tikanga principles were appropriate for succession. Several submitters acknowledged that there

⁵⁴ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Taumauri | Waikato L Rev 1 at 4.

⁵⁵ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Taumauri | Waikato L Rev 1 at 4.

⁵⁶ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 19.

⁵⁷ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 151.

⁵⁸ Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Auckland, 1994) at 8.

⁵⁹ See discussion in Harry Dansey “A View of Death” in Michael King (ed) *Te Ao Hurihuri: Aspects of Maoritanga* (Reed Publishing, Auckland, 1992) 105 at 110.

⁶⁰ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 166.

⁶¹ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 33.

⁶² Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 126.

are differences in the practice of tikanga between the many whānau, hapū and iwi throughout the country.

- 2.46 Te Kani Williams observed that the Māori concept of whānau and what constitutes whānau, in relation to who ought to receive property on the death of a person, is considerably distinct from that of “family”. Williams said that concepts of kaitiakitanga, manaakitanga and whanaungatanga need to be at the forefront of these deliberations for Māori.
- 2.47 Chapman Tripp emphasised the importance of whanaungatanga in tikanga-based succession processes, which acknowledges the familial and relational ties that exist in te ao Māori. Chapman Tripp said that whanaungatanga, most simply, is the rights, responsibilities and expected mode of behaviour that accompany relationships. While these are usually kinship relationships, the term has been widened by modern Māori to include kin-like reciprocal relationships among people generally.
- 2.48 On the website, we asked if tikanga Māori was important to submitters when it came to succession (leaving aside whenua Māori) and, if so, how tikanga affects the way they think about succession.
- 2.49 One website submitter, Raaniera Te Whata, explained the significance of succession as a transfer of ideas and a process:
- For whānau and hapū, ngā uri whakatupu (future generations) are a key focus. Succession planning — ensuring the transference of tikanga (established patterns of behaviour), mātauranga (knowledge) and taonga katoa (treasured possessions including precious objects, customs, values) are central tenets. Employing tikanga generally but also in succession issues is to use a collectivist approach to identify the how (i.e. the methodology for setting values and standards) in any given situation. The socio-culturally measured options — considered in community with the wider whānau/hapū are ultimately focused on rebuilding relationships. This is an inclusive and consensus making process. Rebuilding tikanga based relationships in issues of succession provides a different way of approaching situations that are often challenging and sensitive (e.g. sibling successor conflicts, disparate whānau goals).
- 2.50 Around a third of website submitters answered the question about whether tikanga Māori was important to them. Of those submitters, most agreed that tikanga was important to them. Of those agreeing, around half identified as Māori. Comments from these submitters included that Māori should be able to choose tikanga or state law, that tikanga should be incorporated into the “consciousness of the country” and that tikanga should be available to all New Zealanders as a less adversarial approach in most areas of life, encouraging dialogue and community.
- 2.51 Some submitters said tikanga was not important to them (only one of whom identified as Māori, and they commented that there should be one law for all). Some expressed the view that state law must prevail in matters of succession and that there should be one clear law for the whole country. Others commented that wills that followed tikanga should be respected. Some noted that the application of tikanga was a matter for Māori.
- 2.52 Tikanga affected the way submitters thought about succession in various ways. Some emphasised that tikanga should be available for Māori to address succession matters and that Māori should be able to choose tikanga or state law. Some submitted that succession law should recognise a Māori perspective, especially in relation to whenua Māori. Some commented on the need for clarity and certainty to minimise disputes as disputes are harmful to all families and whānau.

2.53 One submitter, Raewyn Kapa, explained the significance of tikanga to her in this way:

It affects the way my intent aligns tika (rightfully), pono (logically) and aroha (caringly and with compassion) to my estate and its distribution at death. Tikanga for me is also about my kaitiakitanga duties to my most loved and cherished ones I leave in Te Ao with resources, gifts, finances and land for their futures and livelihoods. With land as an example, it's significant for me that the shares I succeed from both of my parents remain within my children's succession and their children for the future. It affects certainty, security and kaitiakitanga for the future so all whenua remains in our possession and theirs and so forth. It's critical that the laws of today keep this intact and ensure tikanga Māori ture and statutory laws keep this protected and to never have it broken for individualism. It's very important. Lastly, I think tikanga as a body of ture at law needs to be developed as its own framework to reflect iwi differences of traditions, pedagogies and epistemologies in that we're not a homogeneous group of "sameness", and that one iwi tikanga may not be nor hold the same tikanga as another. For example, male primogeniture and female primogeniture practices and beliefs, blended families, hierarchy, status and those [who] take that in the quest for being right, King or Queen, can become destructive to families and relationships.

TE TIRITI O WAITANGI | TREATY OF WAITANGI

2.54 In the Issues Paper, we said te Tiriti o Waitangi | Treaty of Waitangi (the Treaty) is a foundation of government in Aotearoa New Zealand.⁶³ As recorded in Cabinet guidance:⁶⁴

The Treaty creates a basis for civil government extending over all New Zealanders, on the basis of protections and acknowledgements of Maori rights and interests within that shared citizenry.

2.55 The Treaty was signed in 1840 by representatives of the British Crown and rangatira representing many, but not all, hapū.⁶⁵ There is a Māori text and an English text. There are differences between the two texts, as we explain below. The meaning and significance of each text, the relationship between them and whether they can or should be reconciled through interpretation and the elaboration of Treaty principles are the subject of significant debate, scholarship and judicial consideration.⁶⁶ We acknowledge these ongoing debates as context for considering the implications of the Treaty for our review of succession law.

⁶³ Kenneth Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government" in Cabinet Office *Cabinet Manual 2017* 1 at 1.

⁶⁴ Cabinet Office Circular "Te Tiriti o Waitangi/Treaty of Waitangi Guidance" (22 October 2019) CO (19) 5 at [7].

⁶⁵ Te Puni Kōkiri | Ministry of Māori Development *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (2001) at 14.

⁶⁶ See for example Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016); Margaret Mutu "Constitutional Intentions: The Treaty of Waitangi Texts" in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 13; Ani Mikaere *Colonising Myths: Māori Realities — He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011); and Ned Fletcher "A Praiseworthy Device for Amusing and Pacifying Savages? What the Framers Meant by the English Text of the Treaty of Waitangi" (PhD Dissertation, Waipapa Taumata Rau | University of Auckland, 2014). See also the Waitangi Tribunal reports referred to in the following discussion, in particular, the discussion in Te Rōpū Whakamana | te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at chs 8 and 10.

- 2.56 In the Māori text, article 1 provides that Māori rangatira grant the Crown kāwanatanga, the right to govern, (ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu – te Kawangatanga katoa o o ratou wenua). Article 2 provides that the Crown will protect the exercise of tino rangatiratanga over lands, villages and all things valued and treasured (ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu – ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa). Tino rangatiratanga has been described as the exercise of the chieftainship of rangatira, which is unqualified except by applicable tikanga.⁶⁷
- 2.57 Article 1 of the English text provides that Māori rangatira cede the sovereignty they exercise over their respective territories to the Crown, while article 2 guarantees to Māori full exclusive and undisturbed possession of their lands and other properties.⁶⁸
- 2.58 Under article 3 of the English text, the Crown imparted to Māori its protection as well as all the rights and privileges of British subjects. A similar undertaking was conveyed in article 3 of the Māori text, which provides that the Crown will care for Māori and give to Māori the same rights and duties of citizenship as the people of England.⁶⁹ Article 3 has been understood as a guarantee of equity between Māori and other New Zealanders.⁷⁰
- 2.59 In the Issues Paper, we also observed that five years before the Treaty was signed, in 1835, a number of northern rangatira signed He Whakaputanga o te Rangatiratanga o Nu Tireni | the Declaration of Independence of the United Tribes of New Zealand (He Whakaputanga). He Whakaputanga was a declaration of the sovereignty and independence of those rangatira. The Tribunal has considered the “striking absence” of any record of explicit discussion about its ongoing relevance or its relationship with the Treaty.⁷¹ The Tribunal has also considered the failure of the British to explain why and how the Treaty nullified He Whakaputanga to be significant.⁷²
- 2.60 At the time of signing the Treaty, Crown representatives made oral undertakings and assurances to Māori, including an undertaking to respect Māori customs and law.⁷³ The

⁶⁷ IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 319. Kawharu explained that the term emphasised to rangatira their complete control according to their customs. The term has also been translated as “paramount authority”: Margaret Mutu “Constitutional Intentions: The Treaty of Waitangi Texts” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 13 at 19–22; and “absolute authority”: Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Whaia te Mana Motuhake | In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 26.

⁶⁸ Article 2 also gave the Crown an exclusive right of pre-emption over any land Māori wanted to “alienate”.

⁶⁹ IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 321.

⁷⁰ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 27.

⁷¹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 520.

⁷² Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 521. See also Ani Mikaere *Colonising Myths: Māori Realities — He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 127–128; and *He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa — The Independent Working Group on Constitutional Transformation* (January 2016) at 43–49.

⁷³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 114.

Tribunal has concluded that these also form part of the agreement reached.⁷⁴ Not all hapū were represented among the rangatira signatories to the Treaty. The Crown has taken the position that the benefit of the promises it made in the Treaty extends to all Māori, whether or not they signed the Treaty.⁷⁵

- 2.61 The overwhelming majority of Māori signatories signed the Māori text rather than the English text.⁷⁶ It has long been acknowledged that the more than 500 rangatira who signed would have done so following their debate and discussion in te reo Māori. While some signed the English sheet, most if not all of them would have relied on the oral explanation of the Treaty's terms in te reo Māori, which likely reflected te Tiriti. It is noteworthy that on behalf of the British Crown, Lieutenant-Governor William Hobson signed te Tiriti.⁷⁷
- 2.62 The Tribunal has mentioned these matters in various reports. For example, the Tribunal has said that precedence, or at least considerable weight, should be given to the Māori text when there is a difference between it and the English text, given the circumstances mentioned above and because this was consistent with the *contra proferentem* rule of the law of treaties that, where there is ambiguity, a provision should be construed against the party that drafted or proposed the relevant provision.⁷⁸
- 2.63 With respect to articles 1 and 2 of te Tiriti, the Tribunal has observed:⁷⁹

⁷⁴ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 526–527.

⁷⁵ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Urewera* (Wai 894, 2017) vol 1 at 139. This is reflected in s 9(1) of the Tūhoe Claims Settlement Act 2014. In 2018, the Tribunal concluded that the Treaty applied to non-signatory hapū as a unilateral set of promises by the Crown to respect and protect their tino rangatiratanga and other rights just as it would for hapū whose leaders had signed, noting that, out of practical necessity, all Māori needed to engage with the Crown on the basis of the Treaty's guarantees, whether they had signed the Treaty or not: Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims — Parts I and II* (Wai 898, 2018) at 188.

⁷⁶ See Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims — Parts I and II* (Wai 898, 2018) at 130, 136, 139–140 and 146. See also Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 522; and Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) at 7.

⁷⁷ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 522.

⁷⁸ See for example Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims* (Wai 215, 2010) at 148; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report of The Waitangi Tribunal on The Orakei Claim* (Wai 9, 1987) at 180; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Ngai Tahu Report 1991* (Wai 27, 1991) at 223. See also FM Brookfield *Waitangi and Indigenous Rights: Revolution, Law, and Legitimation* (Auckland University Press, Auckland, 1999) at 55, cited in Judith Pryor “‘The Treaty always speaks’: Reading the Treaty of Waitangi/Te Tiriti O Waitangi” in *Constitutions: Writing Nations, Reading Difference* (Birkbeck Law Press, Abingdon (UK), 2008) 85 at 99; and see also Ruth Ross “Te Tiriti o Waitangi: Texts and Translations” (1972) 6 NZJH 129 at 133. But see Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014), where the Tribunal did not rely on the *contra proferentem* doctrine in its interpretation of the Treaty: at 522. For a detailed discussion of the application of the *contra proferentem* rule by the Tribunal see Benjamin Suter “The Contra Proferentem Rule in the Reports of the Waitangi Tribunal” (LLM Research Paper, Te Herenga Waka | Victoria University of Wellington, 2014).

⁷⁹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 28. See also Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 21; and Te

The guarantee of tino rangatiratanga requires the Crown to acknowledge Māori control over their tikanga, resources, and people and to allow Māori to manage their own affairs in a way that aligns with their customs and values.

- 2.64 Within te ao Māori, rangatiratanga can embody the authority of a rangatira but also that of the people, which, in the context of this review, includes whānau and hapū. It involves the exercise of mana in accordance with and qualified by tikanga and its associated kawa and, through tikanga, the managing of a dynamic interface between people, their environment and the non-material world.⁸⁰ It is the substance of this rangatiratanga that needs to be upheld and not interfered with through the guarantee of tino rangatiratanga. In effect, te Tiriti envisages the co-existence of different but intersecting systems of political and legal authority.⁸¹
- 2.65 Rangatiratanga is exercised within te ao Māori every day and independently of state law, in accordance with tikanga Māori. However, in some situations, consistency with te Tiriti may require that provision for the exercise of tino rangatiratanga be made in legislation. Implicit in this is that te Tiriti requires careful thought about what responsible kāwanatanga involves.
- 2.66 In the Issues Paper, we said that this approach to articles 1 and 2 of te Tiriti allows an end to debating the different texts in an effort to understand what was exchanged between Māori and the British and how the wording of each of the texts should be qualified.⁸² Instead, it focuses on the relationship between tino rangatiratanga and kāwanatanga and allows us to ask how kāwanatanga can be responsibly exercised in specific contexts, including how the exercise of tino rangatiratanga might be facilitated.
- 2.67 We also discussed the Treaty principles, saying that they have become important in understanding the Treaty and that they have an extensive history in the Tribunal and the courts. We noted that the Tribunal has explained that, although its statutory role is to inquire into the consistency of the Crown's acts and omissions against the Treaty principles, this "does not mean that the terms [of the Treaty] can be negated or reduced."⁸³ Rather, the principles "enlarge the terms, enabling the Treaty to be applied in situations that were not foreseen or discussed at the time."⁸⁴ We also recognised that some regard the Treaty principles as distorting or diminishing the clear terms of the Māori

Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Whaia te Mana Motuhake | In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 26.

⁸⁰ New Zealand Māori Council *Kaupapa: Te Wahanga Tuatahi* (February 1983) at 5–6; Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 41–42 and 229; and Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 36–38. See also the discussion in *He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (January 2016) at 34.

⁸¹ See discussion in Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 524; and see Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) at 42.

⁸² Article 3 in both the Māori and English texts conveys an undertaking of similar effect.

⁸³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 385–386.

⁸⁴ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 386.

text.⁸⁵ We said that this review engages in particular the principles of partnership, active protection and “options” (Māori having choices or options available to them).

Results of consultation

- 2.68 In the Issues Paper, we asked about the role of the Treaty in the review of succession law and whether submitters agreed with our approach. There were no questions on the website that directly addressed the Treaty, although some submitters mentioned it in answer to other questions.
- 2.69 Several submitters to the Issues Paper supported our view that the Treaty was an important aspect of this review. These submitters were Te Hunga Rōia Māori o Aotearoa (THRMOA), Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), Ngā Rangahautira, Professor Jacinta Ruru, Te Kani Williams, Chapman Tripp, MinterEllisonRuddWatts, Succeed Legal, Citizens Advice Bureau (CAB), Katie Murray, and the joint submission from Michael Reason and Azania Watene. Some members of the Family Law Committee of Auckland District Law Society (ADLS) also agreed that the principles and objectives of the Treaty have a role for this review.
- 2.70 Several submitters, including NZLS, Chapman Tripp and Murray, agreed with our approach to implementing the Treaty in this review. NZLS observed that the Issues Paper contained an excellent, well-researched and balanced summary of the position regarding te Tiriti and the relationship between the Crown and Māori. Chapman Tripp agreed with our approach in implementing the relevant text of te Tiriti and its aspirations throughout this review.
- 2.71 Ruru and Williams supported our focus on the relationship between tino rangatiratanga and kāwanatanga, asking how responsible kāwanatanga might be exercised in specific contexts, including how the exercise of tino rangatiratanga might be facilitated. Williams said, however, that articles 1 and 2 of te Tiriti preserve and recognise the rangatiratanga of Māori in Aotearoa and from that recognition flows the exercise of rangatiratanga, which the Crown is obligated to protect. Williams also submitted that consistency with te Tiriti should be implicit in legislation in order to provide consistency between te Tiriti and state law.
- 2.72 Some submitters, including CAB, and Reason and Watene, supported the integration of the principles of te Tiriti into succession law and, in particular, the ability to allow for tikanga to determine succession where this is what whānau want. Conversely, others, including Williams and Murray, preferred to focus on te Tiriti and not the English text or the principles developed.
- 2.73 Some members of the Family Law Committee of ADLS considered that the Treaty should not have a role for this review of succession law because, broadly speaking, the review concerns the dynamics of inter-family relationships and the moral duties and obligations between generations that may be tailored by cultural issues such as tikanga and whakapapa. These members said that, because most people utilise their income and resources for their and their immediate family’s use and benefit and as individuals acquire and dispose of assets, the distribution of an estate should reflect the Western concept

⁸⁵ For example, see Ani Mikaere *Colonising Myths: Māori Realities — He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 263–264. See also the discussion in Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 348 onwards for an in-depth discussion of the texts.

of unilateral ownership and disposal of property and be governed by statute and state courts.

- 2.74 Jan McCartney QC said that, while supporting the principles and objectives of the Treaty, in her view, succession law is about inter-family relationships and moral duties associated with those relationships. In her view, the values that define moral duty include cultural issues that are not dissimilar in tikanga Māori and tikanga Pākehā, and these values need to be reflected in succession law.

OUR FRAMEWORK FOR CONSIDERING TE AO MĀORI AND SUCCESSION

- 2.75 In the Issues Paper, we identified three broad ways to consider law reform in relation to te ao Māori and succession:
- (a) Allow tikanga Māori to determine succession matters for Māori, without state law involvement.
 - (b) Remove taonga from succession law and apply tikanga.
 - (c) Weave together the values of tikanga and state law to create better law for all.
- 2.76 We said that a common theme in all approaches is what role state law should have in facilitating any reform. Any law reform would need to be supported by appropriate dispute resolution mechanisms, including how to bring tikanga Māori into the resolution process.
- 2.77 We asked for feedback on whether the application of state law to succession is a problem, whether tikanga Māori should govern succession for Māori (and, if so, how that might happen in practice) and what the role of state law would be.
- 2.78 On the website, we asked whether our laws should do more to acknowledge tikanga and what submitters thought about the three approaches outlined above.

Results of consultation

Issues Paper submissions

- 2.79 Submitters to the Issues Paper who commented on the framework overall were generally supportive of it. THRMOA observed that the Commission's approach is "ground-breaking", and that it is a difficult task to recommend reforms to succession law that appropriately and adequately address the place of tikanga, are consistent with te Tiriti and provide necessary consistency and certainty for individuals and whānau. However, THRMOA also said that the exclusion of whenua Māori from the scope of this review is unsatisfactory, expressing concern that, given the significance of whenua Māori for Māori, its exclusion from the review potentially undermines aspects of the review overall. Ngā Rangahautira and Chapman Tripp shared this concern.
- 2.80 Submitters expressed a range of views about the role state law should play in succession matters for Māori. NZLS submitted that it is the role of state law to provide the framework within which succession disputes are determined. This would include a defined way for a claim to be initiated and a pathway for resolution, having regard to the cultures and ethnicities of the parties, and ensure resolution is final and binding, and enforceable through the court system. NZLS suggested that a practical balance might be achieved through having a judicial "gateway" to determine whether the dispute needs to be dealt with under tikanga and ao Māori and/or incorporating some aspects of tikanga and ao

- Māori in the general law applying to all. NZLS thought that consideration should also be given to making provision in the new Act to “opt in” or “opt out” of a tikanga approach to succession law.
- 2.81 ADLS submitted that it is the role of state law to promote responsibility by one generation to its descendants, including through the passing of wealth. Jan McCartney QC said the role of state law is to identify, as the purpose of succession, the rights and needs of the next generation and the principles on which their inheritance should take place.
- 2.82 Submitters also said that state law can facilitate space for tikanga to operate. Chapman Tripp said the role of state law now is to give space and authority to tikanga Māori to operate meaningfully within the lives of whānau Māori who wish to reclaim their tikanga.
- 2.83 Several submitters discussed the importance of Māori having the right to choose how their succession matters are resolved. Ben Ngaia (in an interview with Tai Ahu) said this is important because it provides greater choice and empowerment to Māori, which is consistent with the Treaty and the aspirations of the Treaty relationship to be realised. Chapman Tripp said Māori should have the right to decide the means by which succession issues are resolved. This could be a tikanga-based process or a state law process at the time of a death or in a will. Chapman Tripp also noted that, in any case, a grieving period should be provided to the whānau kiritimate (immediate whānau of deceased) before having to make such an election in the case of a mate (death).
- 2.84 MinterEllisonRuddWatts and Succeed Legal supported a role for tikanga Māori in succession if Māori thought this desirable and said further consultation with Māori should determine how this would happen in practice. Morris Legal agreed further work in this area was needed. ADLS submitted that, if all parties whakapapa as Māori, tikanga could govern succession but it would be preferable that there be an option for Māori that state law applies. Some members of the Family Law Committee of ADLS thought that the new Act should provide that, whenever Māori have expressed in writing the wish that tikanga or state law govern succession to their deceased estate, that wish should be respected and implemented.
- 2.85 Community Law Centres o Aotearoa (Community Law) noted the difficulty for Māori in engaging with the legal system when a whānau member dies. Māori already have to navigate two separate legal processes: the general law of succession and te Kooti Whenua Māori | Māori Land Court processes. Separating out taonga potentially creates a third parallel process. Community Law said this is contrary to a communal and holistic view of all property including land, taonga and other chattels, as envisaged by te Tiriti.
- 2.86 Several submitters, including THRMOA, NZLS, ADLS and Te Ripowai Higgins (in an interview with Tai Ahu), emphasised the need for certainty and predictability in succession law.
- 2.87 Only some submitters to the Issues Paper commented directly on the approaches outlined above. THRMOA, Te Kani Williams and Community Law were the only submitters to directly comment on the first option to have tikanga Māori determine succession matters for Māori without state law involvement. Williams expressed his support for the approach. Community Law raised questions about how this approach would work in practice and observed that state law should not necessarily be the default position.
- 2.88 THRMOA submitted that, while this approach appears the most ideal because it offers Māori options, it is also the most complicated in terms of an interrelationship between the two systems of law. THRMOA thought the Commission should have grappled with the

issues arising from this approach, including dealing with the questions of who, according to tikanga, should decide whether tikanga or state law was applicable and the constitutional questions that arise from fundamental differences between the two legal systems. THRMOA agreed that the Issues Paper correctly acknowledged that rights in te ao Māori come with obligations and that the mana of the individual continues to be a key consideration, leading to potential tension between the right of a successor to choose a system that may not reflect the wishes of the deceased. THRMOA noted that there would need to be a dispute resolution process to resolve disputes and determine the appropriate approach for the whānau.

- 2.89 THRMOA said that the second approach, where succession to taonga is governed by tikanga, is consistent with mana motuhake for Māori. THRMOA considered that this approach is positive but not without risks relating to further confusion about the meaning of taonga and who was able to claim something was a taonga as well as the risk that this would generate disputes, which was particularly concerning during a time of grieving. THRMOA suggested having a barred period for engaging in disputes to ensure people have the time to grieve and consider their options clearly. Ngaia (in an interview with Tai Ahu) supported this approach. ADLS agreed that the application of state law to taonga is a problem.
- 2.90 Several other submitters favoured the succession to taonga being governed by tikanga, including Community Law and Chapman Tripp. Further submissions on succession to taonga are discussed in Chapter 3.
- 2.91 The third approach, weaving better law for all, was the subject of several submissions. Professor Jacinta Ruru supported this approach, as it is explained in more detail in Chapter 8 of the Issues Paper. She observed that it engages respectfully and thoughtfully with tikanga Māori in as much depth as is readily possible and that the emphasis on whanaungatanga, manaakitanga and aroha made sense.
- 2.92 THRMOA also supported this approach in principle but was concerned at what this would look like in practice. THRMOA identified risks that tikanga is subsumed into state law and is divorced from its broader cultural context and that considerable power is placed in the hands of judges to determine the meaning and content of Māori words and tikanga principles. THRMOA also said it was not clear what the Commission means when it refers to the values of tikanga compared with tikanga Māori and expressed concern that this approach could result in a watering down of tikanga as seen in state law generally. Nonetheless, THRMOA thought that this approach minimises some of the concerns that arise in the other two approaches regarding conflicts between state law and tikanga.
- 2.93 Ngaia (in an interview with Tai Ahu) observed that this approach seemed ambiguous and that clarity would be needed on how to apply this approach and what it would practically mean. Community Law asked how tikanga would be incorporated into state law and whether mana whenua want the courts to be able to make decisions or recommendations as to tikanga.
- 2.94 Chapman Tripp submitted that recent jurisprudence demonstrates that it is no longer necessary to consider state law and tikanga as distinct and mutually exclusive systems of law. The momentum of recent cases and academic commentary confirms that tikanga Māori is an integral part of the law of Aotearoa and that values such as mana, whakapapa and whanaungatanga should inform the development of the law. Chapman Tripp submitted that tikanga is derived from a segment of the wider pool of mātauranga Māori

(the accumulated knowledge and intellectual property of Māori acquired over generations) and therefore can be interpreted and modified across generations.⁸⁶

Website submissions

- 2.95 A number of submitters to the website commented on whether our laws should do more to acknowledge tikanga and what approach or approaches were preferred.
- 2.96 Some supported cultural sensitivity to tikanga and cited compliance with obligations under te Tiriti. Some thought tikanga represented important concepts that should be available to all New Zealanders. Several thought that tikanga could be effectively recognised through a will, and this was the preferable approach. Others did not favour “two sets of laws”, raising concerns about tikanga being too vague. Some were concerned about there being too much room for disputes.
- 2.97 Raaniera Te Whata supported his preference for our laws doing more to acknowledge tikanga by explaining that:
- ... Regarding the systems of law that govern succession and dispute resolution it is fundamental that relationship property division and taonga succession recognise te māramatanga o ngā tikanga-a-hapū (hapū derived philosophies of law), and whanaungatanga (kinship relationships grounded in responsibility — the bonds of mutual caretaking and mutual guardianship) in considering what is equitable in any given scenario. Tikanga are concerned with the maintenance of balance within the bonds of relationships. Tikanga are mediated through kanohi-ki-te-kanohi negotiation, compromise, and agreement between whānau and hapū. With hapū society traditionally being a pure pantocracy it is the collective voice that determine[s] matters [relating] to whenua and taonga tuku iho and thus no individual exercises power over collective cultural assets or makes executive decisions, unless the mana to do so originates with and [is] conferred by the hapū collective.
- 2.98 Only a few website submitters expressed a direct preference for one or more approaches. Half favoured applying tikanga to the succession of taonga and half favoured the approach of creating better state law that recognises tikanga Māori. In some cases, these submitters favoured both Option Two and Option Three. Few submitters favoured Option One.
- 2.99 One submitter suggested that if Māori are to choose whether current law and the courts or tikanga is to apply in Māori succession matters, there should be consultation/kōrero with all hapū through a referendum or direct engagement with hapū and the roughly 770 marae across the country. They thought it likely that Māori would demand a more legitimate post-colonial, Tiriti-based, pluralistic legal order that facilitated Māori to refer their disputes to mediation or arbitration in accordance with tikanga.
- 2.100 Some submitters who agreed that taonga should be governed by tikanga added that this should be the case if this was important to the deceased or if they had expressed their wishes in a will. Te Whata noted how important it is for the whakapapa of the taonga to be maintained and that this is because the relationships/connections between taonga, whakapapa and tūpuna are not to be understood simply as property but instead as a treasure encompassing multiple concurrent networks of social connections between tangata, taonga and ideas. Those website submitters that commented on succession to taonga are also considered in the discussion of succession to taonga in Chapter 3.

⁸⁶ Chapman Tripp cited Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 15–16.

2.101 One submitter who favoured Option Three said they liked the third approach because it has both state law and tikanga. They said common sense will prevail, and te ao Māori is at essence common sense. Other submissions included that state law should recognise and include tikanga and that there should be one law for all. One submitter suggested that, to be a successful bicultural (and thus a more successful multicultural) country, a single legal system that recognises and regards te ao Māori tikanga as law where necessary is required. Concern was also expressed, including that we have a multitude of non-Māori cultures and beliefs/differences that come with that. One submitter thought that this option is likely to fall short of properly acknowledging tikanga.

CRITERIA FOR GOOD SUCCESSION LAW

2.102 In the Issues Paper, we set out our criteria for good succession law in Aotearoa New Zealand. We said that those criteria are:

- (a) meeting general objectives of:
 - (i) consistency with the Treaty;
 - (ii) reflecting values and attitudes of contemporary Aotearoa New Zealand;
 - (iii) aligning with fundamental values and principles of a democratic society and Aotearoa New Zealand's international obligations; and
 - (iv) making law that is clear and accessible;
- (b) sustaining property rights and expectations;
- (c) promoting positive outcomes for families and whānau; and
- (d) promoting efficient estate administration and dispute resolution.

2.103 In the Issues Paper, we asked for feedback on these criteria.

2.104 We did not ask directly about criteria for good succession law on the website. Nonetheless, the tension between testamentary freedom and obligations to family and whānau, and concern about the need for accessible, simple law to minimise disputes, were strong themes in website submissions generally.

RESULTS OF CONSULTATION

2.105 Several submitters to the Issues Paper addressed the criteria for good succession law. There was broad agreement about the criteria and the need to balance them but there were differing views about how the balance should be reached and whether there were other relevant factors.

2.106 Public Trust, Chapman Tripp, TGT Legal, Morris Legal and MinterEllisonRuddWatts agreed with the criteria. Morris Legal submitted that the objective of promoting positive outcomes for families and whānau should be one of the purposes of the new Act. Morris Legal said that it is important that there is a balanced approach in the new Act to ensure the legislation reflects the diverse make-up of modern Aotearoa New Zealand, allows the courts to consider the needs of individuals in their particular families and sets clear parameters around the eligibility to bring claims, reflecting New Zealanders' general desire for testamentary freedom.

2.107 While Perpetual Guardian agreed generally with the criteria identified, it thought that there was too much emphasis on testamentary freedom. It submitted that, while New

Zealanders might be in favour of testamentary freedom as a concept, it would be a different story if they were left out of their parent's estate. Perpetual Guardian was also concerned about wider societal implications. It submitted that family are a subset of those who are seen by the law (not just succession law) as being those obliged to persons, in keeping with the reference in the Social Security Act 2018, to "use your resources or the resources of those obliged to you".

- 2.108 ADLS also broadly agreed with the criteria but disagreed that the statutes currently in force regarding succession are focused on attitudes and values no longer held. ADLS submitted that it is in the public good that members of a family are equipped by their ancestors to make the best out of life.
- 2.109 MinterEllisonRuddWatts said that there is good balance in the criteria, particularly in giving weight to the will-maker's testamentary freedom as they are usually the best person to judge who is family and what duties are owed to them when distributing the estate. MinterEllisonRuddWatts submitted that retaining testamentary freedom is preferable to a code that sets out entitlements to a "clinical" named class of persons to benefit that bear no relation to how that person treated the deceased or had previous entitlements during their lifetime. MinterEllisonRuddWatts agree that such freedom must be balanced by rights to address clear inequities (such as relationship property entitlements, where a person had been depending on the will-maker's care and welfare and to address tikanga rights and assets).
- 2.110 NZLS submitted that good succession law should start with the principle of testamentary freedom, against which potentially competing principles must be carefully weighed. NZLS submitted that context is important and agreed that this means concepts of succession may differ for Māori and non-Māori. NZLS said that good succession law requires balancing and, where appropriate, integrating a Māori perspective and consideration of tikanga within the general law. NZLS agreed that there has been profound social change since existing succession law was passed more than 50 years ago. NZLS submitted that relevant values to be recognised include:
- (a) testamentary freedom;
 - (b) a recognition of family and whānau relationships in all their evolved forms;
 - (c) the rights of minors and other dependants to be protected and provisioned by those who have responsibility for them; and
 - (d) a framework that fairly balances individual rights with the public good, that is clear and able to be enforced and that provides predictability, certainty and a mechanism to resolve conflict.
- 2.111 NZLS said that the following values or expectations are commonly expressed values or expectations across many cultural groups:
- (a) An expectation that, on death, a parent may have some obligation to provide for their children (including adult children) especially where there is a need.
 - (b) An expectation on the part of a parent of a child that property they had left by succession to the other parent of that child (the fruits of their relationship with that person) would benefit the child on the death of the survivor and a corresponding expectation on the part of the child.
 - (c) An expectation on the part of grandparents that provision to their children will flow through to their grandchildren.

- (d) An expectation (particularly in some cultures) that children have an obligation to support parents or other family members.
- 2.112 NZLS said there were other factors that might give rise to additional criteria and mentioned research about:
- (a) climate change and economic conditions such as the intergenerational wealth gap;
 - (b) changes in cognitive function with age, which fall short of testamentary incapacity but could affect will-making;
 - (c) elder abuse in the context of will-making; and
 - (d) how succession law might promote positive outcomes across the many cultural groups in Aotearoa New Zealand or how it might be disadvantageous to them.
- 2.113 Jan McCartney QC submitted that criteria were set before the key issue has been identified, namely the appropriate restrictions on testamentary freedom. She submitted that the question to ask is what New Zealanders' fundamental values are around the moral responsibility of a will-maker to partners, parents and children. McCartney submitted that proper restrictions on will-makers' freedom should include providing for financial security, psychological wellbeing, promoting intergenerational wealth distribution, promoting economic wellbeing, costs of sustaining climate change effects, costs of superannuation for an ageing population, housing costs and, overall, promoting healthy families.
- 2.114 Trish leong submitted that promoting charitable bequests and lessening rather than exacerbating wealth inequality should also be criteria by which succession law reforms should be assessed. She suggested that the criterion relating to positive outcomes for families and whānau should be extended to also include "and wider society". leong submitted that wealth inequality is a growing issue. Laws that favour retaining wealth within families (that are likely to be wealthy themselves) rather than dispersing wealth among a wider population are archaic and undesirable from a public policy perspective.
- 2.115 leong also observed that existing succession laws were designed at a time when it was entirely natural for people to leave their wealth (that, for most, would be very modest) to family, and many people did not have enough of a surplus after providing for their family to make charitable bequests. leong said that charitable bequests are growing in popularity and referred to Giving New Zealand's 2014 Survey, which found that individual bequests increased by 29 per cent between 2011 and 2014.⁸⁷ leong submitted that charitable bequests are particularly common among high-net-worth individuals and succession laws should not make it any harder for high-net-worth individuals to give away their wealth to charities than it is to give wealth to their own family.
- 2.116 Ngā Rangahautira did not directly address the criteria for good succession law but did comment that, although Māori place high value on testamentary freedom as it is intensely tied to mana and whanaungatanga, this must be balanced against tikanga obligations from whakapapa and whānau. THRMOA similarly said that practical modern-day circumstances mean that most Māori would respect testamentary freedom except in relation to taonga and land.

⁸⁷ Trish leong cited Mark Cox, Fiona Stokes and Hugh Dixon *Giving New Zealand: Philanthropic Funding 2014* (Tōpūtanga Tuku Aroha o Aotearoa | Philanthropy New Zealand, December 2015) at ii.

THE NEED FOR A SINGLE STATUTE

2.117 In the Issues Paper, we observed that the law providing for claims against an estate is found across several statutes, the common law and equity. We expressed our preliminary view that there should be a single comprehensive statutory regime that governs claims against the estate (the new Act) as the principal source of law. We said that the new Act would enable parties to refer to a single source to understand the law and that the new Act should be clear and readable, consistent with modern drafting standards.

Results of consultation

- 2.118 We received several submissions about the desirability of a single statute to govern claims against estates. Public Trust, Perpetual Guardian, NZLS, ADLS, Professor Bill Atkin, Chapman Tripp, MinterEllisonRuddWatts, Morris Legal, Succeed Legal and Bill Patterson agreed that a single statute that governs claims against estates is desirable. TGT Legal and Jan McCartney QC supported a single statute except in relation to having a single statutory cause of action with respect to contribution claims. Chapman Tripp thought appropriate carve-outs for those who choose to rely on tikanga and exclusions for items that have cultural relevance and value are required.
- 2.119 NZLS said that multiple sources of law undermine and reduce the ability of the public to collect information and understand their legal rights. NZLS thought that the Administration Act should be included in such a consolidated statute. Atkin submitted that a new statute should be a genuine code covering all aspects of inheritance, including the Wills Act 2007, the Succession (Homicide) Act 2007 and the Administration Act (after it has been reformed). Public Trust, MinterEllisonRuddWatts, Morris Legal and TGT Legal supported the intestacy provisions being included in the new Act. Conversely, ADLS, Patterson, Chapman Tripp, and Michael Reason and Azania Watene in their joint submission, favoured the provisions remaining within the Administration Act.
- 2.120 Morris Legal noted that the whole of the Administration Act needs review and modernisation, and by including the intestacy provisions within the new Act, any future changes made to the Administration Act will not impact on the new provisions. NZLS considered that the whole of the Administration Act should be reviewed and modernised and sit within the new Act.
- 2.121 Several submitters commented that having a new Act would promote accessible law that was easier to understand.

CONCLUSIONS

RECOMMENDATIONS

R1

A new statute called the Inheritance (Claims Against Estates) Act (the new Act) should be enacted as the principal source of law applying to entitlements and claims against an estate in place of Part 8 of the Property (Relationships) Act 1976, the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949, which should be repealed.

R2

The intestacy regime should remain in the Administration Act 1969 at present, but Part 3 of that Act should be repealed and new intestacy provisions enacted that conform to modern drafting standards and recommendations R30-R51 below.

R3

The Government should consider drafting the new Act in contemplation that the matters currently covered in the Administration Act 1969, the Wills Act 2007, the Simultaneous Deaths Act 1958 and the Succession (Homicide) Act 2007 will be incorporated into the new Act in the future.

R4

The new Act should:

- a. reflect the Crown's obligations under te Tiriti o Waitangi to exercise kāwanatanga in a responsible manner, including facilitating the exercise of tino rangatiratanga by Māori, in the context of succession;
- b. be simple, clear and accessible law that meets the reasonable expectations of New Zealanders;
- c. reflect the New Zealand Bill of Rights Act 1990 and Aotearoa New Zealand's commitments under international instruments;
- d. appropriately balance sustaining mana and property rights (including testamentary freedom) with obligations to family and whānau, in order to promote whanaungatanga and other positive outcomes for families, whānau and wider society; and
- e. promote efficient estate administration and dispute resolution.

Te Tiriti o Waitangi

- 2.122 We conclude that te Tiriti, the Māori text, should be regarded as the primary source of the commitments made when Māori and the Crown entered into the Treaty in 1840. This reflects the context in which the Treaty was debated and signed and is consistent with the doctrine of *contra proferentum*.
- 2.123 We acknowledge the extensive discussion and development of the principles of the Treaty in matters dealt with by the Tribunal and the courts, including in circumstances where statutes require reference to the principles. This has led to some insightful and sophisticated consideration of important questions, and we appreciate that statutory references to the Treaty mean that this is likely to continue. We have, however, concluded that (other than where currently required by statute) the appropriate foundation for understanding the rights and obligations of Māori and the Crown in 21st century Aotearoa New Zealand is the text of te Tiriti. In our view, this is a desirable approach to adopt for the future, including in new legislation.
- 2.124 This contemplates the exercise of tino rangatiratanga by Māori on a daily basis, independently of state law, together with the exercise of kāwanatanga by the Crown. In the context of this review, we focus on how kāwanatanga might be exercised in a responsible manner in relation to succession, including how the exercise of tino rangatiratanga might be facilitated. In adopting this approach, we also accept that, on

some matters, Treaty principles may promote the exploration of what responsible kāwanatanga looks like in specific circumstances.

What responsible kāwanatanga means for succession law

- 2.125 We conclude that responsible kāwanatanga requires us to approach our recommendations for weaving new succession law from three separate starting points. We suggest that in doing so, we are acknowledging the importance of substantive equality, as contemplated in article 3 of te Tiriti.⁸⁸
- 2.126 First, state succession law should facilitate tino rangatiratanga through recognising tikanga Māori where that is necessary, in light of the commitment in te Tiriti, to enable Māori to live according to tikanga. In the context of succession, this promotes the application of tikanga by and within whānau. An example of this is in our recommendations is to specify whāngai as eligible claimants under the new intestacy rules and in relation to family provision awards.⁸⁹ A further example is that when we recommend the availability of family provision awards to surviving partners, we expressly include the tikanga of the relevant whānau as a factor the court should consider in determining the amount of an award.⁹⁰
- 2.127 Second, state succession law should weave new law that reflects tikanga Māori and other values shared by New Zealanders (a “third law”). We think this is a deeply important approach to law-making in Aotearoa New Zealand to support a nation that is grounded in the commitments of te Tiriti, to the benefit of all New Zealanders. As we discussed in the Issues Paper, this approach requires tikanga Māori to be considered in both defining and responding to a policy “problem” rather than just incorporating tikanga into a pre-existing model of state law. An example of this is when we rely on the tikanga relating to whanaungatanga, manaakitanga and aroha that require that the needs of tamariki are met to justify a presumption in favour of granting a temporary occupation order to the principal caregiver of a child of the deceased for the benefit of that child.⁹¹ A further example is the reliance on mana to support the availability of contracting out.⁹²
- 2.128 We have taken these approaches as far as possible in our recommendations for reform. We accept that, in some areas, they have been difficult to implement given the pervasive nature of aspects of state law. This has particularly been the case in relation to the matters we discussed in Part 3 of the Issues Paper, which covered making and resolving claims against an estate. We recognised the importance of considering tikanga in relation to these matters and sought feedback on any other areas where state law ought to recognise and respond to tikanga and any kawa necessary to enliven that tikanga. In Chapters 8–16 of this Report, we have been mindful generally of tikanga concepts as discussed above, the potential incompatibility of tikanga and default rules and the importance of kōrero in resolving disputes. However, we have only discussed specific tikanga where they are meaningful in the context. We do not wish to misrepresent our

⁸⁸ See Te Aka Matua o te Ture | Law Commission *The Treaty of Waitangi and Maori Fisheries* | *Mataitai: Nga Tikanga Maori me te Tiriti o Waitangi* (NZLC PP9, 1989) at [13.5]–[13.7].

⁸⁹ See Chapters 5 and 7

⁹⁰ See Chapter 5.

⁹¹ See Chapter 9.

⁹² See Chapter 10.

understanding or reliance on tikanga in relation to procedural matters that are fundamentally sourced from state law.

- 2.129 Third, kāwanatanga should recognise its own limits by not applying state law to taonga. We conclude that the responsible exercise of kāwanatanga requires that tikanga Māori be able to continue to govern succession to taonga, and the appropriate role of state law in relation to taonga should be limited to facilitating the resolution of disputes in accordance with tikanga Māori. In our view, this is appropriate because taonga sit firmly within te ao Māori. This is responsible kāwanatanga facilitating the exercise of tino rangatiratanga. We acknowledge the views of some Māori who contemplate sharing the concept of taonga more broadly. There may be a future time in Aotearoa New Zealand when the development of the “third law” is such that this may occur.
- 2.130 We are not making any further recommendations in relation to tikanga determining succession matters for Māori without state law involvement. As we said in the Issues Paper, this approach raises profound questions about the relationship between tikanga as the first law of Aotearoa New Zealand and state law, and these questions go beyond this succession project. However, it is important that these matters are considered further, and we expect that contributions will continue to be made by many, including the Commission, academics and those progressing the discussion of constitutional transformation as discussed in the Matike Mai Report.⁹³ Particular matters may nonetheless be able to be advanced while this broad work is progressed. In Chapter 16, for example, we discuss ōhākī, suggesting that, given the significance of ōhākī to Māori in the sphere of succession, the Government considers recognising ōhākī as an expression of testamentary wishes, enforceable in state law.

A new Inheritance (Claims Against Estates) Act

- 2.131 We recommend that a new statute should be enacted as the principal source of law relating to entitlements to and claims against an estate. We also recommend that Part 3 of the Administration Act be repealed and replaced to reflect our recommendations in Chapter 7.
- 2.132 The new Act should reflect our recommendations in this Report and be drafted in simple and clear terms in accordance with modern legislative drafting standards. This will require the repeal of each of Part 8 of the PRA, the FPA and the TPA (and other more incidental changes) as discussed in subsequent chapters of this Report.
- 2.133 The new Act should be titled the Inheritance (Claims Against Estates) Act because this name is simple, clear and reflects the key subject matter of the statute. We suggest the word “inheritance” is used in the name of the new Act as we think it is likely more broadly understood than the word “succession”.
- 2.134 We acknowledge that, given our recommendations about the TPA in Chapter 6, common law and equity claims relating to contributions to a deceased will remain outside the

⁹³ *He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa — The Independent Working Group on Constitutional Transformation* (January 2016). See also Michael and Suzanne Borrin Foundation “The Constitutional Kōrero: Indigenous Futures and New Zealand’s Constitution” <www.borrinfoundation.nz>. Note also the point raised by Dr Maria Hook and Jack Wass in their joint submission that it would be important to clarify the interrelationship between any new or existing conflict of law rules governing the relationship between tikanga and state law, discussed further in Chapter 15.

proposed new Act. We also note our recommendations in Chapter 3 about succession to taonga, discussed above.

- 2.135 In the Issues Paper, we asked whether a reformed intestacy regime ought to sit within the new Act or remain in the Administration Act. Our consultation did not provide a clear answer to this question. For that reason and because there is a case to be made that the other matters of administration dealt with in the Administration Act are usefully kept together with the intestacy regime, we have not recommended that the intestacy regime be included in the new Act.
- 2.136 However, as preferred by other commentators and some submitters (including NZLS), we think there is merit in the Government considering the consolidation of multiple statutes relevant to the administration and succession of both testate and intestate estates, like the approach taken in several Australian states. In our view, this would include at a minimum the new Act, the Wills Act, the Administration Act, the Succession (Homicide) Act and the Simultaneous Deaths Act 1958.⁹⁴ This would result in one statute in which the key laws relating to inheritance could be found, promoting clear and accessible law.⁹⁵ At this point, the name of the Act could be amended to be the Inheritance Act.

Simple clear law that meets New Zealanders' reasonable expectations

- 2.137 Our recommendations in this Report are intended to achieve simple, clear law relating to entitlements to and claims against an estate that meets the reasonable expectations of New Zealanders. The current law is old, out of date and inaccessible. Our recommendations are informed by what we know about Aotearoa New Zealand's changing social context and by the fundamental values and principles of Aotearoa New Zealand's democratic society and its international obligations.⁹⁶ Our recommendations have also been informed by what we have learned about New Zealanders' attitudes, values and expectations of such law through consultation and the results of the Succession Survey.
- 2.138 Several submitters raised a concern that the Succession Survey did not capture a full picture of contemporary values and attitudes. There were practical limitations on the breadth of the survey which meant it was impossible to address all the issues that arise. We nonetheless think the results of the Succession Survey are valuable in relation to the matters it covered.

Reflecting fundamental human rights and international obligations

- 2.139 Good law recognises and respects fundamental human rights, including the rights affirmed in the New Zealand Bill of Rights Act 1990 and international instruments. We

⁹⁴ See Greg Kelly "An Inheritance Code for New Zealand" (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 2010) at 104 for additional legislation that might be included in a new Act.

⁹⁵ The Commission's work in the 1990s had as its ultimate aim a new Succession Act drafted in plain language that would provide for all succession laws in one statute, including the law regarding wills, administration and intestacies: Te Aka Matua o te Ture | Law Commission *Succession Law: Testamentary Claims — A discussion paper* (NZLC PP24, 1996) at vii. See also Greg Kelly "An Inheritance Code for New Zealand" (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 2010) at 12.

⁹⁶ See Te Aka Matua o te Ture | Law Commission *Review of Succession Law: Rights to a person's property on death | He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* (NZLC IP46, 2021) at [1.10]–[1.17]; and Te Aka Matua o te Ture | Law Commission *Relationships and Families in Contemporary New Zealand | He Hononga Tangata, he Hononga Whānau i Aotearoa o Nāianeī* (NZLC SP22, 2017).

have given particular attention to the United Nations Convention on the Rights of the Child, the United Nations Declaration on the Rights of Indigenous Peoples and the United Nations Convention on the Rights of Persons with Disabilities. Our recommendations for reform take these matters into account.

Balancing mana, property rights, obligations to family and whānau and the interests of wider society

- 2.140 The value-laden nature of questions around who should get a person's property when they die were clearly apparent throughout consultation. Strongly held views were expressed in favour of individual property rights and in favour of obligations to family and whānau. The most challenging aspect of making good succession law arises from the inevitable tension between sustaining property rights and expectations (including testamentary freedom) on the one hand and recognising obligations to family and whānau on the other and the need to balance both. In addition to these matters, we have concluded that another relevant criterion for good succession law is taking account of the interests of wider society.
- 2.141 We explained in the Issues Paper that an owner of property generally has rights to deal with property in whatever way they wish. A question arises as to the extent to which this right exists when the owner dies. The traditional approach in common law jurisdictions is to recognise property owners' testamentary freedom (although this is not absolute).⁹⁷
- 2.142 As explained earlier, state law in Aotearoa New Zealand maintains testamentary freedom. Although the right to testamentary freedom is qualified by the various claims an individual can bring to seek further provision from the estate, a properly executed will remains effective until successfully challenged.
- 2.143 There are further reasons to support a property owner's testamentary freedom:
- (a) Testamentary freedom respects the mana of the deceased.
 - (b) The will-maker is usually the best person to judge who is family and what duties are owed to them when distributing their estate.
 - (c) There is symbolic value in beneficiaries receiving gifts that the will-maker has intentionally chosen to make rather than through the operation of statute or a court order.
 - (d) The community may collectively benefit where will-makers have freedom to extend their testamentary dispositions to charities and other community organisations.
 - (e) Too much interference with testamentary freedom may cause avoidance behaviour for those who wish to dispose of their property in a different manner to that required by the law.

⁹⁷ *Banks v Goodfellow* (1870) 5 LR QB 549 at 563. Cockburn CJ observed that "[t]he law of every civilised people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass." However, he qualified this statement by explaining that a property owner would be under a "moral responsibility of no ordinary importance" to make provision for "those who are the nearest to them in kindred and who in life have been the objects of their affection". Unrestricted testamentary freedom developed in the 18th century largely from the rise of liberal individualism, led by thinkers such as John Locke, Jeremy Bentham and John Stuart Mill: see Rosalind F Croucher and Prue Vines *Succession: Families, Property and Death* (5th ed, LexisNexis Butterworths, Chatswood (NSW), 2019) at 16–17; and Sylvia Villios and Natalie Williams "Family provision law, adult children and the age of entitlement" (2018) 39 *Adel L Rev* 249 at 250.

- 2.144 In addition to a will-maker's rights, there are property rights and expectations of others to be considered. A beneficiary of a will has an interest in seeing the deceased's testamentary wishes that benefit them upheld. Parties that acquire rights to property held by the deceased during the deceased's life have an interest in those rights enduring against the estate. A surviving partner's relationship property rights are an important example.
- 2.145 Many submitters acknowledged that, in modern Aotearoa New Zealand, property rights in state law are important for Māori. However, tikanga also requires consideration of the nature of particular property, addressing whether certain items are not properly considered the property of an individual but that of a collective.
- 2.146 For these reasons, in a testamentary context, we have confirmed our preliminary view that any restriction on the property rights individuals enjoy during their life must be supported by clear policy reasons. We have set out in the following chapters our recommendations in relation to entitlements to and claims against estates, reflecting the policy reasons for our views on appropriate restrictions.

Efficient estate administration and dispute resolution

- 2.147 The Issues Paper identified that good succession law must also promote efficient estate administration and dispute resolution. When deciding on the terms of their will, will-makers should be able to understand what obligations they will owe on death. There should be clear rules for distributing an intestate estate. For those who wish to claim against an estate or defend a claim, the law should enable them to understand their rights and to determine the strength of such a claim. For personal representatives charged with administering and distributing an estate, the law should be clear on their duties and what claims can be properly admitted.
- 2.148 We also said that there should be clear processes for resolving disputes in and out of court. Parties should be able to understand what processes may be followed to resolve disputes. They should understand their legal and procedural obligations to facilitate the efficient resolution of disputes, such as disclosure of information and the need to organise the representation of those who the law deems to lack capacity. Parties should be able to settle disputes without the need for defended court proceedings, and the law can facilitate the settlement of disputes through agreement while ensuring parties are aware of their rights and unjust outcomes are avoided.
- 2.149 The emphasis in tikanga on the contribution that proper process can make to dispute resolution is significant. The substance of a dispute and the process for resolving it are inextricably linked. State law can facilitate tino rangatiratanga through its approach to dispute resolution.
- 2.150 Our detailed recommendations on all these matters are set out in the remaining chapters of this Report.

Reference to tikanga Māori in our recommendations

- 2.151 A common theme in many of our recommendations is to refer to tikanga as a key element of rights and obligations as well as dispute resolution processes. This has highlighted the question of whose tikanga we are referring to.
- 2.152 Several submitters commented on the variation in practice of tikanga. Chapman Tripp said it is important to note that understandings of the way in which tikanga principles

manifest in practice will differ between rohe, iwi and hapū, and so the proposed reforms should provide for deference to the tikanga-based practice of particular whānau, hapū and iwi.

- 2.153 We have concluded that, given the nature of succession matters, it is the tikanga of whānau that will be most important. We have therefore referred to tikanga of the relevant whānau in the following chapters. We contemplate that the tikanga of more than one whānau may be involved in some cases. The one exception to this is the tikanga relevant to succession to taonga. As we discuss in Chapter 3, we have concluded that the appropriate tikanga in this context should be articulated more broadly as the tikanga of the relevant whānau or hapū.
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Part Two

ENTITLEMENTS TO AND CLAIMS AGAINST ESTATES



CHAPTER 3

Succession and taonga

IN THIS CHAPTER, WE CONSIDER:

- succession to taonga according to tikanga Māori; and
- the definition of taonga in a succession law context.

INTRODUCTION

- 3.1 This chapter considers whether state succession law should expressly provide that those laws would not apply to taonga and that tikanga Māori should instead apply.
- 3.2 Whenua Māori is recognised as a taonga tuku iho in the preamble of Te Ture Whenua Maori Act 1993 (TTWMA).¹ In the Issues Paper, we discussed TTWMA and the recent changes made to it. The terms of reference for this review specifically exclude TTWMA.² Our recommendations in this chapter do not apply to whenua Māori.³
- 3.3 In the Issues Paper, we also discussed the land that was removed from Māori under the 1967 amendments to the Maori Affairs Act 1953 and expressed our view that the remedy for this is best suited to separate consideration between Māori and the Crown. We asked whether the recent changes to TTWMA have resolved issues relating to family homes built on whenua Māori. We received feedback that this is a complex issue and it is too early to comment on the impact of these changes. We therefore do not discuss these matters further here.

¹ Te Ture Whenua Maori Act 1993, preamble.

² THRMOA, Chapman Tripp and Ngā Rangahautira submitted that the exclusion of whenua Māori from this review is unsatisfactory, see discussion in Chapter 2.

³ We discuss this point below at [3.53].

CURRENT LAW

- 3.4 As we explain in Chapter 2, state succession law follows logically from the state law that recognises property rights during a person's lifetime, such as rights to ownership, use and exclusion of others.⁴ Several statutes relevant to succession refer to property.
- 3.5 Estate is defined in section 2 of the Administration Act 1969 as “real or personal property of every kind, including things in action”. Section 77 deals with succession to real and personal estate on intestacy and prescribes that the “estate” must be distributed according to its terms.⁵
- 3.6 A will is defined in section 8(1) of the Wills Act 2007 as a document that:
- (a) is made by a natural person; and
 - (b) does any or all of the following:
 - (i) disposes of property to which the person is entitled when he or she dies; or
 - (ii) disposes of property to which the person's personal representative becomes entitled as personal representative after the person's death; or
 - (iii) appoints a testamentary guardian.
- 3.7 Section 8(5) does not comprehensively define property but defines it for the purposes of the section as including or excluding certain rights and interests.
- 3.8 The Property (Relationships) Act 1976 (PRA) excludes taonga from the definition of family chattels in recognition that taonga are not like other property referred to in the definition.⁶ To date, case law in relation to claims asserting that items are taonga and should therefore not be understood as family chattels reveals that all claimants have been non-Māori.
- 3.9 State law uses the concept of a trust to permit the holding of property on behalf of others. In *Biddle v Pooley*, te Kōti Matua | High Court (the High Court) held that the taonga, two taiaha and a tewhatewha, were held on a trust on terms that required the trustee to care for the taonga with respect for tikanga.⁷ The case is an example of trust law being used by the courts to ensure taonga are held appropriately.

NGĀ TIKANGA

- 3.10 Taonga are knowledge and identity markers for tangata whenua. They are connected to the past to remind the living of their obligations to the living and future generations.⁸ There are various descriptions of taonga according to tikanga Māori. It has been defined broadly in Te Mātāpunenga as “[a] socially or culturally valuable object, resource,

⁴ Succession to property owned by Māori other than whenua Māori is determined by general succession law: see Te Ture Whenua Maori Act 1993, ss 100–103 and 110.

⁵ See Chapter 7 for a summary of the intestacy rules.

⁶ Property (Relationships) Act 1976, s 2 definition of “family chattels”, para (c)(i).

⁷ *Biddle v Pooley* [2017] NZHC 338 at [161]–[169].

⁸ Submission of Paul Tapsell.

technique, phenomenon or idea.”⁹ Another broad definition is provided in He Pātaka Kupu:¹⁰

He mea kei te tangata e mau ana, nāna ake, nōna ake rānei.

- 3.11 Some descriptions of taonga have emphasised the connection between the object and cultural identity. Professor Tā Hirini Moko Mead has described taonga as a “highly prized object” and taonga tuku iho as “gift of the ancestors, precious heritage”.¹¹ Professor Paul Tapsell has said a taonga is “any item, object or thing which represents a Māori kin group’s (whanau, hapu, iwi) ancestral identity with their particular land and resources”.¹² Professor Jacinta Ruru suggested a taonga may be a “valued possession held in accordance with tikanga Maori and highly prized by the whanau, hapu or iwi”.¹³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal has suggested a “taonga work” is:¹⁴

... a work, whether or not it has been fixed, that is in its entirety an expression of mātauranga Māori; it will relate to or invoke ancestral connections, and contain or reflect traditional narratives or stories. A taonga work will possess mauri and have living kaitiaki in accordance with tikanga Māori.

- 3.12 Taonga are more than their tangible forms, having associated intangible attributes such as mana, tapu, kōrero, mauri (life force, essential quality of life) and utu. The extent to which these attributes are manifested in a taonga depends on a range of factors. For example, a taonga that was originally created or used by tūpuna (ancestors), such as a taiaha, which has been handed down through generations, will derive mana, tapu, kōrero and mauri from the mana of the tūpuna who wielded it and the significance of the incidents in which the taiaha was used. These attributes affect the rights and obligations in tikanga attached to it as well as the manner in which it is expected to be treated or dealt with. Where a taonga strongly reflects these attributes and becomes tapu through ceremonial use or otherwise, it may have its own mauri, which must be respected. Failure to do so may result in utu, or supernatural or divine consequences. Where a taonga has fewer of these intangible qualities, individuals may exert more influence over the taonga.
- 3.13 Taonga hold special significance to their kin collective. For taonga that are not merely valuable possessions but have a special tapu and mauri, the deceased is not necessarily an owner, as understood under general property law, but rather holds a kaitiaki role over these items on behalf of a whānau, hapū or iwi.¹⁵ In a succession context, a critical question

⁹ Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 396.

¹⁰ Te Taura Whiri i te Reo Māori | Māori Language Commission “taonga” He Pātaka Kupu – te kai a te rangatira <www.hepatakakupu.nz>. This may be translated as “An object in the possession of a person, belonging to a person”.

¹¹ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 399.

¹² Paul Tapsell *Pukaki: A Comet Returns* (Reed, Auckland, 2000) at 13.

¹³ Jacinta Ruru “Taonga and family chattels” [2004] NZLJ 297 at 298.

¹⁴ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity — Te Taumata Tuatahi* (Wai 262, 2011) at 54.

¹⁵ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 46; and Jacinta Ruru “Taonga and family chattels” [2004] NZLJ 297 at 298.

is who will be appointed to not only care for the taonga's physical form but to carry the knowledge associated with it and the duties accompanying that knowledge.¹⁶

Recommendations from the PRA review

3.14 In the PRA review, we recommended that the new Relationship Property Act should define taonga within a tikanga Māori construct, but the definition should exclude land.¹⁷ We also recommended that the new Relationship Property Act should ensure that taonga cannot be classified as relationship property in any circumstances and that a court cannot make orders requiring a partner to relinquish taonga as compensation to the other partner.¹⁸ We noted that, although consultation was limited, the level of support for prioritising kaitiakitanga over division for taonga indicated reform was desirable. We considered this reflected the Māori world view and how Māori treat taonga outside of the rules of a property sharing regime when partners separate or when one partner dies.¹⁹ We also suggested that Māori should be consulted to inform the drafting of any definition of taonga.²⁰

ISSUES

Should taonga be excluded from general succession law?

3.15 The central issue concerns how the Crown should exercise its kāwanatanga (the right to govern) to facilitate the exercise of tino rangatiratanga over taonga in a succession context. A significant part of this is responding to the risk that the concept of taonga and the tikanga applying to it may be assimilated into general property law concepts and dealt with under state succession law. This could be inconsistent with te Tiriti's guarantee to Māori of ensuring "te tino rangatiratanga o ... o ratou taonga katoa", which includes proper recognition of tikanga.

3.16 We have heard that disputes over taonga do not usually make their way into the courts. Tikanga operates on a day-to-day basis in Aotearoa New Zealand, and disputes involving taonga are usually resolved within the whānau or hapū to which they belong. In the Issues Paper, we observed that it is possible that creating a statutory exclusion of these items would simply recognise what is already happening in practice: that taonga are being succeeded to according to tikanga outside the general law of succession.

Should taonga be defined by reference to tikanga?

3.17 In the Issues Paper, we said that, if expressly removing taonga from the general law of succession is desirable, taonga would need to be defined within general succession law

¹⁶ Submission of Paul Tapsell.

¹⁷ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R81 and [14.41]–[14.45]. At the end of this chapter, we explain why we have excluded land.

¹⁸ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R82.

¹⁹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [14.47].

²⁰ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [14.44].

in order to be excluded from it. We said this could be done by defining taonga according to the tikanga of the relevant whānau or hapū. Under this approach, tikanga would determine whether or not an item was subject to the general rules of succession. Alternatively, a more prescriptive definition might be adopted, although we acknowledged that there are known risks associated with the inclusion of kupu Māori in legislation.

Should taonga be limited to items that are connected to Māori culture?

- 3.18 “Taonga” is a kupu Māori that originates from a Māori perspective. Arguably, items that in practice have similar properties as taonga should not be considered taonga if they have no connection to Māori culture. Another view would be that taonga may have a much broader definition not limited to items that have a connection to Māori culture.

RESULTS OF CONSULTATION

- 3.19 In the Issues Paper, we asked questions concerning the use of the term taonga, the exclusion of taonga from general succession law and how taonga might be defined for such a purpose. On the consultation website we asked a broad question about the exclusion of taonga from the general law of succession with a fact scenario to explain what that would look like.

Should taonga be excluded from general succession law and instead governed by tikanga?

- 3.20 In the Issues Paper, we asked whether taonga should be excluded from general succession law. Most submitters agreed that taonga should be excluded from general succession law and governed by tikanga instead. These submitters were Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), the Family Law Committee of the Auckland District Law Society (ADLS), Te Hunga Rōia Māori o Aotearoa (THRMOA), Ngā Rangahautira, Chapman Tripp, Te Kani Williams, David Williams, Professor Jacinta Ruru and Katie Murray. Those who did not explicitly agree considered that the views of Māori should determine whether taonga is specifically excluded.
- 3.21 A small number of website submitters addressed the exclusion of taonga from general law. They all agreed that tikanga should determine succession to taonga.

Use of “taonga” to describe items that might be excluded from general succession law

- 3.22 In the Issues Paper, we asked whether taonga is an appropriate term to describe items that might be excluded from general succession law. Several submitters noted that taonga is a broad term. Chapman Tripp noted that taonga can include most things of value, whether tangible or intangible. For example, taonga may describe te reo Māori as well as a pounamu necklace. Chapman Tripp and THRMOA submitted that “taonga tuku iho” is a more appropriate term to use as it denotes a downwards trajectory through generations and so is more appropriate in a succession context. Chapman Tripp also suggested the term “manatunga”, which relates specifically to things of value that are intentionally passed through generations. For Chapman Tripp, “taonga tuku iho” and “manatunga” were preferred because they limit the potential pool to things that are bound up in a philosophy that makes them culturally pertinent. The terms are imbued with

a history and expectation of intergenerational transmission, which in Chapman Tripp's view justifies the removal of such items from the scope of general succession law. THRMOA submitted that a term that more narrowly defines the types of items intended to be caught is required.

- 3.23 NZLS considered that taonga is the correct kupu Māori to use and that its definition cannot be prescriptive as its meaning would need to be fluid and dictated by the tikanga of the relevant whānau or hapū. Ngā Rangahautira also agreed that taonga was an appropriate term to use. However, they noted that taonga is a broad term and it must be defined carefully to exclude certain items that appropriately devolve according to general succession law.
- 3.24 Community Law Centres o Aotearoa queried how taonga would be defined and whether a tikanga process could apply to a family homestead on general land that had been handed down through generations to be lived in communally. They also queried whether other cultures would be able to follow their own cultural practices in relation to items of cultural significance.
- 3.25 Professor Paul Tapsell cautioned that the separation of Māori words from their cultural context removes their indigenous meaning. Tapsell used the word kāinga as an example. It has developed a general meaning of house or home, but in more customary contexts, it holds a much wider meaning, referring to the community's intimate engagement with whenua and associated taonga that supported and nourished the community. Tapsell commented that the customary values underpinning taonga need to be clearly articulated and placed equally alongside state law, consistently reflecting the sharing of sovereignty envisaged under te Tiriti.

Should taonga be limited to items that are connected to te ao Māori?

- 3.26 In the Issues Paper, we asked if taonga (or another appropriate kupu Māori) should be defined by reference to tikanga and if so, should the tikanga be that of the relevant whānau or hapū. We also asked if taonga should be limited to items or things connected to Māori culture.
- 3.27 THRMOA considered that taonga should be limited to items that are connected to te ao Māori and that although taonga could extend to non-Māori items, another term for precious items not connected to te ao Māori is required. THRMOA also considered that this does not mean non-Māori could not claim a taonga as understood in accordance with tikanga Māori.
- 3.28 Ngā Rangahautira considered that taonga should be limited to items that are connected to Māori culture because taonga have special ancestral and cultural significance that could not apply to Pākehā items. They said that applying taonga to non-Māori items undermines the value of kaitiakitanga. Ngā Rangahautira said taonga should be defined by reference to tikanga that is specific to the relevant whānau, hapū or iwi. They said this is the best way to account for differences in tikanga as well as to avoid taonga becoming a word that is up to the interpretation of the judiciary or improperly defined in statute.
- 3.29 NZLS considered that taonga should be limited to items that are connected to Māori culture but noted that, as there may be divergent views within Māoridom on this issue, wide consultation with Māori is necessary.
- 3.30 Tapsell considered that, if the kōrero behind a taonga is lost or becomes obscured, it may render the taonga unprovenanced. Although recognisably Māori, it may no longer be

seen as constrained by customary obligations. Conversely, under the right conditions items that are Western in manufacture can transform into taonga, especially if they come to symbolise an ancestral relationship to a particular people and place.

- 3.31 Murray noted a distinction between communal taonga and individual taonga. She noted that different forms of kaitiakitanga apply over each of them. Whānau, hapū and iwi have to work out succession to community taonga, but succession to individual taonga is determined by the individual. She noted that tikanga Māori sits within a Māori world view, but that does not necessarily mean tikanga should not be available to all. As a partner to te Tiriti, Māori bring tikanga to the table.
- 3.32 Chapman Tripp compared a rākau whakapapa to a car to demonstrate the difference between a taonga tuku iho and other items that are not connected to te ao Māori. They said that a rākau whakapapa handed down between generations is adorned with indications of genealogical links to tūpuna, which also means it is an item with associated mana and tapu. The rākau whakapapa would be handed down through generations to ensure the genealogical ties of a whānau are never forgotten. A car, on the other hand, does not have associated mana or tapu that connects it to te ao Māori. They recognised that there may be items not connected to Māori culture that have sentimental value and therefore one could argue they are at least similar to taonga tuku iho. However, such items could simply be described as heirlooms.

CONCLUSIONS

RECOMMENDATION

R5

State law should not determine the substantive question of succession to taonga. The new Act should provide that succession to taonga is determined by the tikanga of the relevant whānau or hapū and that taonga should not be available to meet any entitlement or claim under the new Act or entitlement under the new intestacy provisions.

“Taonga” is the preferable kupu Māori to use to describe the items to be excluded from state succession law

- 3.33 We prefer the use of the term “taonga” to the term “taonga tuku iho” for two reasons. First, taonga tuku iho is less than what Māori were promised in te Tiriti, which guaranteed “te tino rangatiratanga o ... o ratou taonga katoa”. In the context of this review, we consider that limiting “taonga katoa” to taonga tuku iho does not meet the guarantees in te Tiriti and falls short of the Crown’s obligation to exercise its kāwanatanga in a responsible manner. Second, in our view, taonga tuku iho is too limited in principle for reasons we set out below. We also noted in the PRA review that taonga tuku iho may not capture taonga that are newly created.²¹

²¹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [14.45].

Tikanga (and not state law) should determine the substantive question of succession to taonga

- 3.34 In our view, state law should not determine the substantive question of succession to taonga. The Wills Act, the Administration Act and the new Act will all need to address this to ensure that succession to taonga is determined by the tikanga of the relevant whānau or hapū. The Wills Act should be amended to still contemplate the expression of testamentary wishes by a deceased over taonga but ensure that, where there is any dispute over succession to taonga, tikanga determines the outcome. The Administration Act will need to be amended to exclude the distribution of taonga on intestacy. The new Act will also need to ensure that taonga are not available to meet a family provision or testamentary promise claim. These recommendations do not mean that the state legal system cannot resolve disputes over taonga. As discussed in Chapter 2, we think the state law system must support the expression of tino rangatiratanga, including in relation to taonga. This means providing support to resolve disputes where whānau wish to use state systems to do so.²²
- 3.35 We consider that it is crucial to treat taonga in such a way as to respect tikanga such as kaitiakitanga, whanaungatanga, mana, mauri and whakapapa in their true meanings grounded in mātauranga Māori. It flows from this conclusion that we consider tikanga Māori provides a framework for the succession to taonga and for resolving disputes over taonga. In our view, this approach is preferable to relying on trust law to resolve a whānau dispute over taonga, as happened in *Biddle v Pooley*.
- 3.36 As we noted above, disputes involving taonga do not usually make their way into the courts, and tikanga operates on a day-to-day basis in Aotearoa New Zealand. In forming our recommendations, we have considered the option of simply making no mention of taonga. This would arguably recognise that taonga are being managed according to tikanga outside the general law of succession. Despite this, we prefer an express reference for several reasons:
- (a) In our view, an express reference actively protects “te tino rangatiratanga o ... o ratou taonga katoa” and is the best way for the Crown to responsibly exercise its kāwanatanga to that effect. It is better for Parliament to provide direction than to rely on the relative scarcity of taonga disputes in the courts to ensure that tikanga continues to underpin the treatment of taonga.
 - (b) The cases that have come before a court in the PRA context have been brought by non-Māori parties.²³ By defining taonga within a tikanga construct (which we discuss below), non-Māori parties must engage with tikanga Māori concepts in order to show that something is a taonga, meaning the exclusion of taonga is less likely to be sought to be applied for reasons other than its intended purpose.
 - (c) Notwithstanding that, in practice, taonga may be succeeded to outside of state law, an express exclusion provides certainty as to the legal position of taonga for the purposes of succession law.

²² We discuss the resolution of disputes in Chapters 13 and 14.

²³ *Page v Page* [2001] NZHC 592, (2001) 21 FRNZ 275; *Perry v West* (2002) 21 FRNZ 575 (DC); *Perry v West* [2004] NZFLR 515 (HC); and *Sydney v Sydney* [2012] NZFC 2685.

- (d) We acknowledge the risk that the tikanga of taonga may become fixed or distorted by discussion in the general courts. We think this risk is mitigated by the following:
- (i) Courts are very careful about finding tikanga as a matter of fact, and any finding by a court can only be a “snapshot at a certain point ... What is recognised by a court cannot change the underlying fact of tikanga determined by the hapū or iwi, exercising their rangatiratanga.”²⁴
 - (ii) We expect that few cases involving disputes over taonga will make their way to the courts, consistent with current practice.
- (e) Under our recommendations in Chapter 11, te Kooti Whenua Māori | Māori Land Court will have jurisdiction in relation to succession to taonga. If such jurisdiction is extended, the Part 3A mediation process in TTWMA will be available to support resolution of disputes over taonga within the whānau or hapū. Courts will also be able to appoint pūkenga (experts) to provide evidence on tikanga, where necessary.²⁵
- 3.37 Several submitters noted that testamentary freedom is important for Māori.²⁶ However, most of these submitters said that testamentary freedom must be balanced with whanaungatanga and whakapapa obligations. THRMoa said that, in practical modern-day circumstances, most Māori would respect testamentary freedom with the exception of two categories where testamentary freedom was burdened by whānau and whakapapa considerations, namely taonga and land. MinterEllisonRuddWatts said the application of tikanga to testamentary freedom will typically constitute a balancing exercise, weighing up concepts like mana, whānau, utu and kaitiakitanga and how these apply to the specific circumstances. They noted the nature of the item in question and its significance to the community are likely to be important considerations. These views suggest to us that less weight is placed on testamentary freedom over objects with significant obligations sourced from whanaungatanga and whakapapa, such as taonga.
- 3.38 It is important to note that our proposed approach does not prevent the deceased’s wishes as expressed in a will from having any effect over taonga they may hold. The deceased’s wishes may still be given effect in the following ways:
- (a) The whānau or hapū may choose to respect a provision in a will and give the provision effect as an expression of the deceased’s mana.
 - (b) A provision in a will may serve as an indication of the deceased’s wishes concerning the taonga and inform the kōrero surrounding the question of succession to the taonga.
- 3.39 The tension between testamentary freedom and obligations sourced in whanaungatanga and whakapapa is absent where the deceased has expressed no wishes regarding any taonga. Their wishes cannot be given effect to by the whānau or considered in any kōrero

²⁴ *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291 at [58].

²⁵ See also our recommendations in *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R83 and [14.59].

²⁶ This was also supported by the results of the Borrin Succession Survey: see Ian Binnie and others *Entitlements to Deceased People’s Property in Aotearoa New Zealand: Public Attitudes and Values – A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021).

following death. We do not think that taonga should be succeeded to according to the intestacy rules when tikanga so strongly necessitates whānau or hapū kōrero processes regarding taonga.

- 3.40 Communal responsibility and decision-making over taonga may be contrasted with the purpose of both a will and the intestacy regime. A will is:²⁷
- ... the declaration in a prescribed manner of the intention of the person making it with regard to matters that he or she wishes to take effect after his or her death.
- 3.41 The intestacy regime is a default set of rules that operate in the absence of a will, designed to reflect what most people would have done if they had made a will.²⁸
- 3.42 Communal responsibility and decision-making may not be reflected in a will or the intestacy rules. Although we know testamentary freedom is valued in te ao Māori, in our view, decisions concerning taonga require a contextual approach. The deceased's wishes may be an important contextual factor, particularly if the deceased was a person of great mana, but not necessarily determinative.
- 3.43 We consider that taonga exist on a spectrum. At one end, taonga may include items of value over which it is accepted that the owner's mana permits them influence as to what should happen to the taonga, and the collective will accept that outcome. At the other end, taonga may have mauri and tapu and have significant meaning to the wider whānau, hapū or iwi. The determination of where a taonga sits on this spectrum is, in our view, one that must be made according to tikanga Māori. By recommending a broad exclusion of taonga, we are not recommending that a person would lose influence over personal taonga but rather affirming that those rights are ones sourced from tikanga Māori and not state law.

Taonga should be limited to items connected to te ao Māori

RECOMMENDATION

R6

In the context of state succession law, taonga should be defined within a tikanga Māori construct, but excluding all land. Taonga should be limited to items that are connected to te ao Māori.

- 3.44 In the Issues Paper, we outlined two views arising from the literature and case law about whether taonga should be limited to things that hold cultural significance only for Māori. On one view, taonga is a kupu Māori that originates from an ao Māori perspective and should be limited to things that have some Māori association or content.²⁹ On the other view, taonga describes things or the relationship between people and those things that can apply regardless of cultural context.³⁰

²⁷ William M Patterson *Laws of New Zealand Wills* (online ed) at [2].

²⁸ See Chapter 7.

²⁹ See Jacinta Ruru "Taonga and family chattels" [2004] NZLJ 297 at 297. See also the definition of "taonga tūturu" in the Protected Objects Act 1975, which limits "taonga tūturu" to objects that relate to Māori culture, history or society and were manufactured, modified, brought into New Zealand or used by Māori: s 2 definition of "taonga tūturu".

³⁰ See for example the obiter comments made by Durie J in *Page v Page* [2001] NZHC 592, (2001) 21 FRNZ 275 at [46].

- 3.45 In our view, what constitutes a taonga is something that should be determined by the tikanga of the relevant whānau or hapū. Ultimately, this is a factual inquiry that must be undertaken considering both the relevant tikanga and the circumstances of the case.
- 3.46 On this view, not all things that on their face appear to be derived from or otherwise connected to Māori culture will be a taonga. Conversely, there may be some things that appear to have no connection to Māori culture that may be taonga. Our view is less focused on the thing itself (although that is not irrelevant) and more focused on the surrounding circumstances that show it is a taonga according to tikanga Māori. Thus, context is again crucial. Some of the factors that might be relevant contextually include:
- (a) whether the taonga has an identifiable creator and has been handed down through generations of whakapapa;
 - (b) whether the taonga has been bestowed formally to a recipient, and mana given by the whānau to the taonga ceremonially or otherwise; and
 - (c) whether there is a common expectation by whānau about how the item will be treated as distinct from personal possessions.
- 3.47 Submitters generally favoured a definition of taonga that is limited to items that have a connection to te ao Māori. We agree with this in principle. However, there are some conceptual difficulties in defining exactly what would qualify an item as being connected to te ao Māori. We do not anticipate these difficulties will cause many issues in practice, but we give some examples to demonstrate them. Items of a similar nature to the rākau whakapapa that Chapman Tripp mentioned in their submission, for example, have a clear connection to te ao Māori. Whakapapa information is carved into the taonga itself and is also present in the kōrero surrounding the taonga as it is passed through generations of whānau Māori. However, the way in which an item is connected to te ao Māori may not always be obvious. For example, a war medal received by a tupuna Māori may perform the same functions, have similar kōrero surrounding it and have kaitiakitanga obligations attached to it, but without the requisite knowledge there would be no way to connect it to te ao Māori. Conversely, an intricately carved pounamu depicting atua (revered ancestors or deities) may have been purchased from a gift shop and subsequently sat in a bedside drawer for a decade. It performs no whakapapa functions, has no associated kōrero with it and has no significance to anyone besides the person who received it as a gift. Ultimately, whether an item has a sufficient connection to Māori culture to be considered a taonga will have to be determined according to the relevant tikanga in the facts of any individual case.
- 3.48 For some submitters, items that had no connection to te ao Māori could still be considered a taonga if the core elements of a taonga existed, albeit in an ao Pākehā context. An example may help demonstrate this view. Sarah is 64 and a Pākehā. She looks after an academic gown handed down to her by her grandfather, now deceased, who received it from his father as a graduation gift. Sarah's grandfather gifted the gown to Sarah on his 80th birthday in front of their family and explained where the gown had come from and who had worn it on special occasions. The gown is usually worn by members of the family at their graduation ceremonies and is sometimes worn on other formal occasions. The family all know the history of the gown and ensure that those who wear it know where it has come from. Sarah considers herself the caretaker of the gown on behalf of the family. On this view, it is arguable that the academic gown should be considered a taonga.
- 3.49 We consider these views constitute a valid perspective on taonga. However, although the gown in Sarah's example bears many of the characteristics of a taonga, we do not

think state law should treat it as such. To take this view we would have to first conclude that tikanga Māori as a set of values and ideas can exist independently from the context in which they are derived – in other words, that tikanga Māori and te ao Māori are severable.

- 3.50 Although we received some feedback that this is an arguable position, we have concluded that this approach requires further exploration before it could support such a significant change in the law. Instead, we consider that the identity of a taonga and the obligations that attach to it are derived from the tikanga that exists in the relevant Māori context.
- 3.51 Therefore, these types of items must continue to be passed on to the next generation using state law devices, such as through the deceased's will, through lifetime gifting or using a trust.
- 3.52 In the Issues Paper, we discussed whether taonga should have a prescriptive definition within the new Act or be defined pursuant to tikanga Māori. We prefer a definition that references the relevant tikanga for several reasons:
- (a) The tikanga applicable to any given taonga may vary across whānau and hapū. A prescriptive definition would fail to recognise this.
 - (b) By defining taonga pursuant to tikanga, it will be necessary in most cases for the court to obtain a cultural report, hear expert evidence from witnesses or appoint a pūkenga to assist the court.
 - (c) Legislation lacks the inherent flexibility needed to maintain a prescriptive definition that would align with tikanga Māori as it adapts to changing circumstances through time.
 - (d) Our view of taonga relies heavily on contextual analysis to determine whether something is a taonga or not. A prescriptive definition may undesirably limit a decision-maker's ability to analyse the circumstances before them.
- 3.53 Lastly, we recognise that whenua Māori is a taonga tuku iho and Māori may wish for their whenua to be excluded from the application of state succession law generally. We also recognise that the distinction TTWMA draws between general land and Māori freehold land is not a distinction that is drawn in te ao Māori. In our view, policy decisions regarding whenua Māori must be made considering all whenua Māori and not just whenua classed as general land. If, for example, a definition of taonga included general land but not Māori freehold land, some Māori may feel that, in order to exercise tino rangatiratanga over their whenua, they would have to convert their land to general land. To avoid potential conflicts such as this, we recommend that the definition of taonga should exclude all land. Further discussion between Māori and the Crown may be required in relation to these broader questions about whenua Māori.
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CHAPTER 4

Relationship property entitlements

IN THIS CHAPTER, WE CONSIDER:

- the relationship property entitlements a person has on the death of their partner; and
- the specific rules of relationship property division that apply.

CURRENT LAW

- 4.1 The Property (Relationships) Act 1976 (PRA) directs how couples should divide their property when a relationship ends because the partners have separated or because one of the partners has died.
- 4.2 The property division rules only apply when the relationship that ended was a marriage, civil union, or de facto relationship of three years or longer. The PRA defines a de facto relationship as a relationship between two people who “live together as a couple”.¹ De facto couples in relationships of less than three years will not be required to divide property unless they satisfy additional criteria.² Māori customary marriage does not carry with it rights to property held by the other spouse, yet if a couple in a customary marriage are deemed to be in a de facto relationship for the purposes of the PRA, they may have rights to property they would not otherwise have under tikanga.³
- 4.3 To determine which property a couple should divide, the PRA first classifies certain items of property as relationship property. Broadly, relationship property comprises property

¹ Property (Relationships) Act 1976, s 2D. In determining whether two people live together as a couple, all the circumstances of the relationship are to be considered, including the matters prescribed in s 2D(2).

² Property (Relationships) Act 1976, s 14A. Marriages and civil unions of three years are generally subject to the ordinary property division rules unless one of the special situations outlined in ss 14–14AA apply.

³ Jacinta Ruru "Implications for Māori: Historical Overview" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Reuters, Wellington, 2004) 445 at 450–451.

- the partners acquire during the relationship, property acquired for the partners' common use or common benefit and the family home and family chattels.⁴
- 4.4 On division, each partner is generally entitled to an equal share in the relationship property.⁵
- 4.5 When a partner in a qualifying relationship dies, Part 8 of the PRA provides the surviving partner with a choice. They may:⁶
- (a) divide the couple's relationship property (option A); or
 - (b) accept whatever gifts are made for them under the deceased's will or their intestacy entitlements (option B).
- 4.6 A surviving partner who wishes to choose option A or B must complete and sign a written notice in a prescribed form indicating that choice and generally must do so within six months from the grant of administration in Aotearoa New Zealand.⁷ The notice must include or be accompanied by a certificate signed by a lawyer and certifying that the lawyer has explained the effect and implications of the notice.⁸
- 4.7 A surviving partner must have chosen option A to commence proceedings under the PRA.⁹ The court may extend the time for making the choice.¹⁰ If a surviving partner makes no election within the relevant timeframe, including any extended timeframe, they are deemed to have chosen option B.¹¹ Under section 69(2), a court may set aside a surviving partner's chosen option on certain grounds and where satisfied, having regard to all the circumstances, that it would be unjust to enforce the choice.¹²
- 4.8 If the surviving partner elects option A, the PRA's property division rules will apply with some modification.¹³ However, every gift to the surviving partner in the deceased's will is to be treated as having been revoked unless the will expresses a contrary intention.¹⁴

⁴ Property (Relationships) Act 1976, s 8.

⁵ Property (Relationships) Act 1976, s 11.

⁶ Property (Relationships) Act 1976, s 61.

⁷ Property (Relationships) Act 1976, s 62(1)(b). If the estate is small, meaning that it can be distributed without the need for a grant of administration, the choice must be made within the later of six months from the date of the deceased's death or six months from the grant of administration in Aotearoa New Zealand (if the grant is made within six months of the deceased's death): s 62(1)(a) and s 2 definition of "small estate".

⁸ Property (Relationships) Act 1976, s 65.

⁹ However, the partner can apply under the Family Protection Act 1955 for further provision from the estate irrespective of which option they elect: Property (Relationships) Act 1976, s 57.

¹⁰ Property (Relationships) Act 1976, s 62(2), but the application for extension must be made before the final distribution of the estate: s 62(4).

¹¹ Property (Relationships) Act 1976, s 68.

¹² The relevant grounds are that the choice was not freely made; the surviving partner did not fully understand the effect and implications of the choice; since the choice was made, the surviving partner has become aware of information relevant to the making of the choice; or since the choice was made, a third party has made an application under the Law Reform (Testamentary Promises) Act 1949 or the Family Protection Act 1955: Property (Relationships) Act 1976, s 69(2)(a).

¹³ Property (Relationships) Act 1976, s 75(b).

¹⁴ Property (Relationships) Act 1976, s 76.

Policy behind Part 8 of the PRA

- 4.9 The PRA rests on the theory that a qualifying relationship is a joint venture between the partners to which each partner contributes in different but equal ways.¹⁵ Each partner therefore has an entitlement to an equal share of the couple's relationship property.
- 4.10 The policy basis of Part 8 is that the surviving partner should receive, at a minimum, the same entitlements they would have if the relationship had ended by separation. In other words, the law ensures the surviving partner is not worse off than if the couple had separated.¹⁶
- 4.11 The surviving partner's right to choose option A or option B is to avoid forcing a compulsory property division on couples who are content to have the surviving partner's entitlements determined by the deceased's will or the intestacy rules.¹⁷
- 4.12 The rationale for revoking the gifts to a surviving partner when they choose option A is to avoid the surviving partner receiving more property than the deceased intended.¹⁸

Particular rules of relationship property division on death

- 4.13 There are some differences between Part 8 of the PRA and the rules of relationship property division that apply when partners separate. These are of particular note:
- (a) All property the deceased partner owned at their death is presumed to be relationship property.¹⁹ The person who asserts the property is not relationship property carries the burden of proving that assertion.
 - (b) Property acquired by the estate is presumed to be relationship property.²⁰
 - (c) Property acquired by the surviving partner after the death of the deceased partner is separate property unless the court considers that it is just in the circumstances to treat that property or any part of it as relationship property.²¹
- 4.14 The rules that apply to marriages and civil unions of short duration that end on separation do not apply when a partner dies. Rather, those relationships will be subject to equal sharing unless the court, having regard to all the circumstances of the marriage or civil union, considers that equal sharing would be unjust. De facto relationships of short duration, on the other hand, must still satisfy the same strict eligibility criteria that apply to relationships ended by separation.²²

¹⁵ Property (Relationships) Act 1976, s 1N(b); and Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [2.44]–[2.46].

¹⁶ (26 March 1998) 567 NZPD 7916–7925; *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, October 1988) at 40; and Te Aka Matua o te Ture | Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [4] and [15].

¹⁷ See *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, October 1988) at 44–45.

¹⁸ See Matrimonial Property Amendment Bill 1999 (109-2) (select committee report) at iv.

¹⁹ Property (Relationships) Act 1976, s 81.

²⁰ Property (Relationships) Act 1976, s 82.

²¹ Property (Relationships) Act 1976, s 84.

²² Property (Relationships) Act 1976, s 85.

NGĀ TIKANGA

- 4.15 The traditional roles of men and women in Māori society can only be understood in the context of the Māori world view.²³ Marriage was not a formal ceremony but relied upon the public expression of whānau approval for validity.²⁴ Marriage was a relationship of importance for the whānau and hapū as much as the spouses because it provided links between different whakapapa lines and gave each new members.²⁵ However, while marriage was highly valued, it was not given absolute precedence over other relationships because of the importance of whakapapa.²⁶ Māori hold commitment to partner and commitment to descent in tension.²⁷
- 4.16 Men and women were considered an essential part of the collective whole, with women playing a particular role in linking the past, present and future.²⁸ Women were nurturers and organisers, valued within their whānau, hapū and iwi.²⁹ Women of rank maintained powerful positions within the social and political organisations of their tribal nations.³⁰ Both men and women had the capacity to hold property, in contrast to that of their Pākehā contemporaries.³¹ Marriage did not change this, as women continued to hold land that they held prior to marriage and decisions regarding it were theirs to make, subject to the wider community interests.³²

²³ Annie Mikaere “Māori Women: Caught in the Contradictions of a Colonised Reality” (1994) 2 Taumauri | Waikato L Rev 125 at 125; and Jacinta Ruru “Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand” (2005) 19 IJLPF 327 at 327.

²⁴ See Te Aka Matua o te Ture | Law Commission *Justice: The Experiences of Māori Women | Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 19; and Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 62.

²⁵ Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 62; and Donna M Tai Tokerau Durie-Hall “Māori Marriage: Traditional Marriages and the Impact of Pākehā Customs and the Law” in Sandra Coney (ed) *Standing in the Sunshine: A History of New Zealand Women Since They Won the Vote* (Viking, Auckland, 1993) 186 at 186–187, citing Donna Durie-Hall and Joan Metge “Kua Tutū Te Puehu, Kia Mau” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992).

²⁶ Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 62.

²⁷ Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 59–60.

²⁸ Annie Mikaere “Māori Women: Caught in the Contradictions of a Colonised Reality” (1994) 2 Taumauri | Waikato L Rev 125 at 125; and Jacinta Ruru “Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand” (2005) 19 IJLPF 327 at 330.

²⁹ Te Aka Matua o te Ture | Law Commission *Justice: The Experiences of Māori Women | Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 11.

³⁰ Te Aka Matua o te Ture | Law Commission *Justice: The Experiences of Māori Women | Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 14.

³¹ Angela Ballara “Wāhine Rangatira: Māori Women of Rank and their Role in the Women’s Kotahitanga Movement of the 1890s” (1993) 27 NZJH 127 at 133–134.

³² Angela Ballara “Wāhine Rangatira: Māori Women of Rank and their Role in the Women’s Kotahitanga Movement of the 1890s” (1993) 27 NZJH 127 at 133–134; and Jacinta Ruru “Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand” (2005) 19 IJLPF 327 at 330.

- 4.17 The primary social unit for Māori is the whānau.³³ Professor Jacinta Ruru notes two distinct views on defining whānau membership.³⁴ The first is a “descent-based” view, whereby membership is defined exclusively by descent and excludes most partners. The word “whānau” has another meaning of “to give birth”, which accords with this descent-based view.³⁵ The second is an extended view whereby those who participate in whānau activities are included. Although both views must be held for an understanding of whānau, the descent-based view comes to the fore in connection with the management of group property and the passing down of mana, land rights and the trusteeship of taonga.³⁶ Ruru also notes the varying degrees to which Māori nuclear families remain part of a wider whānau.³⁷
- 4.18 The operation of whanaungatanga, aroha and manaakitanga mean whānau take care of their members, including undoubtedly a pouaru (bereaved partner). This is likely to manifest itself in care not only for the pouaru but for any children of the relationship and likely involve whānau of both partners.

RECOMMENDATIONS IN THE PRA REVIEW

- 4.19 In the PRA review, we made several recommendations for reform of the rules that apply to property division on separation that are relevant to division on death.
- 4.20 We concluded that change to the classification of relationship property is required. We recommended that property should be classified as relationship property if it:³⁸
- (a) was acquired for the partners’ common use or common benefit;
 - (b) was acquired during the relationship other than as a third-party gift or inheritance; or
 - (c) is a family chattel.
- 4.21 On this basis, a family home should be a partner’s separate property if it was acquired before the relationship or as a gift or inheritance.³⁹ However, we recommended that the increase in value of a separate property family home during the time it is used as the family home should be relationship property. Any repayment of the principal amount

³³ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 20.

³⁴ Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 59–60.

³⁵ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World — Māori Perspectives on Justice* (March 2001) at 30; HW Williams *A Dictionary of the Maori Language* (7th ed, Government Printer, Wellington, 1971) at definition of “whānau”; and Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 41.

³⁶ Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 59–60.

³⁷ Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 60–61.

³⁸ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R9.

³⁹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [3.73]–[3.79] and [3.123]–[3.125].

- owing on a mortgage debt relating to the family home using relationship property should entitle the non-owning partner to compensation.
- 4.22 We favoured allocating the burden of proof of establishing whether property is separate property to the partner that owns the property.⁴⁰
- 4.23 We recommended excluding “items of special significance” from the definition of family chattels in addition to the current exclusions for heirlooms and taonga. As a result, they would not be classified as relationship property simply because they were used by the family.⁴¹ We said items of special significance should be defined as items that:
- (a) have a special meaning to a partner; and
 - (b) are irreplaceable, in that a similar substitute item or its monetary value would be an insufficient replacement.
- 4.24 We recommended the continuation of the general rule of equal sharing of relationship property.⁴² We also favoured the continuation of an exception to equal sharing for cases where extraordinary circumstances make equal sharing repugnant to justice but with greater clarity about when a court may take misconduct into account.⁴³
- 4.25 We recommended the introduction of Family Income Sharing Arrangements (FISAs) to share the economic advantages and disadvantages arising from a relationship or its end. We recommended measures to strengthen children’s interests and participation in relationship property proceedings. We discuss the recommendations regarding FISAs and children’s interests further in later chapters.
- 4.26 We recommended that the framework of the proposed new Relationship Property Act should continue to respond to matters of tikanga.⁴⁴ We asked in consultation whether there should be a separate regime for relationship property division according to tikanga Māori. However, the feedback we received did not call for such reform. Instead, we recommended several ways in which the reformed legislation could accommodate and respond to matters of tikanga Māori, including:⁴⁵
- (a) the proposed new Relationship Property Act should incorporate a revised statement of principles, which would include addressing that a just division of relationship property recognises tikanga Māori;
 - (b) Māori land should be excluded from division;

⁴⁰ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R16.

⁴¹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R21–R22.

⁴² Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R37 and [8.20]–[8.23].

⁴³ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R39, R41–R43, [8.41]–[8.45] and [8.83]–[8.95].

⁴⁴ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R4, R79 and [14.9]–[14.10].

⁴⁵ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R79–R85.

- (c) protections should exist so a partner does not have to relinquish taonga on separation; and
- (d) several measures to strengthen the ability of te Kōti Whānau | Family Court to consider matters of tikanga.

ISSUES

Criticisms of the approach taken in Part 8 of the PRA

- 4.27 There is criticism that a partner, having chosen option A, must forgo their entitlements under the deceased's will.⁴⁶ The argument is that, by claiming their share of relationship property, surviving partners are taking what is rightfully theirs. By denying the partner the right to inherit from the deceased on top of receiving their share of relationship property, the partner unjustly forfeits their rights under succession law.
- 4.28 A will-maker can avoid this outcome by stating that the provision for the surviving partner under the will is to remain even if the surviving partner chooses option A (a contrary intention provision). Critics argue, however, there is anecdotal evidence that will-makers seldom include a contrary intention clause in their will because they are unaware of the surviving partner's rights to choose option A.⁴⁷
- 4.29 On the other hand, we have heard concerns that Part 8 of the PRA provides a surviving partner with too great an entitlement. Those concerned gave the example of people who enter relationships late in life and bring property acquired beforehand, possibly during a previous relationship. Even when the relationship lasted only a few years, the surviving partner would share in half the relationship property, potentially affecting the inheritance of the deceased's children.

Criticism of the classification rules in Part 8 of the PRA

- 4.30 The presumptions in Part 8, that property of the estate is relationship property unless proven otherwise, have been criticised. The evidential burden on the personal representatives is difficult to discharge. We have heard that the presumptions are particularly unsuited to short relationships between people later in life because those relationships are unlikely to generate substantial relationship property.

Criticism of the rules relating to qualifying relationships in Part 8 of the PRA

- 4.31 We have heard concerns that the different treatment between marriages and civil unions of short duration and de facto relationships of short duration is discriminatory. Some argue the same rules should apply to all, recognising that the death of a de facto partner is an involuntary end to the relationship in the same way as the death of a spouse or civil union partner.

⁴⁶ See Nicola Peart "New Zealand's Succession Law: Subverting Reasonable Expectations" (2008) 37 *Comm L World Rev* 356 at 372; and Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge, 2017) 95 at 118.

⁴⁷ Nicola Peart "New Zealand's Succession Law: Subverting Reasonable Expectations" (2008) 37 *Comm L World Rev* 356 at 372.

- 4.32 A further issue arises concerning former partners. Currently, Part 8 of the PRA applies to former spouses and civil union partners provided not more than 12 months have elapsed since any dissolution order.⁴⁸ In contrast, no time limit applies to former de facto partners.⁴⁹ The omission of a time limit is probably an oversight as it is unlikely Parliament intended former de facto partners' relationship property rights to revive on death if they were out of time to bring proceedings following separation.⁵⁰

Unequal sharing of relationship property

- 4.33 Difficulties may arise when applying the PRA's exceptions to equal sharing to relationship property division on death. If there are extraordinary circumstances that would make equal sharing repugnant to justice, the court may order that relationship property be divided based on the partners' contributions to the relationship.⁵¹ In the PRA review, we recommended that this provision should continue. We added that, when deciding whether there are extraordinary circumstances that make equal sharing repugnant to justice, a court should be able to take into account a partner's gross misconduct when that misconduct has significantly affected the extent or value of relationship property.
- 4.34 When applying these provisions to relationships ending on death, the deceased would not be able to respond to allegations of misconduct made against them. Personal representatives may struggle to refute or substantiate arguments about the extraordinary circumstances and the partners' respective contributions to the relationship.
- 4.35 These discretionary exceptions to equal sharing are likely to cause uncertainty and lead to disputes. The parties may find it difficult to predict a surviving partner's likely relationship property entitlements. As entitlements in these circumstances are more contestable, disputes are more likely to arise that cannot be settled by the parties without the court's intervention. Efficient estate administration may be undermined.

Limited recognition of tikanga in the PRA

- 4.36 In the PRA review, we observed that the PRA recognises tikanga in the exclusion of Māori land from the ambit of the PRA and the exclusion of taonga from the definition of family chattels.
- 4.37 The PRA regime is underpinned by a strong presumption of equal sharing of relationship property. We do not suggest that the contributions to a relationship that give rise to a presumption of equal sharing under state law are not given equal weight from a Māori perspective. In fact, traditionally, Māori valued the contributions of women much more than their colonial counterparts.⁵² However, whether those contributions should give rise

⁴⁸ Property (Relationships) Act 1976, s 89(1)(d). However, the court may grant an extension: s 89(1)(e).

⁴⁹ Property (Relationships) Act 1976, s 89(1)(b).

⁵⁰ See discussion in Nicola Peart (ed) *Family Property* (online looseleaf ed, Thomson Reuters) at [PR89.01].

⁵¹ Property (Relationships) Act 1976, s 13.

⁵² See generally Angela Ballara "Wāhine Rangatira: Māori Women of Rank and their Role in the Women's Kotahitanga Movement of the 1890s" (1993) 27 NZJH 127; Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 29–30; and Te Aka Matua o te Ture | Law Commission *Justice: The Experiences of Māori Women | Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999).

to a legal presumption of equal sharing may be less clear if more weight is afforded to descent lines. This may also be affected by the nature of the property being considered.

RESULTS OF CONSULTATION

4.38 The Commission received submissions regarding relationship property on both the consultation website and the Issues Paper.

Issues

4.39 Just under half of the submitters to the Issues Paper who addressed the chapter on relationship property expressly agreed that the Commission had correctly identified all the relevant issues in this area as discussed above. No submitter disagreed with any of the issues identified by the Commission.

4.40 Of the submitters to the consultation website, most who commented on the current law raised concerns. Some felt that the current law did not do enough to protect surviving partners, particularly to protect their right to remain in the family home.⁵³ Others thought that the law could result in unfair outcomes for the deceased's children, especially in the case of subsequent relationships. These submitters often commented that the assets had been built up by the deceased and possibly their previous partner (the children's parents).

Obligations to a surviving partner in te ao Māori

4.41 In Chapter 8 of the Issues Paper, we asked several questions about obligations to a surviving partner in te ao Māori. We asked whether obligations sourced from tikanga exist from a deceased partner to a surviving partner in relation to property, particularly how tikanga might respond to the division of relationship property on death.

4.42 The few submitters that responded to these questions recognised obligations to a surviving partner arising primarily from whanaungatanga, but also manaakitanga and aroha. There was an emphasis on whakapapa and how that related to a surviving partner. Submitters acknowledged the need to balance obligations to a surviving partner with wider whanaungatanga obligations.

4.43 Te Hunga Rōia Māori o Aotearoa (THRMOA) commented favourably on the approach in Te Ture Whenua Maori Act 1993 of allowing a surviving partner to take a life interest and receive certain benefits from the estate but excluding the ability to obtain interests in whenua Māori. THRMOA also noted examples within some whānau, hapū and iwi to leave land to the wāhine line, including potentially to a surviving partner who may not whakapapa to the land – although, in these situations the land would be held in accordance with tikanga and the surviving partner would be subject to obligations to the wider whānau.

4.44 Some submitters, including THRMOA and Chapman Tripp, explained the importance of kōrero and arriving at a whānau consensus, potentially guided by an independent pūkenga (expert). They said that automatic provisions or presumptions such as those in the PRA are inconsistent with tikanga to the extent that they do not necessitate kōrero and respond to the particular circumstances. THRMOA noted that prescribed rules generally will not accord with tikanga although this may depend on the type of property.

⁵³ We discuss occupation orders in Chapter 9.

For example, it will not be appropriate to apply the PRA's presumption of equal sharing to Māori land or taonga as these will be subject to whānau and whakapapa considerations as well as any considerations of utu.

- 4.45 Additionally, MinterEllisonRuddWatts said that further thought should be given to how well the concept of relationship property translates to a tikanga Māori world view.

Continued right to choose to divide relationship property

- 4.46 In the Issues Paper, we presented a preliminary view that surviving partners from a qualifying relationship should continue to have available to them a right under the new Act to a share of the couple's relationship property. Many submitters to the Issues Paper, including Public Trust, Chapman Tripp, MinterEllisonRuddWatts, Chris Kelly, TGT Legal, Perpetual Guardian, Jan McCartney QC and Bill Patterson, expressed broad general agreement with most or all of the proposals relating to relationship property. This was subject to the specific comments detailed below.
- 4.47 Around two-thirds of submitters to the consultation website supported our proposal to retain the law that allows a surviving partner to choose to divide relationship property. Several submitters agreed that a surviving partner should be allowed to choose to divide relationship property but only in some circumstances, such as when there was not a will or where the surviving partner is in financial need.
- 4.48 For those submitters to the consultation website that did not support the partner's right to choose a division, many said that priority should be given to the deceased's wishes, as evidenced in their will, and that the will should not be overridden. Several other submitters suggested that the law needed to reflect the reality of the couple's circumstances and the assets that each party has brought into the relationship. Fairness was also raised by some submitters. They said that it would be unfair to the deceased or their children if a partner could take half of a house that they did not contribute to purchasing.

The requirement to elect option A or B

- 4.49 Several submitters, including Patterson, Kelly, Michael Reason and Azania Watene in their joint submission and Succeed Legal expressed concerns about the requirement to formally choose option A or B and give notice of their choice.⁵⁴ These submitters considered that the process was unnecessary, complicated and costly and may lead surviving partners to make hasty decisions without full knowledge of the estate. Reason and Watene submitted that it is cumbersome to require several time limits to be respected. Succeed Legal submitted that the election process should be made more accessible and less abrasive as often a surviving partner does not want to take the step of obtaining independent legal advice because it can feel like they are questioning the will and wishes of their life partner.
- 4.50 Patterson and Kelly submitted that the option A or B election process should be removed entirely, meaning that a surviving partner would simply have 12 months to bring a relationship property claim comparable to the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949 or the new proposed claims. Personal

⁵⁴ Section 65 of the Property (Relationships) Act 1976 requires that the notice must be in a prescribed form, signed and certified by a lawyer and lodged with the administrator of the estate or the High Court.

representatives would be free to distribute an estate after six months of the date of the grant of administration unless they had received notice of a surviving partner's claim. Patterson also submitted that removing the option A or B procedure would also remove an impediment to partners obtaining grants of administration.⁵⁵

- 4.51 In the Issues Paper, we commented that the grounds under section 69(2)(a) of the PRA for setting aside a partner's choice of option A or B might be too limited. Even if the application is uncontested, the courts are confined to these grounds. Public Trust and Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) supported the court having greater flexibility to set aside a chosen option. MinterEllisonRuddWatts submitted that the court's jurisdiction to set aside a surviving partner's choice of option should be limited to the existing grounds in section 69(2)(a) or where the application is uncontested or supported by all parties. The Family Law Committee of Auckland District Law Society (ADLS) suggested that an additional ground should be included where the personal representative had not disclosed to the surviving partner the nature and value of the estate's assets and liabilities, with supporting corroborating documentation.
- 4.52 Lastly, several submitters commented that it was reasonable for a surviving partner to have given notice of their choice within six months of the date of the grant of administration. These submitters included Public Trust, NZLS, ADLS and MinterEllisonRuddWatts.⁵⁶

Top-up approach

- 4.53 In the Issues Paper, we proposed a change to the rule that revokes gifts to the surviving partner if they elect to divide relationship property when the deceased partner has a will. Instead, we proposed that the surviving partner would keep their gifts under the will and the value of these gifts would be included in their total share of relationship property (the top-up approach).
- 4.54 There was broad general support for the top-up approach.⁵⁷ This included express agreement from Public Trust, Chapman Tripp, Succeed Legal and MinterEllisonRuddWatts. These submitters endorsed the proposal's potential to uphold the deceased's intentions under the will and make administering the estate simpler.
- 4.55 Several submitters to the consultation website noted that difficulties can arise when valuing property. They said that a top-up approach may increase the number of items that must be valued or require property to be valued with more precision, which can be problematic when life interests are involved or in the context of rapidly increasing house prices.
- 4.56 Morris Legal suggested that the top-up be an additional option to the current option A because requiring a top-up may impose restrictions on the surviving partner's ability to retain assets that are important and/or useful to them, particularly the family home.

⁵⁵ A surviving partner applying to be an administrator in the intestacy of their partner must certify that they have chosen option B: High Court Rules 2016, r 27.35(4)(a)(iv) and sch 1 form PR 3.

⁵⁶ In the Issues Paper, we did not propose any extension to the current timeframe for making an election, particularly because we considered that concerns around lack of awareness and access to information would be better addressed by changes targeted at those issues.

⁵⁷ Around 80 per cent of submitters to the consultation website expressed support. Most of the website submissions did not detail the reasons for supporting or not supporting the proposals.

- 4.57 McWilliam Rennie objected to the proposal on the grounds that the relationship property is property belonging to the partner and therefore the partner should be entitled to both this and the gifts to them in the will. McWilliam Rennie acknowledged that this would require specific advice from lawyers drafting wills as to the effect of the PRA on their estate.

Qualifying relationships

- 4.58 In the Issues Paper, we expressed our preliminary view that the same qualifying criteria that apply to relationships ending on separation should apply to relationships ending on death under the new Act. Consistent with our recommendations in the PRA review, we proposed that the new Act should apply to all marriages and civil unions irrespective of their length and that de facto relationships of less than three years should not qualify for a relationship property division on the death of a partner unless the relationship meets the additional eligibility criteria.
- 4.59 We received varied views on the proposed definition of a qualifying relationship. Although there was broad general support for the Commission's proposals, few website submitters commented specifically on the proposed changes to the definition of the qualifying relationship. Some submitters to the Issues Paper, including Perpetual Guardian and ADLS, agreed in principle with the proposals but noted that issues may arise in short-term relationships.
- 4.60 For ADLS and several other submitters, three years is not an adequate length of time to qualify for an equal division of relationship property when the relationship ends on death or separation. Members of the Family Law Committee of ADLS were divided between five and seven years as appropriate alternatives. Seven or 10 years were presented as alternatives in submissions on the website, and one submitter considered that a relationship property claim should only be available to married partners.
- 4.61 Several submitters, including Public Trust, Succeed Legal, McWilliam Rennie and TGT Legal, took issue with the proposals that could result in the different treatment of de facto relationships of short duration compared with marriages or civil unions of short duration. These submitters generally preferred that the new Act apply the special rules for short-term relationships to all relationship types, including marriages and civil unions.

Māori customary marriages

- 4.62 We did not receive many submissions regarding Māori customary marriages. Professor Jacinta Ruru and Chapman Tripp submitted that Māori customary marriage should be recognised in state law separately to meeting the requirements of a de facto relationship. Conversely, ADLS submitted that customary marriage should not be recognised in state law.
- 4.63 THRMOA submitted that most (if not all) Māori customary marriages would satisfy the requirements of a de facto relationship under state law and therefore the need for a separate system may not be necessary. However, THRMOA stated that a Māori customary marriage that does not take the form recognised by state law should not be precluded as a valid form of relationship for the purpose of succession, and tikanga should apply in these situations.
- 4.64 NZLS submitted that there should be wider consultation with Māori on whether, in 2021, customary Māori marriage in accordance with tikanga should be provided for in state law.

NZLS commented on the legal history of the intersection of state law and Māori customary marriage and noted that earlier issues such as the recognition of the legitimacy of a child and access to family benefits no longer exist.

Separated partners

- 4.65 In the Issues Paper, we proposed that all former spouses and partners should remain eligible for relationship property division under the new Act provided no longer than two years have elapsed between the partners ceasing to live together in the relationship and the time a partner dies.⁵⁸
- 4.66 Most submitters who commented on the proposed changes to the eligibility of separated partners generally supported the proposals. This included Public Trust, ADLS, TGT Legal and McWilliam Rennie. Submitters noted that a consistent time limit applying to all former partners would limit misunderstanding and confusion. Public Trust also noted the benefit of consistency with the two-year timeframe that a married couple or civil union partner must be living apart before a dissolution order can be granted. Chapman Tripp considered that a more comprehensive test should be applied in assessing the separation than simply the passage of time. Morris Legal proposed that the period should reflect the approach currently taken under the PRA.⁵⁹

Contemporaneous partners

- 4.67 We received several submissions regarding our proposals for apportioning relationship property under the new Act that is contested between two or more qualifying relationships. Consistent with our recommendations in the PRA, we proposed in the Issues Paper that the court should apportion it in accordance with the contribution of each relationship to the acquisition, maintenance and improvement of that property.
- 4.68 TGT Legal and McWilliam Rennie agreed with the proposals. Public Trust said that they agreed in principle with the proposals but thought that practical problems may arise, for example, when trying to determine what constitutes maintenance and improvement. ADLS commented that the rules for apportioning contested relationship property should be determined in accordance with the contribution of each partner to their relationship with the deceased, in accordance with the principles under section 18 of the PRA, so that monetary contributions are not presumed to be of greater value than non-monetary contributions.

Classification and division of relationship property

- 4.69 In the Issues Paper, we expressed our preliminary view that a surviving partner's relationship property entitlements should be based on the classification and division rules recommended in the PRA review that would apply when partners separate, including that:
- (a) property acquired before the relationship or as a gift or inheritance should be separate property, including the family home;

⁵⁸ The concept of ceasing living together in the relationship is drawn from ss 2A(2), 2AB(2) and 2D(4) of the Property (Relationships) Act 1976, which define when a marriage, civil union and de facto relationship end for the purposes of the PRA.

⁵⁹ Section 24(1) of the Property (Relationships) Act 1976 provides that an application must be made within 12 months after a marriage or civil union has been dissolved and within three years after a de facto relationship has ended.

- (b) the burden of proof of establishing whether property is separate property should be on the party that owns the property; and
 - (c) the court should have discretion to order unequal division of relationship property where there are extraordinary circumstances that make equal sharing repugnant to justice.
- 4.70 The submitters who specifically commented on the classification proposals generally expressed their agreement. This included Public Trust, ADLS, TGT Legal and McWilliam Rennie. TGT Legal also commented that education will be needed to assist the public to understand the classification and for proving what is separate property.
- 4.71 Reason and Watene opposed the proposals relating to the family home. In their view, the family home should be relationship property and available for division even if it was a gift or inheritance. They said that dividing property based on contribution lacks simplicity and clarity and will result in more wealth being lost to legal costs.
- 4.72 Morris Legal commented that excluding items of special significance from the definition of family chattels when the relationship ends on death might lead to an increase in litigation.
- 4.73 Most submitters to the consultation website broadly agreed with the proposed changes to the definition of relationship property. Several submitters expressly stated that they agreed with the proposal to treat only the family home's increase in value as relationship property where that home was owned by one party prior to the beginning of the relationship.
- 4.74 The remaining submitters who did not agree did so for varying reasons. Most suggested that a surviving partner should be given occupation rights to the family home for a specified period. Suggestions varied from a life interest to a grace period of six months to two years. A smaller group of submitters considered that not even the increase in value of a family home should be considered relationship property if it was purchased prior to the relationship unless that was stated in the will. Several submitters stated that the surviving partner should only be entitled to the value of their contributions to the property or the relationship.

CONCLUSIONS

- 4.75 In both the PRA review and the consultation in this review, we received few responses to our questions about tikanga and state law in respect of the division of property when a relationship ends. No submitter called for fundamental reform of relationship property law according to tikanga at this time.⁶⁰
- 4.76 Whanaungatanga, manaakitanga, tiakitanga and aroha may establish obligations to a surviving partner in tikanga. It is also possible that the outcomes achieved in some cases by applying relationship property division rules may be substantially similar to the outcomes achieved by applying tikanga. However, two potentially fundamental differences must be considered.

⁶⁰ We note that, in response to the Issues Paper in the PRA review, the Human Rights Commission submitted that consideration should be given to dealing with tikanga issues in a separate part of the PRA: see *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [14.7].

- 4.77 First, obligations in tikanga to a surviving partner do not necessarily translate to property rights. A whānau may take on obligations to care for a partner without this involving any property entitlement, or a surviving partner might acquire rights that are less than ownership, such as occupation rights. Furthermore, the concept of relationship property as determined under state law does not necessarily translate in tikanga Māori. As Ruru said in her submission in the PRA review, enabling a just division of property from a Māori perspective requires creating a justice system that is able to understand the complexities of Māori property law and relationships.⁶¹
- 4.78 Second, although state law rules such as the general rule of equal division are beneficial for enabling certainty and efficiency, they may not facilitate the necessary kōrero between interested whānau members. In Chapter 10 we recommend no procedural requirements for parties who wish to enter settlement agreements to resolve disputes under the new Act or the intestacy provisions in the Administration Act 1969. This will enable whānau to engage in tikanga-based processes. We also recommend in Chapter 13 that the new Act should expressly endorse tikanga-based dispute resolution.
- 4.79 Consequently, we conclude that state law should continue to provide all surviving partners with a right to elect a share of relationship property. To the extent this approach is not consistent with tikanga, where all whānau members and other affected parties agree, they may decide on an alternative distribution of the estate pursuant to tikanga through improved processes to facilitate that kōrero.
- 4.80 We do not recommend reform to recognise or provide specific rules for Māori customary marriage in the new Act at this time. This is an important issue and one that has significance for other areas of law beyond the new Act. The low number of submissions on this issue makes it difficult to assess the extent of Māori support for and the nature of any desirable reform.⁶² In our view, how Māori customary marriage should be recognised under the new Act should be part of a broader conversation about the relationship between Māori and the Crown. Such a conversation ought to consider how Māori customary marriage should be accommodated in other areas of law, in particular, the Marriage Act 1955.

⁶¹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [14.8].

⁶² In Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 71–72, Ruru submitted:

At present there is no pressure from Māori to have marriage in accordance with Māori custom reinstated as a legal form. However with the wider revival of tikanga Māori occurring throughout the country, more couples may decide to marry according to custom, rather than the law, and wish for their unions to be described as Māori customary marriages, rather than de facto or civil unions.

RECOMMENDATIONS

R7

A surviving partner from a qualifying relationship should have a right under the new Act to choose a division of relationship property on the death of their partner.

R8

The option A/option B election process in Part 8 of the Property (Relationships) Act 1976 should not be continued in the new Act.

R9

If a surviving partner chooses a relationship property division and there is a will, they should keep whatever gifts are made for them under the will. They should then receive from the estate whatever further property is needed to ensure they receive the full value of their relationship property entitlement.

R10

Where it is necessary to avoid undue disruption to a surviving partner's life, a court should have discretion to replace property the surviving partner would otherwise receive under the will with particular items of relationship property provided the surviving partner does not receive property of a value greater than their relationship property interest in the estate.

Relationship property entitlements should remain available for surviving partners

4.81 We recommend that a surviving partner from a qualifying relationship has available to them a right under the new Act to a share of the couple's relationship property. The extent of that entitlement should be based on the property division rules that apply when couples separate and subject to the terms of any valid contracting out agreement the partners have entered.⁶³ The new Act should continue the policy that a surviving partner should not be worse off on the death of their partner than they would have been had they separated from their partner.

4.82 Our reasons are as follows:

- (a) The theory that a partner in a qualifying relationship has an entitlement to an equal share of the relationship property arising from their contributions to the relationship is sound. A relationship can be understood as a family joint venture to which the partners contribute equally but often in different ways. It remains appropriate, in our view, that the purpose of the relationship property regime continues to be a just division of property in which partners share in the fruits of the family joint venture — the product of their combined contributions — when a relationship ends.⁶⁴
- (b) It is an accepted part of New Zealand law that partners have relationship property entitlements when a relationship ends by separation or on death.

⁶³ See Chapter 10 for a discussion of contracting out agreements.

⁶⁴ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [2.46] and [2.51].

- (c) The policy appears to be consistent with public attitudes and expectations. In the Succession Survey, respondents were asked about a situation where a man dies and is survived by his two adult children from his first marriage and his second wife to whom he had been married for 10 years. The couple's family home was bought by the husband during the second marriage. In his will, the man left the home to his children even though, had the couple divorced, the wife would have been entitled to a half share of the home. Over 75 per cent of respondents either agreed or strongly agreed that the wife should be entitled to at least a half share of the home regardless of what the will said.⁶⁵
- (d) Most submitters supported this proposal.
- (e) The recommendations from the PRA review, if implemented, will address some of the concerns about the current law relating to equal sharing of relationship property when the property has been acquired before the relationship.
- 4.83 We do not consider the law should require a relationship property division in all cases. That would be a significant shift in the law. We are also mindful that, in most cases, will-makers provide generously for their partners.⁶⁶ We therefore recommend that a partner should continue to be entitled to elect a relationship property division, although, as set out below, we recommend reform for how that election should be made.
- 4.84 A surviving partner is likely to elect a relationship property division only where the deceased intended to leave the surviving partner less than their relationship property entitlement. If a partner chooses a relationship property division, we do not consider the law should allow the partner to take their share of relationship property plus gifts under the will, unless the will displays a contrary intention.
- 4.85 Where a partner dies intestate and a surviving partner elects a relationship property division, the current law should continue. The surviving partner should have no entitlement under the intestacy regime but instead receive their relationship property entitlement.⁶⁷

The option A/option B election process should not be continued in the new Act

- 4.86 We recommend repealing the process to elect option A or option B currently contemplated in section 65 of the PRA.⁶⁸ Instead, a surviving partner would elect a

⁶⁵ There was no statistically significant difference between the views of Māori. Seventy-four per cent of Māori respondents agreed or strongly agreed that the wife should be entitled to a half share of the home: Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at [149].

⁶⁶ For example, we have received data from the Probate Registry of the High Court that shows that, in 2019, out of 18,397 applications for probate and letters of administration, 16 surviving partners filed notices of electing option A compared with 721 who filed notices of option B: email from Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding data on applications for probate and letters of administration (11 August 2020); and email from Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding data on probate applications (24 August 2020). Note that a partner will only file notices with the Registry if administration of the estate has not yet been granted. However, it is a strong indication that elections of option A are relatively rare.

⁶⁷ See Property (Relationships) Act 1976, s 76(3).

⁶⁸ It would also include repealing the consequential provisions in ss 66-70 and other consequential amendments, including to ss 61-64 and 71-72 of the Property (Relationships) Act 1976.

relationship property division by exercising their right to claim in the same way as the other claims under the new Act. This would mean a surviving partner would simply have the option to commence a relationship property claim within 12 months of the grant of administration in Aotearoa New Zealand.⁶⁹

- 4.87 We received several comments about the complexity of the current process, which requires formal notice and certification from a lawyer. Submitters said that the process lacks accessibility and adds unnecessary cost. In some cases, a surviving partner may spend time and money on the formal notice and discover later, once they have full knowledge of the estate assets and liabilities, that it is not worth pursuing a division. The surviving partner may then have to apply to the court to have their chosen option set aside.
- 4.88 It is uncommon for a partner to choose option A. In most scenarios, surviving partners prefer to retain their gifts under the will, either by formally electing option B or by default. When a surviving partner understands the consequences of both options and intends to choose option B, there does not appear to be good reason to require that partner to submit a formal notice to the personal representative.
- 4.89 Removing the election requirements will alleviate the pressure that some surviving partners feel to make a hasty decision without full knowledge of the estate. A surviving partner would still need to notify the personal representative of their intention to claim a relationship property division within six months of the grant of administration in order to prevent the estate from being distributed. However, it would no longer be necessary for the surviving partner to apply to the court for either an extension of time to make their choice or to set aside their choice if they later decide it was the wrong choice. Instead, as we discuss in Chapter 14, the notification would allow the partner three months to pursue the claim.⁷⁰
- 4.90 The option A/option B process has the benefit of requiring a surviving partner to obtain legal advice when they make their choice. This is useful for the circumstances where the partner wants to divide relationship property and needs to fully understand the impact of making that choice. However, in some cases where the partner wants to choose option B, it may add additional legal cost. In an intestacy, if a surviving partner wishes to be the administrator of the estate, they must have chosen option B.⁷¹ This choice is lodged with the te Kōti Matua | High Court (the High Court) when the application for the grant is made.
- 4.91 Additionally, we consider that our recommendations around public education (Chapter 16) and the requirement for personal representatives to notify potential relationship property or family provision claimants (Chapter 14) will reduce the risk that partners are unaware of their right to choose a division of relationship property, the time limit for making the claim and the desirability of obtaining independent legal advice.

⁶⁹ This would be subject to the rules regarding small estates and extensions discussed in Chapter 12.

⁷⁰ See Administration Act 1969, s 48.

⁷¹ High Court Rules 2016, sch 1 form PR 3.

The new Act should take a top-up approach to implement a division of relationship property

- 4.92 We recommend a change to the rule that revokes gifts to the surviving partner if they choose a division of relationship property when the deceased partner has a will and that will does not express a contrary intention. The new Act should take a “top-up” approach.⁷² Under a top-up approach, when a partner chooses a division of relationship property, they would keep whatever gifts are made for them under the will rather than having to forfeit them. They would then receive from the estate whatever further property is needed to ensure they receive the full value of their relationship property entitlement. We consider this approach is likely to disrupt the distribution of an estate pursuant to the will to a lesser extent than the current law. The top-up approach is therefore likely to be more consistent with the deceased’s testamentary intentions and easier for the personal representatives to administer.
- 4.93 To implement a division of relationship property will require the value of the partners’ relationship property to be ascertained. We recognise that it can be complicated to value certain property – for example unique goods like artworks or life interests to occupy a home – and disputes may result. Under the current law, it is necessary to value the estate and the relationship property with varying degrees of precision depending on the circumstances.⁷³ Although we accept that the top-up approach may result in valuing property with greater precision in some circumstances, we believe that, in most cases, it will generally mean minimal or no change to the current approach.
- 4.94 The top-up approach may also make it easier for personal representatives to implement a relationship property division in some circumstances. For instance, by not revoking the gifts to the surviving partner, personal representatives will not have to apply the lapse provisions in the Wills Act 2007 that deal with dispositions that fail.⁷⁴
- 4.95 The top-up approach has the potential to restrict a partner’s ability to access assets that may be of particular use or importance to them. In Chapter 8, we recommend that a court have discretion to order that the value of the top-up be met by particular property in the estate. We also recommend in Chapter 9 that, in certain circumstances, a partner be able to apply for use and occupation orders over certain property of the estate, like the family home. Use and occupation orders would be additional to a partner’s relationship property entitlements.
- 4.96 In circumstances where it does not suit the surviving partner to take the gifts under the will as part of their total relationship property entitlement, the partner may come to an agreement with the affected beneficiaries different to that prescribed by implementing the top-up method. There may be some circumstances, however, where the parties

⁷² This approach is taken in Manitoba: The Family Property Act CCSM 1987 c F25, s 39. More recently, the Law Reform Commission of Nova Scotia recommended that Nova Scotia law be amended to take a top-up approach: Law Reform Commission of Nova Scotia *Division of Family Property* (Final Report, 2017) at 254–255.

⁷³ In the context of separation, a recent survey found that 71 per cent of participants had their assets and/or debts valued by a professional: Megan Gollop and others *Relationship Property Division in New Zealand: The Experiences of Separated People* (Te Whare Wānanga o Ōtākou | University of Otago, descriptive research report, October 2021) at 49.

⁷⁴ See Wills Act 2007, ss 28–29; and Nicola Peart (ed) *Family Property* (online looseleaf ed, Thomson Reuters) at [PR76.03].

cannot agree. We therefore recommend that a court should have discretion to replace property the surviving partner would otherwise receive under the will with particular items of relationship property provided the surviving partner does not receive property of a value greater than their relationship property interest in the estate. The discretion should only be exercised when it is necessary to avoid undue disruption to the surviving partner's life. The court should consider the impact on affected beneficiaries in making the order and whether that outweighs the disruption to the surviving partner if the order was not made. This threshold is purposefully high so as not to disrupt the will-maker's testamentary intentions and the efficient administration of the estate.⁷⁵

- 4.97 Finally, a will-maker should continue to have the option of expressing in their will their intention for their partner to take both their share of relationship property and the gifts in the will.

RECOMMENDATIONS

R11

To be eligible to choose a division of relationship property, the surviving partner should have been in a qualifying relationship with the deceased, being a:

- a. marriage;
- b. civil union; or
- c. de facto relationship of three years or more.

R12

The new Act should include a presumption that two people are in a qualifying de facto relationship when they have maintained a common household for a period of at least three years as recommended in the PRA review (R26). The presumption should be rebuttable by evidence that the partners did not live together as a couple, having regard to all the circumstances of the relationship and the matters currently prescribed in section 2D(2) of the PRA.

R13

When the partners have not maintained a common household for three years or more, the burden of proof of establishing that a qualifying de facto relationship exists should be on the applicant partner, as recommended in the PRA review (R27).

R14

A qualifying de facto relationship should include a de facto relationship that does not satisfy the three-year qualifying period if it meets the additional eligibility criteria that:

- a. there is a child of the relationship and the court considers it just to make an order for division; or
- b. the applicant has made substantial contributions to the relationship and the court considers it just to make an order for division.

(See R29 in the PRA review.)

⁷⁵ We note that, in Manitoba, where a top-up approach is applied, there is no discretion for the court to substitute gifts to a surviving partner under the will with alternative property: The Family Property Act CCSM 1987 c F25, ss 41 and 43.

R15

Where partners have separated prior to death, the surviving partner should remain eligible to claim under the new Act provided no longer than two years have elapsed between the partners ceasing to live together in the relationship and the time a partner dies. The court should have discretion to allow an application when separation occurred more than two years before death.

The time period in which partners must apply for a relationship property division on separation when neither partner has died should be made consistent with the rules that apply to relationships ending on death.

R16

The new Act should provide for contemporaneous relationships in a stand-alone provision that:

- a. applies whenever property is the relationship property of two or more qualifying relationships (contested relationship property); and
- b. requires a court to apportion contested relationship property in accordance with the contribution of each relationship to the acquisition, maintenance and improvement of that property.

(See R33 in the PRA review.)

Qualifying relationships

- 4.98 Consistent with our recommendations in the PRA review, we recommend that the new Act should apply to all marriages and civil unions irrespective of their length. However, de facto relationships of less than three years should not generally qualify for a relationship property division on the death of a partner.
- 4.99 As explained in the PRA review, there are two broad objectives of a qualifying period for de facto relationships ending on separation.⁷⁶ They are equally relevant to relationships ending on death. First, it is a measure of commitment between the partners in the absence of a deliberate decision to formalise the relationship. Second, it acts as a safeguard against the retrospective imposition of property sharing obligations on unsuspecting partners.
- 4.100 We acknowledge that several submitters felt that three years was not an adequate length of time to qualify for an equal division of relationship property on the death of a partner. Although the diversity of de facto relationships means it is difficult to make generalisations about when de facto relationships reach a level of commitment that justifies the imposition of property sharing obligations, we are satisfied for several reasons that it is

⁷⁶ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [6.9].

appropriate to continue the now well-settled three-year qualifying period used in the PRA:⁷⁷

- (a) Three years is broadly consistent with public attitudes and values as to when a de facto relationship reaches a point of commitment that justifies the imposition of property sharing obligations.⁷⁸
- (b) It would be consistent with the qualifying period for relationship property division on separation. This has the important benefit of minimising the risk of public confusion that might arise if the qualifying period is changed (which we noted in the PRA review was also a reason not to change the qualifying period in respect of relationship property division on separation).
- (c) The risk of unfair outcomes in de facto relationships that only just satisfy the three-year qualifying period will be mitigated by implementing other recommendations from the PRA review, including:
 - (i) the classification recommendations to limit equal sharing to property acquired during the relationship or for the partners' common use or common benefit (discussed further below);
 - (ii) the recommendation that the presumption that partners are in a qualifying de facto relationship if they have maintained a common household for a period of at least three years can be rebutted if the evidence establishes they were not living together as a couple based on the factors in section 2D(2);⁷⁹ and
 - (iii) the exception to equal sharing for extraordinary circumstances that make equal sharing repugnant to justice will continue to be available under the new Act (see discussion below).

4.101 We recommend that the ordinary rules of equal division should apply to de facto relationships of less than three years if:⁸⁰

- (a) there is a child of the relationship and the court considers it just to make an order for division; or
- (b) the applicant has made substantial contributions to the relationship and the court considers it just to make an order for division.

⁷⁷ Many of these reasons are those that we presented for favouring the three-year qualifying period in the final report of the PRA review: see *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [6.39].

⁷⁸ Ian Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values — A General Population Survey 2018* (Te Whare Wānanga o Ōtākou | University of Otago, technical research report to the Michael and Suzanne Borrin Foundation, October 2018) at [146] and figures 3 and 4. When asked how long they thought couples should have to live together, 32 per cent of respondents favoured a length of time less than three years, 38 per cent said it should be three years and 29 per cent favoured a length of time greater than three years.

⁷⁹ *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R26.

⁸⁰ *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R29 and [6.64].

- 4.102 These criteria provide different ways to measure commitment and should be given equal weight to the deliberate decision to formalise a relationship by getting married or entering a civil union or satisfying the qualifying period.
- 4.103 As discussed, several submitters to the Issues Paper favoured treating all relationships of less than three years according to the same rules, including partners who chose to formalise their relationship within that three-year period through marriage or civil union. The reasons included concerns that it would be inconsistent with societal views and would treat substantially similar relationships differently, contrary to the principles of the PRA and at risk of being discriminatory according to human rights law.
- 4.104 Our reasons for applying the additional eligibility criteria only to short-term de facto relationships are as follows:
- (a) Couples in marriages and civil unions have chosen to formalise their commitment. As Professor Bill Atkin explains:⁸¹

Marriage is a public event, recorded in a public registry, with the participants more or less knowing what they are committing themselves to. While for many, marriage is a social and ceremonial occasion, people are also aware that there are legal ramifications.
 - (b) It appears consistent with public attitudes and values, as evidenced by the findings of a 2018 public attitudes survey into relationship property division in Aotearoa New Zealand. For 70 per cent of respondents, marriage was an important factor in deciding whether equal sharing should apply to a couple,⁸² and these respondents tended to think that the law should apply to married couples much sooner than three years, with 47 per cent saying the equal sharing law should apply as soon as a couple gets married.⁸³
 - (c) We are satisfied that this different treatment is not discriminatory under human rights law given that early-stage de facto relationships are different in nature to marriages or civil unions of the same length.⁸⁴ In an early-stage de facto relationship, the partners have not made a deliberate decision to formalise their relationship and cannot be presumed to have accepted the legal consequences that entering into marriage or a civil union entails. Requiring the satisfaction of additional eligibility criteria for short-term de facto relationships ensures the new Act treats different relationship types that are substantively the same in the same way and avoids imposing property sharing obligations on de facto relationships that are not substantively the same as marriages or civil unions.

⁸¹ Bill Atkin “Family property” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 193 at 201.

⁸² Ian Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values — A General Population Survey 2018* (Te Whare Wānanga o Ōtākou | University of Otago, technical research report to the Michael and Suzanne Borrin Foundation, October 2018) at figure 1.

⁸³ Ian Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values — A General Population Survey 2018* (Te Whare Wānanga o Ōtākou | University of Otago, technical research report to the Michael and Suzanne Borrin Foundation, October 2018) at [140]–[141].

⁸⁴ Differential treatment of people or groups on a prohibited ground of discrimination is potentially discriminatory under human rights law but only if it treats people in comparable situations differently: *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55] and [109], applied in *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [43].

- (d) There is an increasing trend for marriages and civil unions to be preceded by a de facto relationship,⁸⁵ which is included when determining the length of the relationship.⁸⁶ We noted in the PRA review that the current special rules in the PRA for short-term marriages and civil unions rarely apply in practice, meaning that it is unusual for marriages to commence and end within three years of the relationship beginning.⁸⁷

Separated partners' eligibility to apply for relationship property division

- 4.105 We favour a single rule that determines the eligibility of former spouses, civil union partners and de facto partners. We recommend that former spouses and partners should remain eligible to apply for relationship property division under the new Act provided no longer than two years have elapsed between the partners ceasing to live together in the relationship and the time a partner dies.⁸⁸ A two-year period is likely to reflect a period after which former partners can reasonably be expected to have moved on with their lives.⁸⁹ Two years is also the period that a married couple or civil union partners must be living apart for before a dissolution order can be granted.⁹⁰
- 4.106 The court should have discretion to allow a partner who separated more than two years prior to the death of the other partner to claim, having regard to:⁹¹
- (a) the length of time between the partners ceasing to live together in the relationship and the death;
 - (b) the adequacy of the explanation offered for the delay in resolving the partners' relationship property matters before the death;
 - (c) the merits of the case; and
 - (d) prejudice to the beneficiaries of the estate.

⁸⁵ See *Superu Families and Whānau Status Report 2014: Towards Measuring the Wellbeing of Families and Whānau* (Kōmihana ā Whānau | Families Commission, June 2014) at 164. See also *Te Aka Matua o te Ture | Law Commission Relationships and Families in Contemporary New Zealand | He Hononga Tangata, he Hononga Whānau i Aotearoa o Nāiane* (NZLC SP22, 2017) at 17–18.

⁸⁶ Property (Relationships) Act 1976, ss 2B–2BAA.

⁸⁷ *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [6.61].

⁸⁸ The concept of ceasing living together in the relationship is drawn from ss 2A(2), 2AB(2) and 2D(4) of the Property (Relationships) Act 1976, which define when a marriage, civil union and de facto relationship end for the purposes of the PRA.

⁸⁹ A recent survey of separated partners found that 84 per cent began the process of dividing their relationship property within one year of separation, with 49 per cent beginning at separation. Over half (58 per cent) settled in less than one year and the participants who said it took more than one year to settle generally thought this was an unreasonable length of time: Megan Gollop and others *Relationship Property Division in New Zealand: The Experiences of Separated People* (Te Whare Wānanga o Ōtākou | University of Otago, descriptive research report, October 2021) at 28–30.

⁹⁰ Family Proceedings Act 1980, s 39(2). We recognise the difference between this proposal and s 24 of the Property (Relationships) Act 1976, which provides that an application must be made under the Act no later than three years after a de facto relationship has ended.

⁹¹ These factors are based on the principles frequently applied by the courts when deciding whether to extend the time for bringing an application under s 24(2) of the Property (Relationships) Act 1976. See *Beuker v Beuker* (1977) 1 MPC 20 (SC) at 21.

- 4.107 Several other clarifications should be made in the new Act. First, if a partner has filed relationship property proceedings during the period prior to death, those proceedings should be continued, and the eligibility of the surviving partner to apply for property division should not be affected.⁹² Second, the new Act should recognise that a separated partner's eligibility to claim should be subject to a valid contracting out or settlement agreement (discussed in Chapter 10). Third, for the avoidance of doubt, it should be clear that the two-year period goes to eligibility and is not a limitation period. A separated partner who is eligible to apply for division of relationship property will still be subject to the time limits discussed in Chapter 12.
- 4.108 We note that our recommendation creates inconsistency between the time limits for making an application under the PRA on separation compared with the proposed time limit for the eligibility of former partners on death. On separation, a spouse or civil union partner has 12 months from the order dissolving the marriage or civil union or declaring the marriage or civil union void *ab initio* to make an application under the PRA, and a de facto partner has three years from the end of the relationship.⁹³ We recommend that the Government should implement a single time limit applying to all relationship types and one that is consistent both on separation and on death. For the reasons discussed above, our preference would be two years from separation.

Contemporaneous relationships

- 4.109 We consider tailored rules are required to address contemporaneous relationships. Currently, the PRA establishes a regime for dividing relationship property in contemporaneous relationships, specifically when a person was a partner in:⁹⁴
- (a) a marriage or civil union as well as a de facto relationship; or
 - (b) two de facto relationships.
- 4.110 In the PRA review, we identified several issues with the provisions applying to contemporaneous relationships and recommended reform.⁹⁵ Those recommendations should be adopted in the new Act. Accordingly, we recommend a rule that applies whenever property of the deceased comprises property that may be relationship property of two or more qualifying relationships (contested relationship property). That would occur when both surviving partners from the contemporaneous relationship claim a division of relationship property under the new Act.
- 4.111 When determining how to apportion the contested relationship property to meet each surviving partner's respective relationship property entitlement, we recommend that the court should apportion it in accordance with the contribution of each relationship to the acquisition, maintenance and improvement of that property.⁹⁶

⁹² See Property (Relationships) Act 1976, s 10D.

⁹³ Property (Relationships) Act 1976, s 24(1).

⁹⁴ Property (Relationships) Act 1976, ss 52A–52B. Some multi-partner relationships may be captured by the contemporaneous relationships provisions, although others will not. See discussion on multi-partner relationships in Chapter 16.

⁹⁵ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R33–R34, [7.34]–[7.48] and [7.55]–[7.61].

⁹⁶ This is a different concept to contributions to the relationship, which are defined in s 18 of the Property (Relationships) Act 1976.

- 4.112 We note the apprehensions from ADLS and Public Trust about the practical application of this proposal in certain circumstances. ADLS submitted that the rules for apportioning contested relationship property should be determined in accordance with the contribution of each partner to their relationship with the deceased, as described under section 18 of the PRA, so that monetary contributions are not presumed to be of greater value than non-monetary contributions.
- 4.113 In our view, the purpose of the rule is to apportion contested relationship property between the two contemporaneous relationships. It is part of the classification exercise aiming to identify the property in which each surviving partner should hold a relationship property interest. It accords with the approach to classification we set out in the PRA review, which is to classify as relationship property wealth generated through the relationship (“fruits of the relationship”) and property acquired specifically for the relationship (“family acquisitions”).⁹⁷ Once the relationship property is identified for each contemporaneous relationship, the general rule of equal division of relationship property division would apply. As ADLS noted, that division rests on the general rule that each partner should have an equal interest owing to an equality of contributions to the relationship. However, to use a partner’s contributions to the relationship to identify property that should be classified as relationship property is to confuse the different stages of classification and division. We therefore remain of the view that the better approach is to apportion contested relationship property between relationships in accordance with the contribution of each relationship to the acquisition, maintenance and improvement of that property. This is likely to be a highly factual and potentially difficult inquiry, but that reflects the difficult factual situations contemporaneous relationships present.
- 4.114 Finally, if the Government decides to incorporate a definition of marriage into the new Act, this definition should expressly include valid foreign polygamous marriages, consistent with the definition of marriage in the Family Proceedings Act 1980 and as recommended in the PRA review.⁹⁸

⁹⁷ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [3.18]–[3.21] and [3.66]–[3.67].

⁹⁸ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R34.

RECOMMENDATION

R17

A surviving partner's relationship property entitlements should be based on the classification and division rules recommended in the PRA review (R8–R16) that would apply when partners separate, including that:

- a. property acquired before the relationship or as a gift or inheritance should be separate property, including the family home;
- b. the burden of proof of establishing whether property is separate property should be on the party that owns the property; and
- c. the court should have discretion to order unequal division of relationship property where there are extraordinary circumstances that make equal sharing repugnant to justice.

Classification and division of relationship property

- 4.115 A surviving partner's relationship property entitlements should continue to be based on the classification and division rules that apply when partners separate. The new Act should incorporate those rules.
- 4.116 We consider the general revisions to the definition of relationship property recommended in the PRA review should apply under the new Act.⁹⁹ This would include the changes recommended to the classification of the family home, family chattels and jointly owned property, so that relationship property includes all property that was:
- (a) acquired by either partner for the partners' common use or common benefit;
 - (b) acquired by either partner during the relationship, excluding gifts and inheritances; or
 - (c) used as a family chattel.
- 4.117 Under our recommendations, a family home will be treated in the same way as any other item of property. When the family home is separate property, any increase in the value of the family home occurring during the relationship should be classified as relationship property in every case.
- 4.118 When the family home was one partner's pre-relationship property or was a gift or inheritance, the value of the home when the relationship began or when the gifted or inherited property was received (original value) should be classified as the owning partner's separate property. When the family home is purchased during the relationship, it will be relationship property regardless of the source of funds used to purchase that home because it has been purchased for the partners' common use or common benefit. A family home purchased in contemplation of the relationship, for example, while the

⁹⁹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R9–R16 and ch 3.

partners were dating, will also be classed as relationship property.¹⁰⁰ Where a surviving partner's relationship property interest will not enable them to retain possession of the family home, the surviving partner could apply for an occupation order to meet their accommodation needs as they transition to a life in which they are not dependent on the deceased's estate for accommodation support (see Chapter 9).

- 4.119 We recommend that family chattels should continue to be classified as relationship property whenever acquired, except where the family chattel is an heirloom or taonga, or an item of special significance.
- 4.120 We recommend that the burden of proof of establishing whether property is separate property should be on the party that owns the property. This rule should apply to all property, including property acquired after death. If a personal representative claims that property of the estate is separate property, they would have the burden of proof. Similarly, a surviving partner's property would be classified as relationship property unless they were able to prove it was their separate property.
- 4.121 The main reason for allocating the burden of proof this way is to balance the position of the estate and the surviving partner as both would carry the burden in relation to separate property. It also ensures consistency with the regime that the Commission recommended should apply to relationships ending on separation.
- 4.122 The new Act should continue to provide a general rule that each partner is entitled to an equal share of relationship property. The court should, however, have discretion to order unequal division of relationship property where there are extraordinary circumstances that make equal sharing repugnant to justice. When this exception applies, the court would order that relationship property be divided pursuant to the partners' contributions to the relationship. Although we recognise the difficulties when the court is required to make a discretionary assessment like this, we consider they are outweighed by the benefit of enabling the court to respond when the facts of a case warrant unequal division.
- 4.123 The new Act should take an approach towards a partner's misconduct that is consistent with the recommendations in the PRA review.¹⁰¹ The court should consider misconduct relevant when it is gross and has affected the value or extent of relationship property. However, it should only be relevant to the court's determination when considering:
- (a) whether there are extraordinary circumstances that make equal sharing repugnant to justice;
 - (b) the partners' contributions to the relationship;
 - (c) whether to make an occupation, tenancy or furniture order (see Chapter 9); and
 - (d) what orders to make under the new Act to implement the division of relationship property.

¹⁰⁰ There should continue to be special provision for family homes that are homesteads, in accordance with R10 of *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019).

¹⁰¹ See *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R41–R42.

CHAPTER 5

Family provision claims

IN THIS CHAPTER, WE CONSIDER:

- the law under the Family Protection Act 1955 enabling family members to claim further provision from an estate for their proper maintenance and support.

CURRENT LAW

- 5.1 A family member of the deceased may consider that the provision available for them under the deceased's will or in an intestacy is inadequate. In these circumstances, the Family Protection Act 1955 (FPA) allows family members to apply to the court for further provision from the estate. The family member may claim under the FPA in addition to any other claims they may have, including under the Property (Relationships) Act 1976 (PRA) or Law Reform (Testamentary Promises) Act 1949 (TPA).
- 5.2 Family protection legislation was first enacted in Aotearoa New Zealand as the Testator's Family Maintenance Act 1900. It provided the court with power to grant further provision from an estate to the deceased's spouse or children when the will failed to make "adequate provision" for their "proper maintenance and support".¹ The Act's central objective was to ensure some provision was made for the spouse and children of a will-maker who, under the law of the time, enjoyed complete testamentary freedom.² The main concern was the economic vulnerability of women and minor children, although another justification that emerged during Parliamentary debate of the Bill was to prevent the state from becoming liable to support the deceased's wife and children.³
- 5.3 Parliament made several amendments to the legislation over the following years although the wording of the test for recovery remained the same. The Testator's Family

¹ Testator's Family Maintenance Act 1900, s 2. The Act contained a proviso empowering the court to attach conditions to or to refuse an order where the applicant's "character or conduct is such as in the opinion of the Court to disentitle him or her".

² Rosalind Atherton "New Zealand's Testator's Family Maintenance Act of 1900 – The Stouts, the Women's Movement and Political Compromise" (1990) 7 Otago LR 202 at 216.

³ Mary Foley "The Right of Independent Adult Children to Receive Testamentary Provision: A Statutory Interpretation and Philosophical Analysis of the New Zealand Position" (PhD Dissertation, Te Whare Wānanga o Ōtākou | University of Otago, 2011) at 32.

Maintenance Act was renamed the Family Protection Act.⁴ The classes of eligible claimants were extended to include illegitimate children,⁵ parents of the deceased,⁶ adopted children⁷ and grandchildren.⁸ The Act was extended to apply to intestacies as well as cases where the deceased left a will.⁹

- 5.4 Under the current law, the family members eligible to claim under the FPA are the deceased's:¹⁰
- (a) spouse or civil union partner;
 - (b) de facto partner who was living in a de facto relationship with the deceased at the date of death;
 - (c) children regardless of their age or whether they were being maintained by the deceased immediately before the death;
 - (d) grandchildren living at the date of death;¹¹
 - (e) stepchildren who were being maintained wholly or partly, or were legally entitled to be maintained wholly or partly, by the deceased immediately before the death; and
 - (f) parents if they were being maintained wholly or partly, or were legally entitled to be maintained wholly or partly, by the deceased immediately before the death or there is no living spouse, civil union partner, de facto partner or child of the deceased's qualifying relationship.
- 5.5 Like the earlier legislation, section 4 of the FPA empowers the court to grant further provision from the estate if, under the deceased's will or in an intestacy, adequate provision is not available for the family member's "proper maintenance and support".¹²
- 5.6 Early cases applied this provision narrowly. The courts saw the legislation as an extension of the deceased's maintenance obligations during their lifetime which focused on applicants' material needs.¹³ In 1910, however, the Kōti Pira | Court of Appeal (the Court of Appeal) in *Re Allardice, Allardice v Allardice* held the legislation should be interpreted more broadly and introduced the concept of a "moral duty".¹⁴ The Court saw its role as determining whether the will-maker "has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards

⁴ Family Protection Act 1908.

⁵ Statutes Amendment Act 1936, s 26.

⁶ Statutes Amendment Act 1943, s 14.

⁷ Statutes Amendment Act 1947, s 15

⁸ Statutes Amendment Act 1947, s 15

⁹ Statutes Amendment Act 1939, s 22.

¹⁰ Family Protection Act 1955, s 3.

¹¹ When considering a grandchild's application, a court will have regard to any provision to the grandchild's parents: Family Protection Act 1955, s 3(2).

¹² Family Protection Act 1955, s 4.

¹³ *Re Rush, Rush v Rush* (1901) 20 NZLR 249 (SC) at 253, drawing parallels with the Destitute Persons Act 1894; *Laird v Laird* (1903) 5 GLR 466; and *Plimmer v Plimmer* (1906) 9 GLR 10 (CA).

¹⁴ *Re Allardice, Allardice v Allardice* (1910) 29 NZLR 959 (CA).

his children”.¹⁵ Over the past 110 years, New Zealand courts have embedded the concept of moral duty in their decisions. The test is now commonly articulated as whether, objectively considered, there has been a breach of a moral duty judged by the standards of a wise and just will-maker who is fully aware of all the relevant circumstances.¹⁶

5.7 The court’s assessment is therefore an ethical rather than economic inquiry.¹⁷ In *Williams v Aucutt*, the Court of Appeal commented that:¹⁸

[W]e reject the argument that the Court must expressly find a need for proper maintenance and support. The test is whether adequate provision has been made for the proper maintenance and support of the claimant. “Support” is an additional and wider term than “maintenance”. In using the composite expression, and requiring “proper” maintenance and support, the legislation recognises that a broader approach is required and the authorities referred to establish that moral and ethical considerations are to be taken into account in determining the scope of the duty.

5.8 The courts have established several principles to aid the court’s determination of whether a breach of moral duty has occurred.¹⁹ These principles include the following:

- (a) The court should assess all the circumstances of the case, including changing social attitudes.²⁰
- (b) The size of the estate and other moral claims on the deceased’s estate are relevant considerations.²¹
- (c) It is not sufficient merely to show unfairness. It must be shown in a broad sense that the claimant has need of maintenance and support.²²
- (d) Mere disparity in the treatment of beneficiaries is not sufficient to establish a claim.²³
- (e) The court’s power does not extend to rewriting a will because of a perception it is unfair.²⁴
- (f) Although the relationship of parent and child is important and carries with it a moral obligation reflected in the FPA, it is nevertheless an obligation largely defined by the relationship that actually exists between parent and child during their joint lives.²⁵

5.9 In *Williams v Aucutt*, the claimant had no financial need and instead framed her case as a “support” claim. The Court of Appeal confirmed that adequate “support”, as a standalone

¹⁵ *Re Allardice, Allardice v Allardice* (1910) 29 NZLR 959 (CA) at 972–973.

¹⁶ *Little v Angus* [1981] 1 NZLR 126 (CA) at 127; and *Coates v National Trustees Executors & Agency Co Ltd* [1956] HCA 23, (1956) 95 CLR 494 at 526 and 527. See also *Talbot v Talbot* [2018] NZCA 507, [2018] NZFLR 128 at [40].

¹⁷ See discussion in Bill Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis, Wellington, 2021) at 21–23; and *Welsh v Mulcock* [1924] NZLR 673 (CA).

¹⁸ *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [52].

¹⁹ See the list of principles helpfully summarised in *Vincent v Lewis* [2006] NZFLR 812 (HC) at [81].

²⁰ *Little v Angus* [1981] 1 NZLR 126 (CA) at 127.

²¹ *Re Leonard* [1985] 2 NZLR 88 (CA) at 92; and *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [37].

²² *Re Leonard* [1985] 2 NZLR 88 (CA) at 92.

²³ *Re Shirley (deceased)* CA155/85, 6 July 1987.

²⁴ *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [70].

²⁵ *Flathaug v Weaver* [2003] NZFLR 730 (CA) at [32].

- concept, can require financial provision from an estate as recognition of belonging to the family.²⁶ The Court added that awards for “support” claims should be modest.²⁷
- 5.10 The courts frequently state that an award under the FPA should disturb the deceased’s will no more than is necessary to repair the breach of moral duty.²⁸ The Court of Appeal in *Fisher v Kirby* explained also that awards should be neither unduly generous nor ungenerous.²⁹ Rather, the courts should exercise discretion in the particular circumstances of a case, having regard to the factors identified in the authorities.³⁰
- 5.11 The majority of FPA claims reaching the courtroom today are made by the deceased’s adult children, most of whom were not dependent on their deceased parent and may be financially secure.³¹
- 5.12 Section 106(2) of Te Ture Whenua Maori Act 1993 (TTWMA) provides that no order can be made under the FPA that has the effect of alienating any beneficial interest in Māori freehold land to any person other than the child or grandchild of the deceased. Te Kōti Matua | High Court (the High Court) does, however, have powers to grant orders conferring the right to reside in any dwelling or affecting income derived from any beneficial interest in Māori freehold land.³²
- 5.13 Te Kooti Whenua Māori | Māori Land Court (the Māori Land Court) has jurisdiction to determine FPA claims that relate to Māori freehold land.³³ In addition, the Māori Land Court may determine whether a whāngai is a child of their “birth parents” or their “new parents” for the purposes of a FPA claim that relates to Māori freehold land.³⁴ The tikanga of the relevant iwi or hapū will determine the matter.³⁵ Section 19 of the Adoption Act 1955 does not prevail.³⁶ The tikanga applying to whāngai and succession is discussed more broadly below.

²⁶ *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [52].

²⁷ *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [52] and [55].

²⁸ *Little v Angus* [1981] 1 NZLR 126 (CA) at 127; and *Henry v Henry* [2007] NZCA 42, [2007] NZFLR 640 at [55]–[56].

²⁹ *Fisher v Kirby* [2012] NZCA 310, [2013] NZFLR 463 at [120].

³⁰ *Fisher v Kirby* [2012] NZCA 310, [2013] NZFLR 463 at [120].

³¹ Te Aka Matua o te Ture | Law Commission’s review of FPA cases published on Westlaw and LexisNexis in the 10-year period ending 18 November 2019 found that, of the 116 cases heard and decided (excluding appeals), 93 cases (80 per cent) involved a claim by one or more adult child, none of whom were dependent on the deceased immediately before death. In 40 of the 93 cases (43 per cent), the court found that none of the child claimants were in financial need, and in an additional five cases, the court found that only some of the child claimants were in financial need. Awards were made in 28 of the 45 cases, and a court order (by consent) approved a settlement in an additional case.

³² Te Ture Whenua Maori Act 1993, s 106(3).

³³ Family Protection Act 1955, s 3A(2A).

³⁴ Te Ture Whenua Maori Act 1993, ss 114A(3) and 115(1).

³⁵ Te Ture Whenua Maori Act 1993, s 114A(3).

³⁶ Te Ture Whenua Maori Act 1993, s 115(3).

NGĀ TIKANGA

The importance of whānau

- 5.14 Whānau occupies a central place in te ao Māori. Williams J, in extrajudicial writing, has said that “[w]ithout whānau, being Māori is a mere abstraction.”³⁷ Being part of a whānau involves rights and obligations that are sourced from whakapapa, whanaungatanga, manaakitanga and aroha.³⁸ These obligations can include financial and moral support as well as an obligation to take responsibility for each other’s actions.³⁹ The whānau is also crucial for discussing and settling familial issues relating to child rearing and succession.⁴⁰ Professor Patu Hohepa has said that “[a]ll members must ideally share compassion (aroha), trust (pono), truthfulness (tika) with each other”.⁴¹ The whānau also acts as a first line of defence when there is trouble with an individual or group within a wider whānau.⁴²
- 5.15 Williams J has also described the whānau and the rights and obligations of its members:⁴³
- Traditionally the whanau ... was the centre of Māori life. It was the primary unit of close identity and belonging, the primary unit of social rights and obligations and, at a practical level at least, the primary unit of economic rights and obligations.
- 5.16 Whānau Māori and non-Māori notions of family share some common values. When both are fully functional, the connections one shares with one’s whanaunga (relatives) matter to the individual and to the collective. An estranged family member hurts the individual, the family and the whānau. When a family or whānau member is in trouble, the whānau and family may rally around them to provide support. Compassion, trust and honesty are valued amongst family members and whānau.⁴⁴ Similarly, individuals are responsible to the whānau to ensure that their actions are consistent with tikanga. As demonstrated by the saying “ki te hē tētahi, kua hē te katoa”⁴⁵, the actions of an individual member can

³⁷ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Taumauri | Waikato L Rev 1 at 23.

³⁸ Joan Metge “Succession Law: Background Issues Relating to Tikanga Maori” (paper prepared for Te Aka Matua o te Ture | Law Commission, 1994) at 2–4; Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 32–33; Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 20–21; and Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 60.

³⁹ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Taumauri | Waikato L Rev 1 at 4; and Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 60.

⁴⁰ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 20.

⁴¹ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 20 (emphasis removed).

⁴² Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 61.

⁴³ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Taumauri | Waikato L Rev 1 at 23.

⁴⁴ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 20.

⁴⁵ If one person errs, the collective has erred.

impact on and reflect on others in a family or whānau. In some cases, a family or whānau may bear responsibility for the actions of a member.

5.17 One of the primary obligations of the whānau as a whole is to the welfare of tamariki and mokopuna.⁴⁶ Some of the primary tikanga that apply to pouaru (the surviving partner) include whanaungatanga, aroha and manaakitanga. In many cases these tikanga would ensure that a surviving partner and any children of the relationship are cared for by whānau.

5.18 As discussed in Chapter 4, Professor Jacinta Ruru articulates two distinct views on defining whānau membership.⁴⁷ The first is a “descent-based” view, and the second is an extended view whereby those who participate in whānau activities are included. The descent view may take precedence over the extended view when considering legal claims to further provision from a deceased partner’s estate.⁴⁸ However, the views of those with direct whakapapa to the deceased are constrained by the exercise of tikanga, which would require broader consideration of perspectives in relation to appropriate provision for surviving partners. These might include consideration of:

- (a) the nature and duration of the relationship between the pouaru and the deceased;
- (b) whether there are children of the relationship;
- (c) the level and nature of involvement or association of the pouaru with the broader whānau; and
- (d) the mana of the deceased (a well-respected rangatira’s wishes may be less likely to be challenged).

Whāngai

5.19 Whāngai is a Māori practice where a child is raised by someone other than their birth parents, usually another relative.⁴⁹ Rather than being a way of dealing with children who

⁴⁶ Ranginui Walker *Ka Whawhai Tonu Matou: Struggle Without End* (Penguin Books, Auckland, 1990) at 64; and *Puao-Te-Ata-Tu (day break): The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (September 1988) at 29–30 and 74–75.

⁴⁷ Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 59–60.

⁴⁸ Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 59–60.

⁴⁹ The term “whāngai” is also the verb “to feed”. Some hapū prefer other terms such as “atawhai” or “taurima” to refer to the practice of caring for a child other than a birth child and there are variances about the nature of the relationship that these terms denote: see Professor Milroy’s explanation in *Hohua — Estate of Tangi Biddle* (2001) 10 Rotorua Appellate MB 43 (10 APRO 43); and Waihoroi Shortland’s explanation in *Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal He Pāharakeke, He Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021) at 15. For discussion of whāngai generally, see Merata Kawharu and Erica Newman “Whakapaparanga: Social Structure, Leadership and Whāngai” in Michael Reilly and others (eds) *Te Kōparapara: An Introduction to the Māori World* (Auckland University Press, Auckland, 2018) 48 at 59–63; Geo Graham “Whangai Tamariki” (1948) 57 *Journal of the Polynesian Society* 268; Mihiata Pirini “The Māori Land Court: Exploring the Space between Law, Design, and Kaupapa Māori” (LLM Dissertation, Te Whare Wānanga o Ōtākou | University of Otago, 2020) at 18–21; Michael Sharp “Māori Estates: Wills” in *Wills and Succession* (online looseleaf ed, LexisNexis) at [16.12]; and Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Taumauri | Waikato L Rev* 1 at 5.

lack parents, the concept and practice of whāngai is firmly rooted in whanaungatanga.⁵⁰ One function of whāngai traditionally is encapsulated in the saying “kia mau ki te ara whanaunga”, to hold firm the various strands of whānau relationships so they remain strong.

- 5.20 The term “whāngai” is often associated with the Pākehā tradition of adoption. However, whāngai does not have the same features or consequences as an adoption under state law.⁵¹ If a Pākehā equivalent must be sought, the idea of guardianship is closer to whāngai than adoption but is not an equivalent.⁵² Whāngai:⁵³

... is a technique for cementing ties among members of whanau and hapu located at different points in the whanaungatanga net, and for ensuring the maintenance of tradition between generations; the latter, by placing young children with elders to be educated and raised in Māori tradition. Thus to be a whangai in tikanga Māori is not to be abandoned — quite the opposite. It is to be especially selected as someone deserving of the honour. Stranger adoption was completely unheard of and would be considered abhorrent in a system that valued kinship above all else. A form of banishment.

- 5.21 The origins of whāngai are found in an account of Māui-tikitiki-a-Taranga.⁵⁴ Taranga, Māui’s mother, miscarried Māui, her youngest child. Believing him to be stillborn, she cut off her topknot, wrapped him in it and cast him into the sea. Māui became entangled in seaweed and as a result remained afloat until he was washed ashore and found by his grandparent, Tama-nui-ki-te-rangi, who then raised him. Later, Māui returned to his biological parents and identified himself by reciting his whakapapa to his family, who then welcomed and accepted him and continued to raise and nurture him.
- 5.22 The nature of whāngai arrangements and the rights of whāngai to succeed according to tikanga relating to succession by whāngai varies amongst whānau, hapū and iwi.⁵⁵

Tikanga Māori under the Family Protection Act 1955

- 5.23 The extent to which tikanga should affect the concept of moral duty under the FPA has been described as “a matter of some difficulty”.⁵⁶

⁵⁰ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Taumauri | Waikato L Rev* 1 at 5.

⁵¹ Te Aka Matua o te Ture | Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000) at 73.

⁵² Social Policy Agency, Department of Social Welfare *Review of Adoption Law: Maori Adoption – A Consultation Document* (February 1993) at [54] and [65].

⁵³ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Taumauri | Waikato L Rev* 1 at 5.

⁵⁴ Merata Kawharu and Erica Newman “Whakapaparanga: Social Structure, Leadership and Whāngai” in Michael Reilly and others (eds) *Te Kōparapara: An Introduction to the Māori World* (Auckland University Press, Auckland, 2018) 48 at 59–60.

⁵⁵ See for example *Hohua — Estate of Tangi Biddle* (2001) 10 Rotorua Appellate MB 43 (10 APRO 43); *Pomare — Estate of Peter Here Pomare* (2015) 103 Taitokerau MB 95 (103 TTK 95); and *Retemeyer v Loloa — Estate of Tahuaka Waipouri* (2016) 129 Taitokerau MB 288 (129 TTK 288).

⁵⁶ *Re Green (dec’d); Green v Robson* [1995] NZFLR 330 (HC) at 334. It is also helpful to note the history of how the Family Protection Act 1955 has been applied to Māori. In 1909 Parliament enacted the Native Land Act 1909, which removed Māori estates from the scope of the Family Protection Act’s predecessor legislation. Instead, the Native Land Court was given jurisdiction to make adequate provision for the proper maintenance and support for the widow, children and

- 5.24 In *Re Stubbing*, the deceased had left her son significant land interests but made very little provision for her other child.⁵⁷ The son who received the land argued that, based on “Māori custom”, no breach of moral duty had occurred. The High Court held it had insufficient evidence of the custom by which the son said the farm should pass to him. The Court added that, where a claimant has made out a case for relief, it cannot be overridden by competing claims based on custom.
- 5.25 Some cases have treated tikanga Māori as only an expression of the deceased’s personal values and testamentary freedom.⁵⁸ In *Koroheke v Te Whau*, the High Court noted that, while a Māori will-maker’s personal value system was relevant, it should not be given priority over their moral duty to make provision to their family.⁵⁹ In that case, the will-maker wished to ensure land went to one of her children without needing to be sold because of its whānau importance. The Court noted the decision in *Re Ham* in which the Court of Appeal said the court must pay regard to the strong attachment of Māori to the land.⁶⁰ However, the Court reasoned the land in question had not been held by the family for long. The desire to retain the land for its whānau importance should not be given precedence over ensuring the will-maker discharged her moral duty to her other children.⁶¹
- 5.26 In *van Selm v van Selm* the deceased had given one of her three children a farm in her will.⁶² The other two children claimed further provision from the estate which would have required the farm to be sold. The child that inherited the farm argued that the case should be determined on tikanga Māori rather than current social attitudes. In particular, he argued that the Court should respect the deceased’s wishes that the farm should stay in the whānau. Te Kōti Whānau | Family Court held that the three children did not operate as a whānau and the land was not in fact the papa kāinga for any of the children. The Court ordered that the farm vest equally in the children. On appeal, the High Court altered the children’s shares but did not refer to tikanga.⁶³
- 5.27 The courts have also considered the position of whāngai in FPA cases. In *Keelan v Peach* the Court of Appeal held that a whāngai who had not been formally adopted was not eligible to claim under the FPA.⁶⁴ The Court based its decision on section 19 of the Adoption Act which provides an adoption in accordance with Māori custom is of no force or effect. In *Re Green (dec’d); Green v Robson*, the High Court significantly altered the

grandchildren of a Māori person who had made a will: Native Land Act 1909, s 141. The Family Protection Act 1955 was made applicable to Māori estates in 1967: Maori Affairs Amendment Act 1967, s 80.

⁵⁷ *Re Stubbing* [1990] 1 NZLR 428 (HC).

⁵⁸ *Re Green (dec’d); Green v Robson* [1995] NZFLR 330 (HC) at 334–335; and *Marino v Macey* [2013] NZHC 2191 at [31]–[32].

⁵⁹ *Koroheke v Te Whau* [2020] NZHC 863.

⁶⁰ *Re Ham* (1990) 6 FRNZ 158 (CA) at 162.

⁶¹ *Koroheke v Te Whau* [2020] NZHC 863 at [125].

⁶² *van Selm v van Selm* [2015] NZFC 3242, [2015] NZFLR 693.

⁶³ *Ormsby v van Selm* [2015] NZHC 2822.

⁶⁴ *Keelan v Peach* [2003] 1 NZLR 589 (CA) at [43]. However, the most recent amendments to TTMMA include an amendment that te Kooti Whenua Māori | Māori Land Court may determine whether someone is a whāngai for the purposes of a claim under the FPA that relates to Māori freehold land: see Te Ture Whenua Maori Act 1993, s 115.

deceased's will in which she left the bulk of the estate, mostly interests in Māori freehold land, to "foster children".⁶⁵ The Court commented on the lack of the evidence about the deceased's reasons for the dispositions in the will. The Court held that the deceased's only "natural" son's claim "clearly outweighed" the interests of the foster children.⁶⁶ The Court ordered that the whole estate go to the son to remedy the breach of moral duty.

ISSUES

- 5.28 In the Issues Paper, we noted several potential issues with the FPA. First, the court's emphasis on remedying the deceased's breach of "moral duty" may obscure the Act's policy objective. In any situation, there can be a wide variety of views about what is a moral way to distribute an estate. The assessment is likely to be more contestable as New Zealand society becomes more culturally diverse and there are differences in family forms, wealth and social perspective.⁶⁷ Case analysis shows variation both in the reasons for determining a breach of moral duty and for quantifying awards.⁶⁸ The FPA has been criticised for enabling a judge to substitute their determination of what is moral or fair in the place of the will-maker's determination.⁶⁹
- 5.29 The lack of clarity has practical consequences. Predicting case outcomes is sometimes difficult for will-makers, potential claimants and lawyers advising these parties. The uncertainty may discourage claimants and personal representatives from settling out of court.
- 5.30 Second, we suggested that the ability of adult children to seek further provision from an estate under the FPA could be inconsistent with public attitudes and values. As noted, most litigation under the FPA concerns claims brought by adult children of the deceased. Awards to adult children who do not have financial need have caused concerns.⁷⁰ The results of the Succession Survey show high numbers of respondents (80 per cent) agreed that a person should be allowed to exclude family members from their will.⁷¹ However, when presented with different family scenarios, respondents were more likely than not

⁶⁵ *Re Green (dec'd); Green v Robson* [1995] NZFLR 330 (HC).

⁶⁶ *Re Green (dec'd); Green v Robson* [1995] NZFLR 330 (HC) at 334–335.

⁶⁷ Richard Sutton and Nicola Peart "Testamentary Claims by Adult Children — The Agony of the 'Wise and Just Testator'" (2003) 10 Otago L Rev 385 at 408.

⁶⁸ In the 10-year period ending 18 November 2019, there were 32 appeals published on Westlaw NZ and LexisAdvance that inquired into awards under the FPA. Twelve (37.5 per cent) of these appeals were successful and resulted in changes to the awards made, increasing or decreasing the award in the first instance or in some cases reinstating the will. A 13th case, *George v Blomfield* [2017] NZFC 7553, was a rehearing rather than an appeal but also resulted in an increase in the award made.

⁶⁹ John Caldwell "Family protection claims by adult children: what is going on?" (2008) 6 NZFLJ 4 at 4. See also Mary Foley "The Right of Independent Adult Children to Receive Testamentary Provision: A Statutory Interpretation and Philosophical Analysis of the New Zealand Position" (PhD Dissertation, Te Whare Wānanga o Ōtākou | University of Otago, 2011) at 84; and Greg Kelly "An Inheritance Code for New Zealand" (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 2010) at 19.

⁷⁰ John Caldwell "Family protection claims by adult children: what is going on?" (2008) 6 NZFLJ 4. See also Nicola Peart "Awards for children under the Family Protection Act" (1995) 1 BFLJ 224.

⁷¹ Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at figure 1.

to agree that adult children of the deceased should be allowed to challenge a will and get a share of an estate. We concluded that the Succession Survey findings suggest that testamentary freedom is important to most New Zealanders, but there is general support for some limits on this freedom to ensure certain family members are provided for. We discuss the results of the Succession Survey further below.

- 5.31 Third, we had heard from lawyers that, while a claimant may feel vindicated by an award, FPA claims can severely damage relationships between family members. Prolonged disputes add to the time and costs of administration, negatively affecting beneficiaries of the estate who are often also family members. There are also questions as to how the hurt caused by a parent's failure to recognise a child in their will can be remedied by a judge's decision to award provision from an estate.⁷²
- 5.32 Lastly, we noted the possible ways tikanga might align or conflict with the policy of the FPA. We noted too how whāngai are not an eligible class of claimants under the FPA. We asked what tikanga has to say about the rights of whānau members to challenge a deceased's testamentary wishes.

RESULTS OF CONSULTATION

- 5.33 We received many submissions on the consultation website and Issues Paper addressing the issues and our proposals for reform regarding family provision. There was a diverse range of views among submitters.

Issues

- 5.34 Several submitters, including Public Trust, MinterEllisonRuddWatts, Chapman Tripp and McWilliam Rennie, expressed broad agreement with the issues we identified in the Issues Paper.
- 5.35 Some emphasised the need for the law to provide greater certainty. TGT Legal explained that the cases are fact specific and require judges to exercise a high level of discretion, meaning the outcome of the case will depend on the views of the presiding judge. The unpredictability and variability in the application of the FPA make it difficult to advise clients on the risks and benefits of a claim. Perpetual Guardian emphasised that the quantum of awards varies significantly.
- 5.36 Around one in five submitters commented that the law should provide less incursion into testamentary freedom. Several submitters said they had carefully considered their testamentary wishes and they were concerned that a court could interfere. Some submitters explained that will-makers will have good and thought-out reasons for favouring a beneficiary or omitting another. Allowing a court to adjust those terms rested on a paternalistic assumption that the will-maker had acted inappropriately and that a judge knows better.
- 5.37 Several submitters, including Public Trust, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), TGT Legal, McWilliam Rennie and Chris Kelly, submitted that framing the legal test for provision in the language of "moral duty" is problematic. They noted that

⁷² John Caldwell "Family protection claims by adult children: what is going on?" (2008) 6 NZFLJ 4 at 9.

what constitutes morality, especially in the context of a very diverse society, is a subjective and contentious question.

- 5.38 Several submitters noted the particular problem that can arise in relation to stepfamilies. A deceased will often provide the bulk of an estate to their partner with the expectation the partner will provide in their will for the deceased's children from a prior relationship. If the partner later changes their mind, the children from the first relationship have limited rights to seek provision from the estate of their stepparent.
- 5.39 Some submitters strongly disagreed with our analysis of the issues in the Issues Paper. Submitters, including the Family Law Committee of Auckland District Law Society (ADLS), NZLS, the Rt Hon Sir Peter Blanchard and Jan McCartney QC, saw the FPA as generally satisfactory. They said the suggestion that the law creates uncertainty is exaggerated. Rather, judges make decisions that are fair and equitable, and the fact that most cases settle indicates the relevant legal principles are well understood. These submitters also disagreed with our conclusion that the Succession Survey shows high support for testamentary freedom. Rather, they commented, the Succession Survey confirms that most people agree family members should be able to claim against an estate.

Options for reform

- 5.40 In the Issues Paper and consultation website, we proposed several options for reform. All options involved repeal of the FPA and a replacement "family provision" regime being available in the new Act. We presented four options for who should be eligible for family provision and in what circumstances:
- (a) Option One: Family provision awards for partners.
 - (b) Option Two: Family provision awards for children under a prescribed age.
 - (c) Option Three: Family provision awards for disabled children.
 - (d) Option Four: Recognition awards for children.
- 5.41 As discussed in the Issues Paper, we preferred the first two options, but not the third and fourth.

Option One: Family provision awards for partners

- 5.42 We proposed that a surviving partner should be eligible to make a family provision claim. The court should grant an award when the surviving partner has insufficient resources to enable them to maintain a reasonable, independent standard of living, having regard to the economic consequences for that partner of the relationship or its end. The provision the court grants from the estate should be to enable the partner to transition from the family joint venture.
- 5.43 This option received strong support from submitters. Some, however, were concerned that what provision would be needed to ensure a "reasonable, independent standard of living" could be difficult to determine. It is inherently fact specific and may need to take into account other sources of income available to the partner, such as provision from a trust.
- 5.44 NZLS noted the possibility that a family provision claim will enable a surviving partner to access property of the deceased that would otherwise have been protected under the PRA as separate property. It noted that the Commission's recommendations to reform

the PRA would result in there being less relationship property for some relationships, particularly those that start later in the partners' lives. NZLS recommended there should be additional factors the court takes into account to protect separate property and respect the deceased's plans to provide for other parties.

- 5.45 Public Trust and TGT Legal were the only submitters to address our proposal regarding partners who separate prior to death. They agreed that partners who separated two years or longer prior to the death of the deceased should be ineligible to claim.

Option Two: Family provision awards for children under a prescribed age

- 5.46 We proposed that the deceased's children who are younger than a prescribed age should be eligible to make a family provision claim from the estate when they would receive inadequate provision under the deceased's will or in an intestacy. The court should have discretion to grant an award from the deceased's estate to enable the children to be maintained to a reasonable standard and, so far as is practical, educated and assisted towards attainment of economic independence. We suggested three options for the prescribed age: 18, 20 or 25 years.

- 5.47 Submitters generally agreed it was important to ensure young children are properly provided for on a parent's death. Around half the submitters who commented on the prescribed age favoured 25 years, with most noting that a young person's need for parental support will usually extend to this age. Around 25 per cent of submitters favoured 18 years, and around 25 per cent favoured 20 years.

- 5.48 We proposed that "accepted children" should be eligible to claim family provision. An accepted child would be a child for whom the deceased had assumed, in an enduring way, the responsibilities of a parent. Again, submitters generally supported this proposal. Several submitters noted, however, that the quality and nature of the relationship must be carefully examined. A minority of submitters, particularly among website submitters, were concerned at the proposal. They observed that a person wishing to provide for children in a parental capacity can do so in their will. They also noted the complexities that may arise if a child had multiple stepparents and biological parents.

- 5.49 TGT Legal agreed with our proposal that, if posthumous reproduction is made permissible in the future, a posthumously conceived child should be eligible for family provision under the new Act provided the unborn child was in utero prior to the expiry of the limitation period. Public Trust also agreed such children should be eligible and noted that eligibility might be qualified by a requirement that the deceased consented to the pregnancy.

Option Three: Family provision awards for disabled children

- 5.50 Our third option for reform was to provide that disabled children of any age may claim family provision. An award would recognise that a child in this category who does not have sufficient resources to enable them to maintain a reasonable standard of living should receive provision from the estate.

- 5.51 Submitters strongly favoured this option. Some submitters cautioned that it would be difficult to define disability. Nan Jensen, a practitioner specialising in disability law, noted that disabled people who do not receive resources from family will have a limited standard of living due to limited work opportunities. Relying on labour market statistics from Tauranga Aotearoa | Stats NZ, Manaakitia a Tātou Tamariki | Office of the Children's Commissioner similarly emphasised the discrepancy seen in official statistics

between the average incomes for disabled people and non-disabled people.⁷³ Jensen noted too that any provision a disabled person receives from an estate may impact on their asset or means-tested social security benefits. If benefits are negatively affected, there are issues about what is required for a reasonable standard of living.

Option Four: Recognition awards for children of all ages

- 5.52 Submissions on our proposals for reform in relation to adult children of a deceased showed a division of opinion between submitters. We proposed an option to allow children of the deceased, regardless of their age or needs, to make a claim for a “recognition award” to recognise the importance of the parent-child relationship and to acknowledge that the child belongs to the family. We explained in the Issues Paper that we did not prefer this option.
- 5.53 Several submissions on the consultation website supported this option. However, around double the number of submissions opposed adult children having any rights to seek further provision from an estate. Many submitters thought there is no requirement to provide for an adult child and will-makers’ decisions should be respected. They suggested that the will-maker is the best person to decide how their relationship with their child should be recognised, not the courts. Some submitters were concerned that claims have a negative impact on families. A small number of submitters shared personal stories of how they were required to defend their own provision from a deceased’s estate against what they viewed as unmerited claims from adult children. They described the significant financial and emotional burden they experienced.
- 5.54 Three law firms who submitted on the Issues Paper, Morris Legal, TGT Legal and Chapman Tripp, did not agree adult children should be able to claim recognition awards. Both Chapman Tripp and TGT Legal explained that a court making a financial award to a child is not a substitute for the parent providing emotional recognition. They said it is hard to imagine how protracted litigation, with very personal details and unpleasant family history being dredged up, could ever redress such grievances and ameliorate such a situation even when it results in a financial award. Professor Emeritus David Williams noted the mischief the original legislation had in mind at the turn of the previous century bears no resemblance with the situation today. Currently, he observed, “children” in their 60s can claim a “moral duty” for a parent in their 80s to provide for them and thus undermine a will-maker’s desire to gift to a charity or other cause of their own choosing.
- 5.55 Public Trust, while saying it did not have a strong view on the proposed recognition awards, noted that continuing to make moral claims available will also continue the uncertainty associated with these claims.
- 5.56 On the other hand, many submitters were very concerned at the proposal to remove adult children’s rights to claim. These submitters included Perpetual Guardian, NZLS, ADLS and several other leading family law and succession practitioners. Submitters gave varying reasons in support, but several points were repeatedly raised.
- 5.57 First, most of these submitters argued that it is an important matter of fairness and equity that parents provide for children of all ages when they die. Society generally expects

⁷³ In the June 2020 quarter, the median weekly income for disabled people was \$402 compared to \$713 for non-disabled people: Tatauranga Aotearoa | Stats NZ “Labour market statistics (disability): June 2020 quarter” (26 August 2020) <www.stats.govt.nz>.

parents to do what they can to support a child's psychological and physical security through all stages of the child's life.

- 5.58 Second, submitters explained that often will-makers will make “inappropriate” wills. Some noted that parents can be cruel or unfair in the terms of their wills. Some raised gender-based bias. Others noted that ageing people can be more susceptible to influence to change their wills, or they can develop irrational prejudices. It is necessary, the submitters argued, that the court retains power to remedy these instances of unfairness.
- 5.59 Third, some submitters argued that the courts should adjust wills to respond to a parent's misconduct towards their children. The death may have closed the door on any opportunity for the parent to make amends, but the court can help victims by redressing abuse or neglect.
- 5.60 Fourth, submitters pointed to will-makers' responsibilities to provide for the financial needs of adult children. Intergenerational transfers of wealth are especially necessary, they said, because of the rising costs of living, particularly housing.
- 5.61 Lastly, some submitters noted that eliminating FPA claims for adult children would not result in less litigation. Rather, aggrieved children would be likely to seek provision through some other claim, such as challenging testamentary capacity or relying on the contribution claim we proposed in the Issues Paper.
- 5.62 Submitters who favoured retaining adult children claims were divided on what the nature of the claim should be:
- (a) McCartney submitted the current test of “moral duty” works sufficiently. It has the benefit of responding to the economic needs of families in contemporary Aotearoa New Zealand.
 - (b) Bill Patterson favoured rewriting the legislation to state in more precise language the concept of “need” as it has been developed in its wider sense in the case law.
 - (c) Kelly suggested more guidance in the legislation to focus on cases of genuine need or injustice.
 - (d) NZLS and Stephen McCarthy QC suggested reframing adult child claims into two categories based on economic or financial need in one category and family recognition in a second category. They said this would make the claims clearer and reduce the scope for the sort of derogatory evidence that often appears in family protection cases.
 - (e) TGT Legal submitted that there should be just one category of case for exceptional circumstances in which the court should have discretion to alleviate the financial need of an adult child where failure to do so would cause serious injustice or some other high threshold.
 - (f) Vicki Amundsen proposed the legislation provide a specified percentage award for adult children, depending on family construct, if the children wished to apply. For example, where there are up to three children, each should be entitled as of right to a claim of 15 per cent of the estate, but where there are four or more children, 50 per cent of the estate should be divided by the number of eligible children.

Other comments

- 5.63 We received submissions both favouring and opposing our proposal that parents cease to be eligible claimants.
- 5.64 NZLS submitted that the position of grandchildren should be expressly clarified in the legislation rather than rely on our proposed category of “accepted children”. It is not unusual, NZLS explained, for grandchildren to be cared for by grandparents as their primary care providers. Alternatively, a grandchild’s parents may have predeceased the grandparent. In such circumstances, NZLS submitted the legislation should provide that a minor or disabled grandchild should have the ability to claim for a family provision or recognition award.

Ngā tikanga

- 5.65 Several submissions addressed the questions we raised in Chapter 8 of the Issues Paper regarding whānau members’ rights to challenge a deceased’s testamentary wishes and tikanga perspectives on the options for reform we raised in Chapter 4.
- 5.66 Te Hunga Rōia Māori o Aotearoa (THRMOA) and Ngā Rangahautira submitted that testamentary freedom is consistent with tikanga. It is intensely tied to mana and whanaungatanga. However, both submitters cautioned that it must be balanced against tikanga obligations relating to collective rights arising from whakapapa and whānau. Chapman Tripp submitted that testamentary freedom as an overriding principle would not sit comfortably with tikanga Māori as it must be balanced with expectations derived through whakapapa under the practice of whanaungatanga.
- 5.67 THRMOA stressed that, where challenges are made to a person’s testamentary wishes, it is important for the dispute to be determined in accordance with tikanga. Discussion among whānau would be expected. Chapman Tripp submitted that a challenge would require kōrero among interested whānau members, and whānau members would have every right to speak their mind. There would need to be an eventual agreement between the whānau involved to resolve the dispute. THRMOA added that, where whānau members are undertaking a challenge separate to other whānau members, they would need a sufficiently persuasive case. Likewise, Chapman Tripp noted that whanaungatanga does not require everyone agreeing with each other all the time.
- 5.68 Tamati Cairns (in an interview with Tai Ahu) stressed that, under tikanga, a will-maker’s decisions should not be immune from challenge, but the tikanga underpinning that decision need to be explored and given appropriate weight. The process for the challenge needs to be in accordance with tikanga.
- 5.69 In responding to whether our proposals for reform in the Issues Paper were consistent with tikanga, THRMOA noted that presumptions and a prescribed default set of rules do not accord well with tikanga. While the proposed options may be consistent with tikanga, a tikanga approach must flourish and evolve on its own terms without reference to specific rules or options.
- 5.70 THRMOA was confident that tikanga could address the options proposed. Whanaungatanga and whakapapa are relevant to all whānau members’ rights to succeed, while the concepts of manaaki, kaitiaki and aroha are specifically relevant towards surviving partners, younger children and disabled children. The concept of utu may be relevant towards adult children. Te Kani Williams agreed that the concepts of

whanaungatanga, manaakitanga and aroha could inform rights to seek provision from a relative's estate.

- 5.71 Chapman Tripp noted the position that separated partners ought to be able to claim family provision is not inconsistent with tikanga. Specific factors ought also to be taken into account, such as whether there are children from the relationship and the relevant contributions giving rise to utu.
- 5.72 ADLS did not believe the proposals relating to surviving partners' rights to claim family provision were consistent with tikanga. ADLS considered that whakapapa should be prioritised over surviving partners.
- 5.73 Chapman Tripp said an age limit for a family provision claim for children may not necessarily clash with tikanga. However, it may not pay sufficient attention to the wider and unique circumstances of each case. Also, thought should be given to mokopuna obligations because the mokopuna-tupuna relationship in tikanga Māori is very important (and was usually the framework within which whāngai was traditionally practised). This may also be a specific factor to take into account.
- 5.74 Submitters generally agreed that the proposal for "accepted children" to be eligible claimants was consistent with tikanga in respect of whāngai. Whāngai ought to be included and provided for to some extent by the deceased's estate in accordance with whanaungatanga. Tamati Cairns (in an interview with Tai Ahu) stressed that individuals become whāngai for strategic or aspirational reasons. Where a deceased had made a decision to dispose assets to a whāngai, any challenge to that decision needs to be brought in accordance with tikanga. The broader tikanga reasoning should be explored and given appropriate weight.

CONCLUSIONS

- 5.75 What provision family members of a deceased person should receive from the estate by law is a difficult question because the answer is predominantly a value judgement. In a Pākehā context, the answer generally depends on personal philosophies towards inherently subjective matters. Moses and Peart summarise the types of considerations that are engaged as including:⁷⁴

... individual rights and freedoms, self-responsibility and collective responsibility, equity, the meaning of family, recognising the different roles and values within private relationships, the courts' place in regulating private lives and arrangements, and other very profound issues that go to the heart of the kind of society we want to have.

- 5.76 The attitude an individual takes to the policy of the FPA may also depend heavily on personal experience. We received submissions from people who described how they defended their inheritance from what they saw as unmeritorious claims from other family members. These submitters advocated for the removal of rights to claim against an estate. Conversely, we received submissions from children of a deceased who were aggrieved by what they saw as the deceased's neglect or prejudice towards them. These submitters felt very strongly that they should be able to claim against the estate. We

⁷⁴ Juliet Moses and Nicola Peart "Reforming Succession Law" (paper presented to NZLS Trusts Conference — 2021 A Trust Odyssey, Wellington, 19 October 2021) at 18.

heard from those who have made wills who were concerned that their testamentary wishes would be overridden.

- 5.77 In te ao Māori, submitters were clear that the tikanga of challenging the deceased's testamentary wishes would require a process through which whānau members would kōrero.⁷⁵ The discussion would encourage a mutually agreed and balanced outcome while observing the mana and whanaungatanga relating to the deceased's testamentary wishes. Consequently, provision from an estate in te ao Māori is less about personal views and philosophies and more about the whānau applying tikanga values and processes to reach the appropriate outcome.

The FPA should be repealed

RECOMMENDATION

R18

The Family Protection Act 1955 should be repealed. In its place, the new Act should provide that certain family members of the deceased may claim family provision awards.

- 5.78 We conclude that the FPA requires reform and should be repealed for the following reasons.

The FPA does not clearly set out the basis for a claim

- 5.79 The *Legislation Guidelines* provide that the underlying policy objective of an Act should be discernible in legislation itself.⁷⁶ Further, the *Legislation Guidelines* provide that legislation must be accessible because:⁷⁷

[i]f citizens cannot find the legislation that applies to them or if that legislation cannot be understood, then both the efficacy of the legislation and the rule of law itself are undermined. If legislation is vague about the obligations it imposes or leaves too much to people's discretion, it will create confusion and inconsistency.

- 5.80 In our view, the FPA does not sufficiently express a policy objective nor the principles on which the courts should rely when making decisions. Indeed, the authors of *Burrows and Carter Statute Law in New Zealand* cite the FPA as a leading example of legislation giving the court discretion to “order virtually anything it likes”.⁷⁸ The authors comment that the courts have established their own principles to guide the exercise of the discretion.⁷⁹ Rather than look to the legislation as the primary source of their rights and obligations, will-makers and those engaged in estate disputes must instead refer to the case law

⁷⁵ Submissions from Te Hunga Rōia Māori o Aotearoa and Chapman Tripp.

⁷⁶ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at 15.

⁷⁷ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at 9–10.

⁷⁸ Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 534.

⁷⁹ Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 539.

which is less accessible. The better approach would be for the legislation to clearly state the objectives and principles against which the court will make decisions.

- 5.81 Many of the submitters who favoured retaining broad rights for adult children said the test in the FPA requires redrafting.⁸⁰ They said the statutory wording should set out the basis of a claim more precisely.

The moral duty test is unsatisfactory

- 5.82 In our view, it is unsatisfactory to have a legal test expressed as a “moral duty” in this area of law. This is the second time the Commission has reviewed the FPA and reached this conclusion.⁸¹
- 5.83 There are likely to be extreme cases where society will generally agree that a will-maker can be described as having acted immorally or unethically based on the terms of their will. However, as we note above, people’s views will reflect personal value judgements, which must be applied in the unique factual circumstances of a particular family. Consequently, in most cases, reasonable minds will differ as to the “moral” way of distributing a deceased’s estate. Aotearoa New Zealand’s increasing cultural diversity and the need to enable Māori perspectives no doubt add to the differences of opinion. We do not think it is possible to adopt the standpoint of a notional wise and just will-maker and arrive at an objectively discernible moral duty.
- 5.84 That is not to say, as a matter of legal design, that the court should have no discretion. Our recommendations for reform set out below contain considerable discretionary elements. Rather, because we consider a moral duty in this context is incapable of objective assessment, the courts currently exercise discretion in pursuit of an illusory goal.
- 5.85 We have paid attention to the views of submitters who called strongly for the retention of the moral duty test. We have considered the underlying policy objectives they say the court should pursue when assessing moral duty. Taking into account the range of opinions communicated to us, we remain convinced it is inadvisable to couch the law in terms of an objective moral duty when the nature of that duty is so subjective and contestable.
- 5.86 The better approach, in our view, is for legislation to express more precisely the grounds on which it is permissible to alter the terms of a will.

Tikanga Māori has been inadequately recognised

- 5.87 The courts have been reluctant to accept arguments that tikanga Māori should determine the scope of a deceased’s moral duty. As noted above, the courts have instead preferred to treat tikanga as only relevant insofar as it is an expression of the deceased’s personal

⁸⁰ These submitters included leading practitioners such as Stephen McCarthy QC, Bill Patterson, Chris Kelly and NZLS.

⁸¹ Te Aka Matua o te Ture | Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [33]–[35].

values and testamentary freedom.⁸² Further, in *Re Stubbing*, the High Court commented that a case for relief cannot be overridden by competing claims based on custom.⁸³

- 5.88 Based on these judgments, we consider tikanga Māori is insufficiently woven into the law. For whānau Māori, we consider tikanga Māori should influence the scope of the obligations owed by a deceased to their whānau and what provision a court should grant to family members from a deceased's estate in appropriate cases. Not only do the judgments demonstrate how a deceased's moral duty is predominantly analysed by the courts in Pākehā terms, in our view, the judgments do not give proper attention to the constitutional significance of tikanga, as discussed in Chapter 2. There is, therefore, a strong case for rewriting the legislation into which tikanga can be expressly woven to signify its relevance when the court assesses family provision claims.

The new Act should provide for family provision awards

- 5.89 In place of the FPA, we recommend that the new Act should allow certain family members of the deceased to apply to the court for a family provision award. We discuss which family members should be eligible to claim family provision below, and the basis on which the court would determine an application.
- 5.90 Family provision under the new Act should take the approach of the current law in providing that the terms of the deceased's will or the terms of the intestacy regime prevail until a court decides otherwise. Further, as discussed below, we recommend that the quantum of a family provision award should be at the discretion of the court, albeit based on the statutory tests we outline.
- 5.91 We have considered but have not recommended a "forced heirship" approach.⁸⁴ Broadly, that would have required a deceased's estate to be distributed to certain family members based on fixed shares prescribed by law notwithstanding the deceased's wishes. We do not think a forced heirship regime would be appropriate for Aotearoa New Zealand for two key reasons. First, it would represent a significant change away from the greater testamentary freedom under the law of Aotearoa New Zealand. We do not think such a change would receive adequate support in principle or for any particular prescription of shares. Second, in our review of other jurisdictions, forced heirship regimes are seldom absolute. Rather, they allow family members to be disqualified on certain grounds, usually relating to some form of unacceptable behaviour such as criminal conduct, exercising duress over the deceased or causing a breakdown in relations with the deceased.⁸⁵ We therefore anticipate that any certainty a forced heirship regime may be thought to deliver

⁸² For example, the Court of Appeal in *Re Ham* (1990) 6 FRNZ 158 (CA) at 162 referred to the need to "pay regard to the strong attachment of the Maori to the land and to closely held deeply felt feelings within the family in that respect." In *Koroheke v Te Whau* [2020] NZHC 863 at [101], the High Court accepted that an assessment of the deceased's moral duty must take into account the deceased's own perspectives and value system. However, at [120]–[122], the Court held the Family Court had erred by giving too much weight to the deceased's personal preferences that land be retained in the family for whānau purposes.

⁸³ *Re Stubbing* [1990] 1 NZLR 428 (HC) at 437, recently cited in *Koroheke v Te Whau* [2020] NZHC 863 at [123].

⁸⁴ As used in several other jurisdictions, particularly civil law jurisdictions.

⁸⁵ See for example Louisiana Civil Code, CC 1621, arts 1621–1622; German Civil Code, § 2339; Spanish Civil Code, art 853.2; and the Civil Code of Catalonia, Book IV. See also Esther Arroyo I Amayuelas and Esther Farnós Amorós "Kinship Bonds and Emotional Ties: Lack of a Family Relationship as Ground for Disinheritance" (2016) 24 *European Review of Private Law* 203 at 207–208.

may be undermined by exceptions and the resulting disputes that would inevitably occur around disqualification.

Family provision awards for partners

RECOMMENDATIONS

R19 A court should make a family provision award to a surviving partner where, taking into account the provision available from the deceased on the deceased's death, a surviving partner has insufficient resources to maintain a reasonable, independent standard of living, having regard to the economic disadvantages arising from the relationship for that partner.

R20 A partner should have been in a qualifying relationship as defined in recommendations R11–R15 to be eligible to claim family provision.

R21 In determining the amount of a family provision award to a surviving partner, the court should take into account:

- a. the extent of the economic disadvantages the partner suffers from the relationship;
- b. the duration of the relationship;
- c. the partner's responsibilities for any children of the deceased;
- d. the partner's current and likely future employment situation; and
- e. the tikanga of the relevant whānau.

R22 In determining the amount of a family provision award to a partner, the court should have discretion whether to take into account any means-tested social security assistance a surviving partner receives.

5.92 We recommend that surviving partners are eligible to claim family provision awards from a deceased partner's estate in place of rights to claim under the FPA.⁸⁶

5.93 In relationships ending on death, the surviving partner may have suffered and continue to suffer economic disadvantages from the relationship. A common example is where the surviving partner has forgone full participation in the workforce to care for the couple's

⁸⁶ Family provision awards should also replace rights a partner may have to receive maintenance under the Family Proceedings Act 1980. In a recent case, *Guzman v Estate of Osborne* [2020] NZFC 1983, [2020] NZFLR 142, the Family Court held it had jurisdiction to order maintenance against the estate of a deceased partner under s 70 because the de facto relationship ended on death, even though the partners had not separated. Note the authors of *Family Property* rightly question this interpretation of s 70 of the Family Proceedings Act 1980: Nicola Peart (ed) *Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [FA70.01].

children. The deceased partner, while alive, was free to work. Both partners will have benefited from the arrangement, which can be understood as a family joint venture.⁸⁷ However, the surviving partner's expectations of continued provision through the family joint venture may be defeated on the deceased's death through no or inadequate provision. In these circumstances, it is appropriate for the surviving partner to receive provision from the estate to enable them to maintain a reasonable, independent standard of living.

- 5.94 For relationships ending on separation, the PRA provides that a just division of relationship property has regard to the economic advantages or disadvantages for the partners arising from the relationship.⁸⁸ In the PRA review we affirmed that there were compelling policy reasons to share economic advantages and disadvantages when a relationship ends by separation and proposed a regime of Family Income Sharing Arrangements (FISAs).⁸⁹ However, for the reasons given below, we do not think it best to address the economic consequences of a relationship that ends on death through awards from relationship property or FISAs. Rather, we think it better the court continue to have discretionary powers to respond to a surviving partner's needs when they are a result of the economic consequences of that relationship.
- 5.95 We therefore recommend that a surviving partner should be eligible to make a family provision claim. The court should grant an award when, taking into account the provision the deceased has made for the surviving partner on the deceased's death,⁹⁰ the surviving partner has insufficient resources to enable them to maintain a reasonable, independent standard of living, having regard to the economic consequences for that partner of the relationship. The award the court grants from the estate should enable the partner to transition from the family joint venture, noting that some partners, particularly those of older age, may never be financially independent from the estate.
- 5.96 Our recommendations take a different approach to the law governing partners' claims under the FPA. Under the FPA, the courts have traditionally taken the view that the deceased's duty towards their surviving spouse is paramount.⁹¹ They have held that a deceased's moral duty is to provide a surviving partner with an allowance that will allow them to live without financial anxiety to a standard they enjoyed during the deceased's lifetime, particularly in cases of larger estates.⁹² However, the courts have taken a

⁸⁷ For a description of the theory of the family joint venture see *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [2.43]–[2.48].

⁸⁸ *Property (Relationships) Act 1976*, s 1N(c) and s 15.

⁸⁹ *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [10.4]–[10.9].

⁹⁰ In assessing what provision the deceased has made for their partner, the court should take into account the partner's entitlements under the deceased's will or their entitlements in the intestacy, as the case applies. The court should also take into account the deceased's property that has become available to the surviving partner on the deceased's death, such as joint tenancy property accruing to the partner by survivorship. Additionally, we would expect provision available from a trust would be relevant, either to whether the deceased has made adequate provision to the partner or in assessing the resources of the partner: see *Flathaug v Weaver* [2003] NZFLR 730 (CA) at [36]; and *Wylie v Wylie* (2003) 23 FRNZ 156 (CA) at [26]–[28].

⁹¹ *Re Rush, Rush v Rush* (1901) 20 NZLR 249 (SC); and *Re Z (deceased)* [1979] 2 NZLR 495.

⁹² See Bill Atkin and Bill Patterson *Laws of New Zealand Family Protection and other Family Property Arrangements* (online ed) at [32]; and Bill Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis,

different approach in cases where the surviving partner was from the deceased's only relationship during their life, compared to where the surviving partner is of a second or subsequent relationship.⁹³ In particular, the courts may give greater consideration to competition with the deceased's children from a prior relationship⁹⁴ or if the subsequent relationship has been of relatively short duration.⁹⁵ Ultimately, the courts have stressed that the extent of the deceased's moral duty to a partner from a subsequent relationship will depend on the circumstances of the case.⁹⁶

- 5.97 The reframed family provision award we recommend focuses instead on the needs of the surviving partner, having regard to how their participation in the family joint venture with the deceased has impacted them financially. We consider this inquiry is more objectively ascertainable than what a deceased's moral duty might be in the circumstances of any given case, particularly as more New Zealanders now enter second or subsequent relationships. We also consider the recommendation aligns better with our conclusions in the PRA review about how the law should address the economic consequences of a relationship for each partner on separation.
- 5.98 An assessment of sufficient resources should take into account any relationship property to which that partner is entitled. When a surviving partner's entitlement under the will or on intestacy is less than their share of relationship property, the partner should first apply to divide their relationship property before seeking a family provision award.
- 5.99 We believe the objective of ensuring a surviving partner receives the provision they need to maintain a reasonable, independent standard of living is a concern that tikanga would recognise and respond to. We understand the values of whanaungatanga, aroha and manaakitanga would ensure that a surviving partner of the relationship is cared for both financially and emotionally.
- 5.100 The specific provision a surviving partner should receive from the estate in the context of a Māori whānau should, however, be informed by tikanga. The goal of ensuring provision for the partner should be balanced with wider whanaungatanga obligations and whakapapa connections the deceased had with other members of the whānau. For example, THRMOA and Chapman Tripp explained that in some whānau, hapū and iwi, there are instances where land might be left to the wāhine line. In other instances, such as the position taken under TTWMA, a surviving partner should be provided for but not to the extent where they take an interest in land. Submitters also stressed that when a will is challenged, consideration must also be given to the mana of the deceased.

Wellington, 2021) at 146, citing *Re Allen (Deceased)*, *Allen v Manchester* [1922] NZLR 218 (SC); *Re Short (Deceased)*, *Short v Guardian Trust & Executors Co of New Zealand Ltd* [1954] NZLR 1149 (SC) at 1152; *Re Kallil (Deceased)*, *Kallil v Koorey* [1957] NZLR 31 (SC); and *Re Kallil (Deceased)*, *Kallil v Koorey* [1957] NZLR 31 (CA) at 37.

⁹³ Nicola Peart (ed) *Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [FP4.07(1)(b)]; and Bill Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis, Wellington, 2021) at 152–153.

⁹⁴ *Re McNaughton (deceased)* [1976] 2 NZLR 538 (SC); *M v L* [2005] NZFLR 281 (FC); and *Matthews v Phochai* [2020] NZHC 3455 at [45].

⁹⁵ *Re Cunningham (Deceased)* *Cunningham v Cunningham* [1936] NZLR s 69 (SC) at 71, cited in Bill Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis, Wellington, 2021) at 150.

⁹⁶ *Matthews v Phochai* [2020] NZHC 3455 at [46].

Consequently, as set out below, the court should be required to have regard to the tikanga of the relevant whānau when deciding an appropriate award.

Definition of “partner” for the purpose of a family provision award

5.101 We recommend that people who, prior to the death of their partner, were in qualifying relationships for the purposes of relationship property entitlements should be eligible to claim a family provision award.⁹⁷ Those qualifying criteria are set out in Chapter 4. By way of summary, a qualifying relationship would include:

- (a) surviving spouses, civil union partners and de facto partners who have been in a de facto relationship for three years or more;⁹⁸
- (b) partners in a de facto relationship of less than three years that meet the additional eligibility criteria of:
 - (i) there being a child of the relationship and the court considers it just to make orders; or
 - (ii) the applicant has made substantial contributions to the relationship and the court considers it just to make an order for division; and
- (c) separated partners provided that no longer than two years have elapsed between the partners ceasing to live together in the relationship and the death, subject to the court’s discretion to allow a claim where more than two years has elapsed.

Quantifying a family provision award

5.102 We recommend that the amount of a family provision award to a surviving partner should be at the discretion of the court but guided by the matters we set out below. Our reasons for a discretionary approach are as follows:

- (a) The purpose of an award is to afford the surviving partner a reasonable, independent standard of living, having regard to the economic consequences of the relationship. This is a highly factual inquiry, focusing on the circumstances of the surviving partner and the consequences of the relationship.
- (b) An award should factor in any provision made by the deceased to a partner during the deceased’s lifetime, such as gifts. It may also be relevant to inquire into the property the surviving partner receives outside the estate, such as property passing by survivorship. Again, these are highly factual matters and are best considered through the exercise of the court’s discretion.

5.103 In determining the amount of the award for partners, we recommend that the court should take into account:

- (a) the extent of the economic disadvantages the partner suffers from the relationship;

⁹⁷ Where the deceased is survived by more than one partner, each partner may be eligible to make a family provision claim provided they were in a qualifying relationship with the deceased. For further discussion on contemporaneous and multi-partner relationships see Chapters 4 and 16.

⁹⁸ The rules applying to de facto relationships would include a presumption that two people are in a qualifying de facto relationship if they have maintained a common household for a period of at least three years: see *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R26.

- (b) the duration of the relationship;
- (c) the partner's responsibilities for the deceased's children;
- (d) the partner's current and likely future employment situation; and
- (e) the tikanga of the relevant whānau.

- 5.104 In addition, when considering a claim, the court should have discretion whether to have regard to any means-tested assistance an applicant receives from the state, such as benefits under Part 2 of the Social Security Act 2018 or a residential care subsidy under the Residential Care and Disability Support Services Act 2018.⁹⁹ A family provision award responds to a partner's needs resulting from any economic disadvantages suffered from a relationship. It is appropriate, then, as a general principle, that the deceased partner's estate meet those needs in the first instance rather than the state, even if receipt of an award results in a surviving partner becoming ineligible for state benefits.¹⁰⁰ Conversely, a court may take into account the benefits a surviving partner receives in connection with needs that do not arise from the relationship, such as benefits relating to a health condition or because of injury. Benefits that are payable to a surviving partner irrespective of their income and assets, such as superannuation, should be a matter to which the court has regard.
- 5.105 Some of the factors the court should take into account are directed to the prospects that the surviving partner will transition to financial independence after the deceased's death. Some submitters commented on what it would mean for a surviving partner to transition from the family joint venture. Many surviving partners, particularly those who are older people, may never achieve financial independence. We agree with these comments, and we would expect the quantum of an award to reflect this possibility.
- 5.106 We note NZLS's concern that what would be the deceased's separate property under a PRA division might be available to meet family provision awards when the partners entered the relationship at the end of their working lives. A family provision award to a surviving partner is, however, made with reference to the economic disadvantages the partner suffers from the relationship. The types of circumstances it is aimed at addressing are instances where, over the course of the relationship, a partner has given up income-earning opportunities on behalf of the relationship, such as to care for the couple's children. Or, to take a different scenario, when one partner dies, the other must give up work to become the primary caregiver of the couple's children. In both cases, the surviving partner is disadvantaged in terms of their diminished income-earning potential.
- 5.107 In contrast, when partners enter a relatively short relationship later in life, it is unlikely a surviving partner will suffer economic disadvantages from the relationship. We do not intend a partner to be able to claim family provision when, on the death of their partner, they are no worse off in economic terms than they would have been had the relationship never occurred.

⁹⁹ See s 13 of the Family Protection Act 1955, which requires the court to disregard any benefit under pt 2 of the Social Security Act 1938 (other than a superannuation benefit, a miner's benefit or a family benefit). The courts have taken a similar approach to benefits outside the Social Security Act such as residential care subsidies: see *Re Toomey* (1995) 13 FRNZ 481 (DC); and *B v New Zealand Guardian Trust FC Rotorua FAM-2005-063-736*, 20 April 2009.

¹⁰⁰ The possibility of losing eligibility for state benefits will be something for a surviving partner to consider when deciding to make a claim. In Chapter 16, we recommend that a person should not lose entitlements to state benefits because of a decision not to pursue a claim they may have under the new Act.

- 5.108 We propose that the award may take the form of a lump sum payment, transfer of specific property, periodic payments, or the establishment of a trust. Preference should be made for a lump sum payment over periodic payments as these give claimants greater control and make administration of the estate quicker and less expensive.

Interface between family provision awards for partners and FISAs

- 5.109 As noted, in the PRA review we recommended a regime of FISAs to share economic advantages and disadvantages when a relationship ends by separation.¹⁰¹ A FISA would require the partners to share their income after separation for a specified period (to a maximum of five years) based on what the partners earned in the period before separation and subject to the court's power to adjust the sharing arrangement where necessary to avoid serious injustice. In practice, a FISA would require the economically advantaged partner to pay the economically disadvantaged partner an amount to equalise their respective incomes for the duration of the FISA.
- 5.110 We recommend against applying FISAs to relationships ended by the death of a partner for the following reasons:
- (a) Although as a matter of general principle, there is a case for sharing economic disadvantages a partner (Partner A) suffers through a FISA when the advantaged partner (Partner B) dies, the economic advantages Partner B has gained through a relationship cease on their death and therefore cannot be shared through a FISA. If FISAs were to be available, a very different approach would need to be devised to move away from notionally sharing the deceased partner's future income.
 - (b) Evidence suggests that, in most cases, partners will make generous provision for each other in their wills.¹⁰² It is therefore likely that if FISAs were available on death, they would be sought in a minority of cases.
 - (c) Most relationships that end on the death of one partner occur in older age.¹⁰³ Responding to economic advantages and disadvantages when Partner A is at retirement age is different to scenarios where the partners are of working age. In many cases, there will be no economic disparity between the partners. It may also be difficult to identify what economic disadvantage Partner A suffers given that, as they are retired, they cannot suffer a diminished income-earning potential and they may have benefited from Partner B's income and accumulation of assets.

¹⁰¹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [10.4]–[10.9].

¹⁰² For example, far more notices of option B than option A are filed with the High Court each year. In 2019, out of 18,397 applications for probate and letters of administration, 16 surviving partners filed notices of electing option A compared with 721 who filed notices of option B: email from Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding data on applications for probate and letters of administration (11 August 2020); and email from Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding data on probate applications (24 August 2020). Note that a partner will only file notices with the Registry if administration of the estate has not yet been granted. However, it is a strong indication that elections of option A are relatively rare.

¹⁰³ In the year ending March 2020, four in every five deaths were people aged 65 years and older and the median age at death was 80.6 years (78.1 for men and 83.4 for women): Tatauranga Aotearoa | Stats NZ "Births and deaths: Year ended March 2020 — Infoshare tables" (18 May 2020) <www.stats.govt.nz>.

- 5.111 As recommended above, partners who separated within two years of the deceased's death would be eligible to claim family provision. Our view is that, in such circumstances, partners should lose the ability to claim a FISA. This would depart from our recommendation in the PRA review where we said that the death of either partner after separation should not affect the disadvantaged partner's (Partner A's) entitlement to a FISA.¹⁰⁴
- 5.112 Where former partners have reached a settlement on a FISA or a court order has been made and one of the partners dies during the period for which the FISA is notionally payable, we recommend that the FISA should continue to be payable subject to the court's ability to order an adjustment to the FISA as recommended in the PRA review.¹⁰⁵
- 5.113 An application for an adjustment order in these circumstances could be made by Partner B (the advantaged partner) in circumstances where Partner A died. Where Partner B died, the application could be brought by the personal representative of the deceased's estate or by a beneficiary of Partner B's estate.
- 5.114 A court should have the power to make an adjustment order if it is satisfied that failure to make an adjustment would result in serious injustice. The court should have regard to the considerations set out in the proposed new Relationship Property Act.¹⁰⁶

Family provision awards for children

- 5.115 In Chapter 2, we explain that good succession law should reflect public values and attitudes in contemporary Aotearoa New Zealand. This is especially true for the provision family members should be able to claim from an estate when this has the effect of altering the terms of a will. Through our research and consultation, it is evident that opinions in Aotearoa New Zealand are divided on the question of whether adult children should be eligible to seek further provision from a parent's estate. As discussed above, submitters put forward strongly opposing views. Even among those who favoured retaining adult children's rights to claim, submitters gave quite varying policy justifications, ranging from the need to respond to parental abuse through to assisting the next generation into housing. The differing views demonstrate the diversity in opinion on the policy objectives of the legislation.
- 5.116 The Succession Survey similarly revealed mixed views towards adult children's claims in various hypothetical scenarios. Fifty-six per cent of respondents agreed that an adult child should be able to challenge their parent's will and get a share where the estate is

¹⁰⁴ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [10.138].

¹⁰⁵ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R55 and [10.115]–[10.121]. Note also the recommendation that FISAs replace rights to maintenance under the Family Proceedings Act 1980: at R50. Our conclusion here that FISAs in place before death continue to be payable should substitute any ability to enforce a maintenance order against a deceased partner's estate.

¹⁰⁶ See Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [10.117] for the list.

left to a charity.¹⁰⁷ A greater number of Māori respondents, 67 per cent, agreed. Fifty-seven per cent of respondents agreed an adult child should be able to challenge a will that leaves the estate to a wife (of 10 years) from a second marriage.¹⁰⁸ Sixty-two per cent of all respondents and 70 per cent of Māori respondents agreed that an adult child should be able to challenge a will that leaves the estate to another adult child.¹⁰⁹ When the scenario was changed so that the adult child who was left out was struggling financially, 67 per cent of all respondents agreed the child should be able to challenge the will.¹¹⁰

- 5.117 The Succession Survey demonstrates that, while a majority of submitters did favour adult child claims in the specific scenarios, the margin was in most cases modest. Further, when respondents were probed about the reasons they gave for their answer, respondents gave a range of responses, most of which would require a subjective assessment of the circumstances of the scenario in question. For example, respondents often said it would depend on the quality of the relationship the child had with the deceased,¹¹¹ the needs of the adult child,¹¹² the claims of other beneficiaries of the estate¹¹³ and whether the adult child was fit to receive a share of the estate (for example, where they were affected by drug addiction or gambling).¹¹⁴ The responses to the specific scenarios must also be held in tension with the 80 per cent of respondents who agreed with the statement that a person should be allowed to leave family members out of their will.¹¹⁵ The Succession Survey can be seen as a further indication of divided opinion.
- 5.118 In light of the considerable differences of opinion we have encountered, we are unable to put forward a single recommendation towards children that we believe represents a shared view. Instead, we put forward two options for reform for the Government to

¹⁰⁷ Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at figure 11.

¹⁰⁸ Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at [136].

¹⁰⁹ Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at [142].

¹¹⁰ Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at [143].

¹¹¹ Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at figure 7 and [145].

¹¹² Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at figure 7 and [145].

¹¹³ Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at figure 12.

¹¹⁴ Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at [145].

¹¹⁵ Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at figure 1.

consider. The first option proposes family provision awards for all children and grandchildren of the deceased while the second option proposes family provision awards for children of the deceased who are under 25 years and disabled children of the deceased.

RECOMMENDATIONS

R23

A child of the deceased eligible to claim family provision should be defined in the new Act to include:

- a. any individual for whom the deceased is considered by law to be the child's parent;
- b. an accepted child, being a child for whom the deceased had assumed, in an enduring way, the responsibilities of a parent; and
- c. a whāngai.

R24

A grandchild eligible to claim family provision should be defined in the new Act to include:

- a. a child considered by law to be a child of the deceased's child;
- b. a child of a whāngai of the deceased; and
- c. a whāngai of the deceased's child or whāngai.

R25

Because of the divided opinions in Aotearoa New Zealand, no option for reform will represent a consensus view on the circumstances in which a deceased's children should be eligible to claim family provision. Consequently, the Government should consider implementing one of the following two options for reform regarding children's claims.

Option One: Family provision awards for all children and grandchildren of the deceased

A court should make a family provision award to a child or grandchild of the deceased where, despite whatever provision is available to the child or grandchild from the deceased on the deceased's death, the deceased has unjustly failed to:

- a. provide for the child or grandchild who is in financial need; or
- b. recognise the child or grandchild.

In determining whether to make an award and the amount of an award, the court should take into account:

- a. the size of the estate and the demands on it;
- b. the relative financial means and needs of the claimant and other beneficiaries;
- c. whether the deceased has given inadequate or no consideration to the strength and quality of the claimant's relationship with the deceased over their lifetime;
- d. whether the will can be seen to be irrational or capricious;

- e. the reasons (if any) given by the deceased for making their will;
- f. any disability or other special needs of the claimant and of other beneficiaries in the estate; and
- g. the tikanga of the relevant whānau.

For applications made by a grandchild, the court should take into account the provision made to the grandchild's parents from the deceased.

A court should not take into account any means-tested social security assistance a claimant receives.

Option Two: Family provision awards for children under 25 years and disabled children

Children under 25 years

A court should make a family provision award to a child of the deceased aged under 25 years when, taking into account whatever provision is available to the child from the deceased on the deceased's death, the child does not have sufficient resources to enable them to be maintained to a reasonable standard and, so far as is practical, educated and assisted towards attainment of economic independence.

In determining a family provision award for a child, the court must make the best interests of the child a primary consideration, taking into account:

- a. the child's age and stage of development, including the level of education or technical or vocational training reached;
- b. any other actual or potential sources of support available to the child, including support from a surviving parent (including any family provision award made to that parent that reflects their responsibilities for the child), a trust or provision from the estate of another deceased parent;
- c. the amount of support provided by the deceased to the child during the deceased's life or on their death;
- d. the actual and potential ability of the child to meet their needs; and
- e. the tikanga of the relevant whānau.

A court should not take into account any means-tested social security assistance a claimant receives.

Disabled children

A court should make a family provision award to a disabled child of the deceased when, taking into account whatever provision is available to the child from the deceased on the deceased's death, the child does not have sufficient resources to enable them to maintain a reasonable standard of living.

Disability should include any long-term physical, mental, intellectual or sensory impairments that have reduced the person's independent function to the extent that they are seriously limited in the extent to which they can earn a livelihood.

A disabled adult child should be eligible if they had been wholly or partly dependent on the deceased for support immediately prior to death, or if the child's disability arose prior to them reaching 25 years.

In making a family provision award to a disabled child, the court should take into account:

- a. the child's age and stage of development, including the level of education or technical or vocational training reached;
- b. the possibility of recovery from disability;
- c. any other actual or potential sources of support available to the child, including support from a surviving parent (including any family provision award made to that parent that reflects their responsibilities for the child), a trust or provision from the estate of another deceased parent;
- d. the amount of support provided by the deceased to the child during the deceased's life or on their death;
- e. the actual and potential ability of the child to meet their needs; and
- f. the tikanga of the relevant whānau.

A court should not generally take into account any means-tested social security assistance a disabled child receives, but the court should have a residual discretion to take state assistance into account.

Children aged over 25 years or who are not disabled would be ineligible to claim family provision.

Definition of "child"

5.119 Before discussing the two options, we first set out who should be considered a child of the deceased. The definition of child would apply equally to both options, albeit an age limit on eligible children would apply under Option Two.

5.120 We recommend that a child of the deceased should be widely defined in the new Act as any individual for whom the deceased is considered by law to be the child's parent, including children born to the deceased and adopted children. In addition, we recommend that a child of the deceased should include an "accepted child" and "whāngai". While we recognise that whāngai are a different type of relationship to biological children, for the purpose of grouping categories of eligible claimants together in a way that is practical for drafting, a child of the deceased should also include whāngai.

Accepted child

5.121 An "accepted child" would be a child for whom the deceased had assumed, in an enduring way, the responsibilities of a parent. In deciding whether the person is an accepted child of the deceased, the court should have regard to how much responsibility has been assumed, why this was done, the period of time during which the deceased maintained the child, guardianship arrangements and the responsibility of others for the child. Our intention is that any child should have the opportunity to bring a claim where the deceased had established an ongoing and nurturing relationship with the child and became responsible for that child. This might include stepchildren, foster children and

customary adoptions within different ethnic groups.¹¹⁶ The mere fact of the deceased being in a qualifying relationship with that child’s parent would not be sufficient.

Whāngai

- 5.122 In the Issues Paper we proposed that whāngai be eligible to claim from the estate of the matua whāngai provided they came under the category of an accepted child. Submitters who responded to this matter generally considered the approach to be consistent with tikanga. After consideration, we recommend that whāngai should be included as a standalone category of eligible children, distinct from accepted children and other children. Some submitters stressed to us that there is diversity among whāngai arrangements and the reasons for them. We therefore prefer an approach that recognises whāngai as a unique type of relationship.
- 5.123 Some whāngai may have been adopted or could otherwise meet the definition of an accepted child. In addition, a whāngai would still be considered a child of the birth parent. A claimant may therefore be eligible to claim in multiple categories (although under the Adoption Act a whāngai who was adopted would not be considered under state law as a child of their birth parent).¹¹⁷
- 5.124 Although we recommend that whāngai should be included as a category of children eligible to claim, we consider that the extent to which a whāngai should receive provision from the estate of the matua whāngai and the estate of the birth parent is a question that should be informed by tikanga. We have heard that, for many Māori, decisions to formally adopt a whāngai child do not supplant the tikanga applying to that whāngai arrangement. Accordingly, as discussed below, when considering an application, we recommend that the court should have regard to the tikanga of the relevant whānau. In applications brought by whāngai, we expect the relevant tikanga to include considerations relating to whakapapa and whanaungatanga. If a whāngai has been formally adopted, our preliminary view is that the child should remain an eligible claimant against the estate of their birth parent despite the terms of the Adoption Act. We expect tikanga to qualify the extent of any award, although we received little feedback on this issue during consultation. We note Tāhū o te Ture | Ministry of Justice is currently reviewing adoption law.¹¹⁸ It may wish to consider this issue further.

Unborn children

- 5.125 Children who are in utero but not born at the time of the deceased’s death hold succession rights on live birth, including rights to claim under the FPA.¹¹⁹ It is possible that

¹¹⁶ We note the Government is considering customary adoption in its review of adoption laws and may wish to consider this point further. See Tāhū o te Ture | Ministry of Justice *Adoption in Aotearoa New Zealand: Discussion document* (18 June 2021) 29-31.

¹¹⁷ Adoption Act 1955, s 16(2)(b).

¹¹⁸ See Tāhū o te Ture | Ministry of Justice *Adoption in Aotearoa New Zealand: Discussion document* (18 June 2021).

¹¹⁹ Nicola Peart (ed) *Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [FP3.03(4)], citing *Edwards v Brown* [1999] NZFLR 279 (FC). See also s 2(1) of the Administration Act 1969, which provides that a child living at the death of any person includes a child who is conceived but not born at the death of the deceased but is subsequently born alive. Compare however *Wood-Luxford v Wood* [2013] NZSC 153, [2014] 1 NZLR 451, where the Supreme Court held that an unborn stepchild in utero at the time of the deceased’s marriage to the child’s mother was not “living at the date” of the marriage.

children who may be born from gametes and embryos stored for posthumous reproduction that have not been implanted in utero at the time of death would be excluded from making claims against their deceased parent's estate.¹²⁰

- 5.126 The Advisory Committee on Assisted Reproductive Technology (ACART) has undertaken a recent review of guidelines relating to posthumous reproduction.¹²¹ In its discussion document and during its deliberations, ACART proposed that, where the deceased gave consent for their sperm or eggs to be used to create offspring for their partner, the wishes of the deceased should be enabled through the revised guidelines.
- 5.127 If posthumous reproduction is enabled through revised guidelines, we recommend that the approach should continue that an unborn child of the deceased must be born alive having been in utero at the time of the deceased's death to be eligible to claim family provision. In the Issues Paper, we proposed that unborn children in utero prior to the expiry of the limitation period should be eligible for family provision, thereby allowing a limited window for children posthumously conceived to claim. We have departed from this proposal for two main reasons.
- 5.128 First, it appears unlikely an embryo could be implanted in utero through a posthumous reproductive procedure before the expiry of the limitation period. ACART has proposed that posthumous use of gametes and embryos should require ethics approval from the Ethics Committee on Assisted Reproductive Technology (ECART).¹²² It is reasonable to assume that people applying for approval will take some time to process the death and make an application. Currently, ECART meets six times a year and only considers around 12 ethics approval applications for all assisted reproductive procedures at each meeting. This means sometimes people will have to wait several months for their application to be considered.¹²³ Once an application is granted, further time is needed for the posthumous reproduction procedures to get underway. By the time an embryo has been implanted in utero, it is probable that the limitation period to commence a family provision claim will have long passed.¹²⁴ An alternative approach could be taken that would allow for time limits to be extended where posthumous reproduction is contemplated. However, this

¹²⁰ In addition, there are issues arising relating to the status of the child's parenthood. Under the Status of Children Act 1969, a deceased partner is unlikely to be considered the "partner" of the surviving partner for the purposes of the Act because "partner" and "partnered woman" are defined in the present tense: see s 14; and Nicola Peart "Life Beyond Death: Regulating Posthumous Reproduction in New Zealand" (2015) 46 VUWLR 725 at 742. If a deceased's eggs or sperm are not considered to be the gametes of the woman's partner, the Act deems that the deceased will not be considered the parent of the child for any purpose: at ss 21–22.

¹²¹ Advisory Committee on Assisted Reproductive Technology (ACART) *Posthumous Reproduction: A review of the current Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man to take into account gametes and embryos* (Manatū Hauora | Ministry of Health, 3 July 2018); and Advisory Committee on Assisted Reproductive Technology (ACART) *Proposed Guidelines for the Posthumous Use of Gametes, Reproductive Tissue and Stored Embryos: Stage two consultation document* (Manatū Hauora | Ministry of Health, July 2020).

¹²² Advisory Committee on Assisted Reproductive Technology (ACART) *Proposed Guidelines for the Posthumous Use of Gametes, Reproductive Tissue and Stored Embryos: Stage two consultation document* (Manatū Hauora | Ministry of Health, July 2020) at [82]–[83].

¹²³ Te Aka Matua o te Ture | Law Commission *Te Kōpū Whāngai: He Arotake | Review of Surrogacy* (NZLC IP47, 2021) at [5.21].

¹²⁴ See Chapter 12 where limitation periods are discussed.

could result in lengthy and potentially indefinite delays to the distribution of an estate, which are not desirable.

- 5.129 Second, ACART has proposed that, when considering an application for ethics approval, ECART must be satisfied that the intending parent or parents have been encouraged to seek legal advice to ensure they understand, among other things, the implications for the resulting child's inheritance rights.¹²⁵ While obtaining legal advice cannot guarantee provision will be available from the deceased's estate for children born through posthumous reproduction, it should cause the parties to consider the future needs of a child. This could include succession under TTWMA or to taonga as contemplated in Chapter 3 where the necessary whakapapa or other connections exist.

Option One: Family provision awards for children and grandchildren of all ages

- 5.130 The first option we present is to allow family provision awards for children and grandchildren of all ages.
- 5.131 We have concluded that the new Act should clearly set out the basis for adult children to claim family provision. It is, however, difficult to identify what the appropriate basis should be. There is considerable diversity in the views held by submitters who supported adult children's claims. For example, some submitters considered the court should continue to hold a broad discretion to remedy breaches of moral duty. On the other hand, some submitters said awards should be restricted to cases of "serious injustice" where further provision is needed to alleviate a child's financial need. Whichever way the FPA is reformed will cause some to disagree.
- 5.132 We have therefore attempted to identify grounds that, among the range of views, received the most support from submitters who wished to retain adult child claims. We have also been mindful that the test for an award should, to the extent possible, provide predictable outcomes.
- 5.133 Accordingly, under this option, the court should grant further provision to a child or grandchild of the deceased where, despite whatever provision is available under the deceased's will or in an intestacy, the will-maker has unjustly failed to:¹²⁶
- (a) provide for a child or grandchild who is in financial need; or
 - (b) recognise the child or grandchild.
- 5.134 The definition of child is set out above. A grandchild should include all children considered by law to be the deceased's children. It should also include children of a whāngai of the deceased and a whāngai of the deceased's child, although we expect the tikanga of the relevant whānau to be relevant to the extent of any award. Where a grandchild is a whāngai and the deceased grandparent is their matua whāngai, the grandchild would be an eligible claimant as a whāngai and grandchild. That does not mean, however, they would be eligible to make two separate claims. Again, we expect the tikanga of the relevant whānau would address the extent of any award to the whāngai/grandchild. We

¹²⁵ Advisory Committee on Assisted Reproductive Technology (ACART) *Proposed Guidelines for the Posthumous Use of Gametes, Reproductive Tissue and Stored Embryos: Stage two consultation document* (Manatū Hauora | Ministry of Health, July 2020) at 41.

¹²⁶ This suggestion is based on the suggestion NZLS made in its submission that the basis for claims should be reformulated into two concepts: financial support and recognition.

do not recommend that a child who would otherwise be considered an “accepted child” of the deceased’s child should be considered an eligible grandchild. In these circumstances, we do not consider a grandparent-grandchild relationship can be assumed to exist.

Grounds for an award

- 5.135 The first ground on which the court could make a family provision award is to alleviate a child or grandchild’s financial need. The ground is directed to instances where a child is unable to maintain a reasonable standard of living. The court’s inquiry should take into account any special needs of the child given their particular circumstances, such as their age or a disability. Because family provision would be available only where the deceased has *unjustly* failed to provide for the child, we would not expect a court to grant an award where the applicant’s financial need is attributable to their own reckless or wasteful behaviour.
- 5.136 The second ground would address instances when the provision that a will-maker has made for a child or grandchild can be described as unjust because it does not properly recognise them. We intend this ground to apply to situations submitters commonly identified as instances in which people make “inappropriate” wills. For example, where, in light of the size of an estate and the other demands on it:
- (a) the will-maker has developed some unreasonable prejudice such that the terms of the will can be seen as irrational or capricious towards the child or grandchild; or
 - (b) the deceased has omitted to consider the strength and quality of their relationship with the child or grandchild over their lifetime.
- 5.137 The policy basis for this option rests on the expectation that most parents should provide for their children on their death, either to ensure they have a reasonable standard of living or simply to recognise the parent-child relationship. The option stresses the importance of the family bonds and, in te ao Māori, the importance of whakapapa and whanaungatanga. It also recognises the mana of the deceased and recognises there may be instances where a will-maker can justifiably make a will that does not provide for a child or grandchild.
- 5.138 To reflect these objectives, we recommend that the factors a court should take into account when considering an application for family provision should be:¹²⁷
- (a) the size of the estate, including any property available through the new Act’s anti-avoidance provisions,¹²⁸ and the demands on it;
 - (b) the relative financial means and needs of the claimant and other beneficiaries;
 - (c) whether the deceased has given inadequate or no consideration to the strength and quality of the claimant’s relationship with the deceased over their lifetime;
 - (d) whether the will can be seen to be irrational or capricious;
 - (e) whether the deceased has ignored or been unaware of the claimant during the deceased’s lifetime;

¹²⁷ We have drawn considerable assistance from Chris Kelly’s submission in formulating this list of factors.

¹²⁸ Anti-avoidance is discussed in Chapter 8.

- (f) the reasons (if any) given by the deceased for making their will;
 - (g) any disability or other special needs of the claimant and of other beneficiaries in the estate; and
 - (h) the tikanga of the relevant whānau.
- 5.139 For applications made by grandchildren, the court should consider the additional factors of what provision is available to the grandchild's parents from the deceased.¹²⁹ We consider that in most cases any provision the deceased makes to a child, being the grandchildren's parent, would benefit the grandchild. The main concern is instances in which the grandchild's parents have died or cannot be relied upon to benefit the grandchild. This factor may be of less relevance if the grandchild is also a whāngai of the deceased.
- 5.140 A question arises as to whether a court should be required to take into account welfare support an applicant (or their guardian) receives from the state. As noted, the policy behind an award is that a parent ought to be expected to make provision in response to a child's financial need. It follows that this obligation should take priority over the state's obligation to provide a benefit.¹³⁰ We therefore recommend that a court should not generally take into account any means-tested assistance an applicant receives under Part 2 of the Social Security Act.
- 5.141 Many of the principles derived from existing case law under the FPA would continue to be relevant. For example:¹³¹
- (a) mere disparity in the treatment of beneficiaries would not be sufficient to establish a claim;
 - (b) the court's power would not extend to rewriting a will because of a perception it is unfair; and
 - (c) an award should disturb the deceased's will no more than is necessary.
- 5.142 We consider this option would provide more clarity in the legislation as to what the court should be aiming to achieve in an award. Nevertheless, we remain concerned that it still gives the court a broad discretion to determine what are highly subjective matters on which reasonable minds may differ.
- 5.143 It could also be argued that allowing the court to redistribute an estate because of a perception the will-maker has acted irrationally or without properly considering their children is both paternalistic and undermines the notion of testamentary capacity (which can itself be tested under other law). These were, however, grounds favoured by several submitters.
- 5.144 The option is inconsistent with the views of many submitters who felt strongly that will-makers should owe no duties towards adult children. As we have explained, what option should be preferred is ultimately a difficult policy choice based on values and philosophies towards testamentary freedom and obligations to family and whānau.

¹²⁹ See s 3(2) of the Family Protection Act 1955.

¹³⁰ This follows the general approach taken under s 13 of the Family Protection Act 1955. See *Re Hollick (deceased)* HC Christchurch CP57/87, 18 July 1990 at 27.

¹³¹ See case law cited at [5.8] above.

5.145 We acknowledge the submitters who said the law should continue the court’s discretion to provide for children’s needs, taking a broad view of what “needs” mean. We remain of the view that this approach would not enable will-makers and parties to a dispute to read the new Act and understand their rights and obligations, even if the new Act attempted to define what is meant by a child’s needs. We prefer the option outlined above as a more confined and clearer articulation for the basis of a claim.

Option Two: Family provision awards for children under 25 years and disabled children

5.146 Under this second option, the deceased’s children who are under 25 years of age or who are disabled would be eligible to claim family provision from a deceased parent’s estate. Children who fall outside these two categories would be ineligible to claim.

Category one: Children under 25 years

5.147 Under this option, we recommend that the deceased’s children who are younger than 25 should be able to make a family provision claim from the estate when they would receive inadequate provision under the deceased’s will or in an intestacy. The court should have discretion to grant an award from the deceased’s estate to enable the children to be maintained to a reasonable standard and, so far as is practical, educated and assisted towards attainment of economic independence.

5.148 Family provision awards for children would be based on Aotearoa New Zealand’s overarching obligation under the United Nations Convention on the Rights of the Child (UNCROC) to make a child’s best interests a primary consideration in matters concerning children.¹³² The proposed approach is also consistent with a parent’s duties to maintain their children consistent with the Care of Children Act 2004, the Child Support Act 1991 and section 152 of the Crimes Act 1961.

5.149 Like provision for surviving partners, we expect that tikanga, particularly, whanaungatanga, aroha and manaakitanga, would ensure that young children of a deceased person are cared for both financially and emotionally. We are therefore satisfied this category of family provision is not inconsistent with tikanga. Tikanga may, however, be relevant to the extent to which a child should be eligible to claim against the estate, particularly if they are a tamaiti whāngai. Tikanga may be relevant to determine what provision should be made for the children. We note these considerations below.

5.150 Grandchildren would not be eligible in this option as a standalone category of claimants. Rather, their only avenue to claim against the estate of a grandparent would be as a whāngai of the deceased, or where the grandchild is an “accepted child” where the grandparent accepted parental responsibilities for the grandchild. We note the comments of some submitters, like NZLS, who argued that it is not uncommon for grandchildren to be cared for by grandparents and thus it is appropriate for grandchildren to form a standalone category. In our review of the case law, very few cases are brought by infant

¹³² The United Nations Convention on the Rights of the Child, 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) sets out basic rights of children, including the right to have their “best interests” treated as a “primary consideration” in actions concerning them: art 3(1).

grandchildren.¹³³ Further, if a grandparent did care for a child, we would expect that it would not be difficult to satisfy a court that a child is an accepted child of the grandparent.

Age limit of 25 years for children eligible to make family provision claim

- 5.151 Under this option, the new Act would impose a maximum age limit. We recommend that a claimant child would need to be 25 years old or younger at the time the parent died and would only be able to claim family provision for the period up until they turned the prescribed age.
- 5.152 In the Issues Paper, we presented three options for the prescribed age: 18, 20 or 25 years. Submitters strongly favoured the prescribed age of 25. Many agreed with our view that, at 25, young adults are maturing towards adult responsibility and independence. Some may be studying or have not long started their working life. The later age would recognise that common societal “markers of adulthood” such as marriage, children, home ownership and fulltime work, are often happening later in life.¹³⁴ At this stage of life, young adults may continue to benefit from parental support. Scientific research has shown that parts of the brain controlling decision-making and impulses continue to develop in the early 20s.¹³⁵ There are also laws reflecting the expectation that parents will provide financial support to their children into their early 20s. For example, until a student reaches 24 years, their eligibility for a student allowance generally depends on their parents’ income,¹³⁶ and under the Oranga Tamariki Act 1989, a young person is entitled to be supported to live with a caregiver until they are 21.¹³⁷
- 5.153 Where age restrictions are imposed by family provision legislation in comparable jurisdictions, eligibility may be extended into the 20s for children who are undertaking further education.¹³⁸

¹³³ In our case review of 116 cases over a 10-year period ending 18 November 2019, 10 (8.62 per cent) applications were brought by grandchildren, only two of whom were infants. In three further cases, grandchildren joined an application brought by another party. In total, 13 cases (11.2 per cent) involved grandchildren but they mainly concerned adult grandchildren.

¹³⁴ Data obtained from Stats NZ’s Infoshare platform shows that this is the case for marriage and home ownership, but the data is less clear in respect of the average age of having a first child or entering fulltime work: Tauranga Aotearoa | Stats NZ “Marriages, civil unions, and divorces: Year ended December 2018” (3 May 2019) <www.stats.govt.nz>; Alan Bentley “Homeownership in New Zealand: Trends over time and generations” (paper presented to New Zealand Population Conference, Wellington, 20 June 2019) at 14; and Tauranga Aotearoa | Stats NZ “Births and deaths: Year ended December 2019” (19 February 2020) <www.stats.govt.nz>. Differences in demographics such as ethnicity and socio-economic status may also have a significant impact.

¹³⁵ The bulk of this research is centred in the criminal justice arena: see for example Peter Gluckman *It’s never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister’s Chief Science Advisor, 12 June 2018) at 13.

¹³⁶ Student Allowances Regulations 1998, reg 4. This applies to students who are single and without a supported child or children.

¹³⁷ Oranga Tamariki Act 1989, ss 386AAA and 386AAD. A young person under that Act may also be entitled to advice or assistance up to 25 years: ss 386A–386B and 447(1)(cc) and (da).

¹³⁸ For example, in Victoria, a child’s eligibility is extended to 25 years if they are in full-time education: Administration and Probate Act 1958 (Vic), s 90 definition of “eligible person”. Alberta makes a similar distinction for children up to the age of 22: Wills and Succession Act SA 2010 c W-12.2, s 72(b)(v). The Scottish Law Commission proposed an option that dependent children should be entitled to claim from their deceased parent’s estate where the parent owed an obligation of aliment immediately before death. This was therefore applicable to those aged under 18 years or under

Quantifying a family provision award

- 5.154 We recommend that, in determining a family provision award for a child, the court must make the best interests of the child a primary consideration, taking into account:¹³⁹
- (a) the child's age and stage of development, including the level of education or technical or vocational training reached;
 - (b) any other actual or potential sources of support available to the child, including support from a surviving parent (including any family provision award made to that parent that reflects their responsibilities for the child), a trust or provision from the estate of another deceased parent;
 - (c) the amount of support provided by the deceased to the child during the deceased's life or on their death;
 - (d) the actual and potential ability of the child to meet their needs; and
 - (e) the tikanga of the relevant whānau.
- 5.155 Like Option One, we recommend that a court should not generally take into account any means-tested assistance an applicant or their caregiver receives under Part 2 of the Social Security Act.
- 5.156 We recommend that the court should have discretion as to the form of an order, whether to award a lump sum, order transfer of specific property, order periodic payments or establish a trust. A family provision award in favour of a child should be presumed to be payable to the guardian of the child, except where the child is 18 years or older or the court considers it inappropriate.¹⁴⁰ This would enable money to be used for the support of the child during their childhood. Paying money to the child's guardian would also be consistent with the Child Support Act.

Children over 25 years are ineligible to claim

- 5.157 This option is based on the view that a parent's obligation to make testamentary provision for their child should cease when the child reaches age 25. As discussed, many submitters held a strong preference for respecting a parent's choice as to who to leave their property to when they die. They explained that a parent's decision to provide for an adult child or not will generally be carefully considered. It is paternalistic for the law to substitute the deceased's reasons with a court's decision on the distribution of an estate.
- 5.158 This option also recognises the potential impacts adult child claims may have on families. It avoids disputes that centre on the nature of the relationship between the deceased and the child. Some submitters emphasised the negative consequences of protracted litigation with very personal details and unpleasant family history being dredged up.
- 5.159 We acknowledge the views of submitters who said the sense of injustice a child feels, having been excluded under a deceased's will, outweighs the heavy toll FPA litigation takes on families. Ultimately, these are qualitative assessments that must be balanced in

25 years if engaging in higher education: see Scottish Law Commission *Report on Succession* (Scot Law Com No 215, 2009) at [3.67]–[3.70]; and Family Law (Scotland) Act 1985.

¹³⁹ Section 28(3) of the Draft Succession (Adjustment) Act in Te Aka Matua o te Ture | Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at 86.

¹⁴⁰ The court may, for example, order that a trust is established in favour of the child.

light of the extent one considers adult children should be entitled to succeed to the property of a parent.

- 5.160 Some submitters maintained that it is desirable for the court to redistribute a deceased's estate to respond to parental wrongdoing, such as abuse or neglect of their child. A counterargument to these views is that the law already responds, such as through the criminal law, tort or fiduciary law.¹⁴¹ We think it is inappropriate for the court to redress alleged misconduct through a broad discretion to grant a child further provision from the estate.
- 5.161 We also acknowledge submitters' observations that removing rights of adult children to claim under the FPA will not reduce litigation. These submitters considered adult children will instead bring another claim, such as challenging the deceased's testamentary capacity or other causes of action relating to contributions of work or property to the deceased. While that may be the case, it may be seen as preferable because the other claims reflect a sounder policy basis for recovery.
- 5.162 Some submitters expressed concerns relating to the situation where a parent leaves the bulk of the estate to a surviving partner in the expectation the partner then provides in their will for the deceased's children from a former relationship. If the surviving partner decides to make no provision for the deceased children, they will have no means of redress. A response to this concern is that the deceased could structure their affairs in a way that ensures provision for their children. For example, the deceased could gift property outright to their children. As we recommend in Chapter 10, the deceased could enter an agreement with their partner that provided for the children. The deceased could contemplate some other type of arrangement such as granting the surviving partner a life interest in the estate property. While we recognise all these options have their shortcomings, any method of balancing the interests of a surviving partner and children from a prior relationship has its difficulties. In Chapter 16, we recommend that the Government should consider improving public education about the law. This campaign could include measures on how to ensure provision for children from a former relationship.
- 5.163 Lastly, we recognise that some may consider an age limit of 25 years on a child's eligibility to claim family provision to be inconsistent with an ao Māori perspective. While some submitters such as THRMOA and Chapman Tripp said an age limit may not necessarily clash with tikanga, they cautioned that prescribed rules do not accord well with tikanga. An age limit may preclude consideration of specific circumstances in which tikanga would respond. Some submitters considered that whanaungatanga, manaakitanga, aroha and utu may be relevant to enable provision for adult children from the estate of a deceased parent. However, we understand that aroha is particularly relevant to tamariki who are

¹⁴¹ We note the proceedings in *A v D* [2019] NZHC 992, [2019] NZFLR 105 currently before the courts. In that case, the adult children of the deceased alleged their father had abused them while they were minors under his care. Three years before his death, the deceased settled most of his property on trust. The evidence was clear that the deceased's intention was to prefer his new partner over the claims of his children. The children argued their father was in breach of fiduciary duties to protect them from abuse and to protect their economic interests. The High Court refused to strike out the claim. The substantive claim has since been heard by the High Court and, at the time of writing, judgment has not been issued. In our view, the case stands on its own facts. The claimants have invoked fiduciary law in the context of a specific scenario where serious abuse is alleged against a parent and that parent has taken deliberate steps to remove property from the reach of those children.

young children, more so than adult children, and this distinction exists already in te ao Māori. We note further that, despite the default rules of the new Act, whānau and other affected parties would be able to come to a mutual agreement through tikanga processes on the distribution of an estate to adult children. However, we recognise that this option does not provide a basis for adult children to claim family provision when the family cannot reach agreement.

- 5.164 We also note the implications this option may have for succession to Māori land. Orders can be made under the FPA granting a child of the deceased an interest in Māori freehold land.¹⁴² The Māori Land Court has jurisdiction to consider claims under the FPA that relate only to Māori freehold land.¹⁴³ Under this option, adult children would not have rights to claim family provision and, consequently, they would not be able to seek interests in Māori freehold land on this basis. As we set out further below, the Government may wish to consider further the relationship between succession to Māori freehold land and family provision.

Category two: Family provision awards for disabled children

- 5.165 We recommend that the new Act should provide for a category of family provision for children of any age who are disabled.
- 5.166 The court should order family provision where, despite the provision available to the child from the deceased on the deceased's death, the child does not have sufficient resources to enable them to maintain a reasonable standard of living. Submitters strongly favoured this category of family provision. The Succession Survey showed high levels of support for disabled children. Eighty-seven per cent of respondents agreed that a disabled adult child should be able to challenge a parent's will that leaves the entire estate to charity.¹⁴⁴ Family provision legislation in several comparable jurisdictions addresses disabled children of any age alongside minor children.¹⁴⁵
- 5.167 Disability should be defined broadly in the new Act and consistently with Article 1 of the Convention on the Rights of Persons with Disabilities (CRPD). Any long-term physical, mental, intellectual or sensory impairments are included.¹⁴⁶ Eligibility under this category

¹⁴² See for example *Re Green (dec'd); Green v Robson* [1995] NZFLR 330 (HC); and *Marino v Macey* [2013] NZHC 2191. Note s 106 of Te Ture Whenua Maori Act 1993 prevents the court from making orders under the Family Protection Act 1955 that have the effect of alienating any beneficial interest in Maori freehold land to any person other than a child or grandchild of the deceased.

¹⁴³ Family Protection Act 1955, s 3A.

¹⁴⁴ Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at figure 11.

¹⁴⁵ Administration and Probate Act 1958 (Vic), s 90 definition of "eligible person"; Wills and Succession Act SA 2010 c W-12.2, s 72(b)(iv) definition of "family member"; The Dependents Relief Act CCSM 1990 c D37, s 1 definition of "dependant"; The Dependents' Relief Act RSS 1978 c D-25, s 2 definition of "dependant"; Dependents of a Deceased Person Relief Act RSPEI 1974 c D-7, s 1 definition of "dependant"; Dependents Relief Act RSY 2002 c 56, s 1 definition of "dependant"; Dependents Relief Act RSNWT 1988 c D-4, s 1 definition of "dependant"; Dependents Relief Act RSNWT (Nu) 1988 c D-4, s 1 definition of "dependant"; and Louisiana Constitution of 1974, art XII, § 5.

¹⁴⁶ Article 1 of the United Nations Convention on the Rights of Persons with Disabilities, 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008) (CRPD) states that "[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." Consideration should be given to the

would require that the disability reduces the person's independent function to the extent that they are seriously limited in the extent to which they can earn a livelihood.¹⁴⁷

5.168 In our view, further criteria would need to be met to limit the interference with the deceased's testamentary freedom and to recognise that the general (at least implied) policy of Aotearoa New Zealand's welfare and support law is that a parent's responsibility for their child ends when the child is no longer a minor, even if that child is disabled.¹⁴⁸ Eligibility would therefore also require that:

- (a) the child's disability occurred prior to them reaching age 25; and/or
- (b) the child was wholly or partly dependent on the deceased for support immediately prior to death.

Quantifying a family provision award to a disabled child

5.169 In making a family provision award to a disabled child, we recommend that the court should take into account:

- (a) the child's age and stage of development, including the level of education or technical or vocational training reached;
- (b) the possibility of recovery from disability;
- (c) any other actual or potential sources of support available to the child, including support from a surviving parent (including any family provision award made to that parent that reflects their responsibilities for the child), a trust or provision from the estate of another deceased parent;
- (d) the amount of support provided by the deceased to the child during the deceased's life or on their death;
- (e) the actual and potential ability of the child to meet their needs; and
- (f) the tikanga of the relevant whānau.

5.170 A question arises as to whether a court should be required to take into account any financial assistance an applicant receives from the state in connection with their disability. The answer to this question is perhaps less clear than it is for other categories of family provision claimants. Generally, state assistance is available to people with disabilities regardless of their parental support. Views are likely to differ as to whether responsibility to provide for a disabled adult who is unable to provide for themselves should fall primarily on a parent or on society generally. Our view is that the court should, as a starting point, disregard any state assistance the applicant receives when making an award. That approach accords with the principle underlying this option that parents should be expected to provide for the needs of their disabled children in the circumstances to which this option applies. The court should, however, have discretion to

adoption of the broader definition in s 21(1)(h) of the Human Rights Act 1993. Aotearoa New Zealand ratified the CRPD on 25 September 2008.

¹⁴⁷ In the Issues Paper, we proposed the test be that the child's disability renders them "unable to earn a livelihood". We now recommend a test that is less absolute, recognising that many disabled people will be able to earn some degree of livelihood.

¹⁴⁸ See for example the Care of Children Act 2004, ss 8 and 15; Child Support Act 1991, s 5; and Social Security Act 2018, ss 23 and 78–89 and sch 2.

take state assistance into account. That might be appropriate, for example, where the estate is small or there are other beneficiaries and claimants to consider.¹⁴⁹ It might also be a relevant consideration if, were a disabled child to receive a family provision award, they might lose entitlements to means-tested state benefits.¹⁵⁰

5.171 Again, the court should have discretion as to the form of an award.

Other matters

Parents

5.172 Parents have been eligible claimants since 1943, but there have been very few cases involving a claimant parent. Although many children will provide for their ailing parents in later life, this is not a legal requirement, nor is it reliable to infer that, because someone was providing support to a person when they died, they would have wanted this support to be continued. The Succession Survey respondents were divided about whether a parent should be able to challenge their child's will and get a share of the estate, but more than half (52 per cent) said this should not be allowed.¹⁵¹

5.173 Very few submitters commented on the eligibility of parents. Four submitters were in favour of retaining parents' rights to claim. ADLS commented that most people do not expect to die before their parents, but if they died and had assets "to spare" after making provision for a partner and children, parents should be provided for. Morris Legal noted that some parents migrate to Aotearoa New Zealand to retire and live with their children and may not be eligible for a New Zealand pension. They said that it may be appropriate to leave in place some mechanism for parents to claim when they are in financial need and the deceased was maintaining them at the date of their death. TGT Legal, on the other hand, supported the removal of parents as eligible claimants as there is no legal requirement to support parents and parents could bring a testamentary promise or other claim to seek recompense for services rendered to the child.

5.174 From an ao Māori perspective, we think whanaungatanga would ensure parents and matua whāngai of a deceased are supported. However, we received few submissions on this point.

5.175 Parents of the deceased should not be eligible claimants under the new Act. We are mindful of the very few cases that have been brought by parents and the general approach taken in law and policy that does not require children to maintain their parents.¹⁵² Children concerned about their parents' future welfare should be encouraged to provide for them in their will.

¹⁴⁹ The approach of expressing a general principle that the deceased's obligation to support the claimant takes priority over the state's obligation but giving the court a residual discretion was supported by Tipping J in *Re Hollick (deceased)* HC Christchurch CP57/87, 18 July 1990 at 27.

¹⁵⁰ We note the concern expressed in submissions that awards may disentitle disabled people from means-tested benefits. In our view, this is an issue best addressed in the policies applying to those benefits.

¹⁵¹ Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at figure 4.

¹⁵² In our case review of 116 cases over a 10-year period ending 18 November 2019, in no case was a parent the applicant.

Te Ture Whenua Maori Act 1993 and family provision

RECOMMENDATION

R26

The Government should consider whether and, if so, how family provision under the new Act should relate to succession of Māori freehold land under Te Ture Whenua Maori Act 1993.

- 5.176 As noted above, a court may redistribute interests in Māori freehold land pursuant to an award under the FPA provided the order does not have the effect of alienating any interest to any person other than the child or grandchild of the deceased.¹⁵³ The Māori Land Court has jurisdiction to determine FPA claims that relate only to Māori freehold land.¹⁵⁴
- 5.177 In Chapter 3, we recommend that state succession law should have no application to taonga. Instead, taonga should be dealt with consistently with the tikanga of the relevant whānau or hapū. As TTWMA recognises, Māori freehold land is a taonga tuku iho. It seems strange that the FPA overlays the regime governing succession to Māori freehold land (albeit with the restrictions on alienation). It is unclear from the FPA and TTWMA on what basis a court would adjust the succession of Māori freehold land given its unique status. Indeed, as discussed above, the cases show the courts have been willing to make awards under the FPA regarding Māori freehold land without much engagement of the relevant tikanga.¹⁵⁵
- 5.178 The terms of reference for this review of succession law do not extend to reform of TTWMA. We therefore recommend the Government should consider further whether and, if so, how family provision awards under the new Act should apply to succession to Māori freehold land.

¹⁵³ Te Ture Whenua Maori Act 1993, s 106.

¹⁵⁴ Family Protection Act 1955, s 3A(2A).

¹⁵⁵ See for example *Re Green (dec'd); Green v Robson* [1995] NZFLR 330 (HC), in which the High Court significantly altered the deceased's will in which she left several interests in Māori freehold land to her "foster children". The Court held this neglected her moral duty to her "natural" son.

CHAPTER 6

Contribution claims

IN THIS CHAPTER, WE CONSIDER:

- the claims a person who has provided a benefit to the deceased can bring against an estate.

CURRENT LAW

6.1 Sometimes, people will provide benefits to someone who later dies. These benefits could include money, work, property, or services. Sometimes, these benefits are provided in the expectation that the person providing them (a contributor) will receive something in return from the deceased's estate. There are several claims a contributor can make against an estate.

The TPA

6.2 When the deceased promised to reward the contributor in their will but failed to do so, there is a statutory remedy. The contributor may claim an award from the estate under the Law Reform (Testamentary Promises) Act 1949 (TPA). To establish a TPA claim, the contributor must show:¹

- (a) the contributor rendered services to, or performed work for, the deceased during the deceased's lifetime;
- (b) the deceased either expressly or impliedly promised to reward the contributor;
- (c) there is a nexus between the services rendered or work performed and the promise; and
- (d) the deceased failed to make the promised testamentary provision or to otherwise remunerate the contributor.

6.3 The award amount must be reasonable in all the circumstances of the case, having regard to certain factors listed in section 3(1) of the TPA.²

¹ Law Reform (Testamentary Promises) Act 1949, s 3.

² Law Reform (Testamentary Promises) Act 1949, s 3(1); and *Re Welch* [1990] 3 NZLR 1 (PC) at 6.

Contract

- 6.4 If there is a contract between the contributor and the deceased, the contributor could enforce that contract against the estate.

Constructive trust

- 6.5 A contributor might claim a constructive trust over the estate. To establish a constructive trust, a contributor must show:³
- (a) contributions, direct or indirect, to the deceased's property;
 - (b) the expectation of an interest therein;
 - (c) that such an expectation is a reasonable one; and
 - (d) that the legal owner of the property should reasonably expect to yield the claimant an interest.
- 6.6 The amount of an award will be the value of the contributions that give rise to a constructive trust or the particular property if it is appropriate.⁴

Estoppel

- 6.7 A contributor may claim estoppel by showing that the deceased encouraged them to expect that they would receive an interest in the recipient's property and that they provided the benefit in reliance on this expectation. To establish estoppel, the contributor must show:⁵
- (a) a belief or expectation has been created or encouraged through some action, representation or omission to act by the legal owner of the property;
 - (b) the belief or expectation has been reasonably relied upon by the contributor;
 - (c) detriment will be suffered if the belief or expectation is departed from; and
 - (d) it would be unconscionable for the party against whom the estoppel is alleged to depart from the belief or expectation.
- 6.8 The amount and form of an award is largely discretionary and can respond to the circumstances of the case.⁶

Unjust enrichment

- 6.9 Although the law is continuing to develop in this area, te Kōti Matua | High Court has held that claims in Aotearoa New Zealand may be founded on unjust enrichment.⁷ To establish unjust enrichment the contributor must show:

³ *Lankow v Rose* [1995] 1 NZLR 277 (CA) at 294.

⁴ *Lankow v Rose* [1995] 1 NZLR 277 (CA) at 286.

⁵ See James Every-Palmer "Equitable Estoppel" in Andrew S Butler (ed) *Equity & Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 601 at 613–621; and *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567 at [44].

⁶ *Carroll v Bates* [2018] NZHC 2463, [2018] NZAR 1570 at [74].

⁷ *Enright v Enright* [2019] NZHC 1124; and *Young v Hunt* [2019] NZHC 2822. See also Peter Twist, James Palmer and Marcus Pawson *Laws of New Zealand Restitution* (online ed) at [9].

- (a) proof of the recipient's enrichment by receipt of a benefit;
 - (b) a corresponding deprivation by the contributor; and
 - (c) the absence of any "juristic reason" for the enrichment (meaning there was no legal reason for the enrichment, like a contract).
- 6.10 The amount of an award is the gain the recipient made at the contributor's expense.⁸ A remedy may be proprietary (by way of a constructive trust) or monetary (by way of a personal remedy).⁹

Quantum meruit

- 6.11 Contributors might make a claim for quantum meruit where the recipient requested or freely accepted services without paying for them and the recipient knew that the contributor expected to be reimbursed for those services.¹⁰ To establish a claim for quantum meruit, a contributor must show:¹¹
- (a) the recipient asked the contributor to provide services or freely accepted services provided by the contributor; and
 - (b) the recipient knew (or ought to have known) that the contributor expected to be reimbursed for those services.
- 6.12 The award amount will be the reasonable cost of providing the services.¹²

NGĀ TIKANGA

Utu

- 6.13 In the Issues Paper, we noted that utu is concerned with "the maintenance of relationships and balance within Māori society".¹³ Life is kept in balance by the principle of utu, which operates in relation to individuals, groups and ancestors.¹⁴ An understanding of utu can only be achieved by placing it within the context of mana and tapu, as utu governs relationships where a breach of tapu or an increase or decrease in mana has occurred.¹⁵ Utu also denotes the idea of ongoing reciprocity, which provides for the ongoing maintenance of relationships.¹⁶

⁸ Peter Twist, James Palmer and Marcus Pawson *Laws of New Zealand Restitution* (online ed) at [2].

⁹ Peter Twist, James Palmer and Marcus Pawson *Laws of New Zealand Restitution* (online ed) at [2].

¹⁰ See for example *Tervoert v Scobie* [2020] NZHC 1039.

¹¹ *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd* CA90/05, 8 August 2006 at [50].

¹² *Electrix Ltd v Fletcher Construction Co Ltd (No 2)* [2020] NZHC 918 at [96]–[100].

¹³ Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 67.

¹⁴ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 23.

¹⁵ Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 68.

¹⁶ Te Aka Matua o te Ture | Law Commission *Māori Customs and Values in New Zealand Law* (NZLC SP9, 2001) at 38.

Take-utu-ea

6.14 As well as being a stand-alone principle, utu can sit within the take-utu-ea framework.¹⁷ This is a framework for assessing breaches of tikanga and what the appropriate utu is to reach a state of ea, or resolution. The breach of tikanga becomes the take (cause), which upsets the natural balance of things and requires action to be taken. Both parties usually have to agree that there is a take. The appropriate response is the utu, which is done to reach a resolution that satisfies all parties. The state of resolution at the end of the process is ea.

Whanaungatanga and whakapapa

6.15 Whanaungatanga can encapsulate both kin and non-kin relationships.¹⁸ In our view, in the context of contributions whanaungatanga means that the nature of the relationship between the deceased and the contributor is a factor that must be taken into account. Chapman Tripp pointed us to a whakataukī that demonstrates the importance of whanaungatanga in this context: “Ko te here o te aroha, tē taea te wetewete” (“The bond of compassion is unbreakable”).

6.16 Contributions may be made by those who share a close whakapapa connection with the deceased or by those who do not share any whakapapa connection at all. Our understanding is that whether the deceased and the contributor share a close whakapapa relationship is an important factor when considering the appropriate response to the contributions according to tikanga Māori.

Mana

6.17 Utu operates in response to increases or decreases in mana.¹⁹ We consider that, from an ao Māori perspective the appropriate response to contributions is relative to the increase in mana caused by the contributions and not the contributions themselves. In this sense, tikanga Māori may dictate a different outcome than a response that does not take mana into account.

6.18 These tikanga may be balanced through the process of kōrero to determine the appropriate outcome in a particular context.

ISSUES

The law is complex and uncertain

6.19 The main issue with the current law is its complexity and uncertainty. A contributor can potentially bring several claims against an estate in respect of the same contributions, each with different inquiries and awards available. This can lengthen litigation and increase costs. It also makes predicting outcomes and awards difficult, which can discourage parties from settling claims out of court.

¹⁷ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 31.

¹⁸ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Taumauri | Waikato L Rev* 1 at 4. Chapman Tripp also made this point in their submission.

¹⁹ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World — Māori Perspectives on Justice* (March 2001) at 68. See also our description of mana in Chapter 2.

- 6.20 The potential for claimants to choose between multiple claims on the same facts to maximise their award is also unsatisfactory. For example, claimants may choose between a proprietary remedy based on a constructive trust if the value of the property in question has increased, or a TPA claim if it has decreased.
- 6.21 The TPA is framed in outdated and inaccessible language and does not conform with modern drafting standards. The other claims are found in case law rather than statute so can be inaccessible for that reason.
- 6.22 Some of the law, particularly unjust enrichment and quantum meruit, is developing. Cases have taken different approaches when deciding the availability and elements of the claims. In particular, there is a debate as to whether unjust enrichment is a separate and broad cause of action that encompasses quantum meruit cases.²⁰ This debate may have practical consequences for claimants. If the foundation of quantum meruit is unjust enrichment, the focus of the inquiry will be ensuring that the recipient gives up any benefits unjustly received. However, if it is not, the focus of the inquiry may be ensuring that the reasonable costs of providing the services by the contributor are returned to them.²¹
- 6.23 Life expectancy in Aotearoa New Zealand is progressively increasing and is projected to continue.²² As life expectancy increases, more people may need to rely on informal care arrangements.²³ These informal care arrangements are often ones to which contribution claims have responded. It is important for the law to be clear regarding the parties' rights and obligations in these arrangements. Additionally, if adult children were no longer able to make claims for family provision, more adult children may bring a contribution claim if they consider they have not been adequately provided for in their parent's will or under the intestacy regime.

Tikanga Māori has not been woven into the law

- 6.24 A reading of the TPA, its legislative history, and case law relating to claims made under the TPA and on other grounds set out above makes it clear that tikanga Māori has not been taken into account to date. This means that this law has not given proper attention to the constitutional significance of tikanga, as discussed in Chapter 2.

²⁰ In *Enright v Enright* [2019] NZHC 1124 and *Young v Hunt* [2019] NZHC 2822 the Court held that unjust enrichment was a separate cause of action. However, the Court in *Tervoert v Scobie* [2020] NZHC 1039, relying on the earlier case *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* HC Auckland CIV-2003-404-5143, 6 April 2005, held that unjust enrichment was not a separate cause of action. In *Electrix Ltd v Fletcher Construction Co Ltd (No 2)* [2020] NZHC 918 the Court preferred to decide the case on quantum meruit principles, holding that unjust enrichment did not provide a "satisfactory unifying conceptual foundation": at [96].

²¹ See *Electrix Ltd v Fletcher Construction Co Ltd (No 2)* [2020] NZHC 918 at [96]–[100]; and *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd* CA90/05, 8 August 2006 at [44].

²² Tauranga Aotearoa | Stats NZ *Demographic trends: implications for the funeral industry* (January 2016) at 4–5.

²³ One study concludes that large increases in the need for daily and weekly care are expected by 2026: Ngaire Kerse and others *Intervals of care need: need for care and support in advanced age — LiLACS NZ* (Waipapa Taumata Rau | University of Auckland, 21 April 2017) at 11.

RESULTS OF CONSULTATION

- 6.25 We received many submissions that commented on our proposals for contribution claims, both on the public consultation website and the Issues Paper. We asked submitters to comment on the issues with the current law. We proposed two options for reform:
- (a) Option One: Introduce a single, comprehensive statutory claim in place of the TPA and other causes of action available for contributions made to the deceased or their estate. It was aimed at responding to the complexity, uncertainty and inaccessibility of the current law. In the Issues Paper, we presented draft legislative provisions for how the statutory claim might look.
 - (b) Option Two: Retain the TPA cause of action within the new Act and leave the remaining claims to operate outside the statute.
- 6.26 We received several submissions that expressed general concern with the current law. Reasons for this were varied. Some submitters did not give a reason, but most of the submitters stated that the current law seemed complex. Some expressed general concern with any claims that interfered with the contents of a will. A few submitters said that only contracts made during the deceased's lifetime should be enforceable. Several submitters had concerns over establishing a promise when one party was no longer alive to give evidence. Other points raised included:
- (a) the law should not compensate people for simple "acts of kindness";
 - (b) contributors should get nothing unless they are able to prove an express promise; and
 - (c) the law needs to take into account benefits the contributor received during the deceased's lifetime.
- 6.27 Nearly all website submitters expressed general agreement with our Option One to codify contribution claims within the new Act. Most people did not give reasons, but some agreed that the law should be simplified. Several submitters made general statements that contributors deserve to be reimbursed for their contributions. Some submitters agreed with Option Two to carry the TPA into the new Act and update it to modern drafting standards.
- 6.28 Of submitters to the Issues Paper, several submitters, including Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS),²⁴ the Family Law Committee of Auckland District Law Society (ADLS)²⁵ and Chapman Tripp, expressed agreement in principle with a single, comprehensive contribution claim that codified the TPA and other equitable and common law claims. A few submitters expressed agreement with a comprehensive cause of action but did not think it should be a codification and that the equitable remedies should remain available.
- 6.29 Some submitters noted that the draft provisions did not focus on a representation from the deceased of reward or that the contributor held a reasonable expectation of reward.

²⁴ Although NZLS agreed in principle, they noted that they had not had time to consider whether our draft proposals incorporated the scope of current equitable and common law claims. NZLS said that, on the one hand, it may be too complicated and may be preferable to leave equitable claims to one side. On the other hand, there would be benefit in having a clear limitation period for bringing all claims against deceased estates. NZLS also did not agree with including claims for contributions to the deceased's estate after the deceased's death.

²⁵ ADLS agreed with a single, comprehensive cause of action but did not think it should be available for contributions to a deceased person's estate.

Some were concerned that the words “just and reasonable” are inherently subjective and the cause of action provides courts with more discretion than the current law. A common complaint among most of these submitters was that the draft provisions cast the net too wide and would result in frivolous or unmeritorious claims.

- 6.30 A few submitters did not think that contribution claims should apply to contributions made to the deceased’s estate after their death. Bill Patterson noted that these claims are rarely brought in practice and, by having contribution claims available for contributions to a deceased’s estate, estate claims will multiply. ADLS commented that succession law should be limited to what happens during a deceased’s lifetime and contributions made to a deceased’s estate are essentially administrative matters for the personal representative to manage. NZLS said that the current law should continue to apply in respect of contributions made to the deceased’s estate after their death, with tracing available if allowed. It said that, otherwise, a distribution of the estate is likely to be delayed.
- 6.31 Jan McCartney QC and Patterson preferred to retain a TPA cause of action along with other available causes of action. Dr Tobias Barkley submitted that our draft proposals should be clarified in their relationship to claims arising from detrimental reliance. He noted that equitable estoppel claims are framed as the claimant relying on the deceased’s promise to their detriment and do not necessarily require a benefit be provided to the deceased. A few submitters commented that the removal of adult children claims under the Family Protection Act 1955 would mean that these claimants will turn to contribution claims in order to get something from the estate.
- 6.32 Te Hunga Rōia Māori o Aotearoa (THRMOA) and Chapman Tripp commented that utu plays a significant role in determining how contributions should be treated in te ao Māori. They noted that there is an expectation through tikanga that actions are responded to in kind to maintain balance, whether between kin or non-kin. This may give rise to a stake in an estate. However, utu would only be one factor in the kōrero process to resolve a claim against an estate. MinterEllisonRuddWatts noted that, in this context, utu should be underpinned by the concept of ea (achieving a state of balance). The application of ea may sometimes yield a different result than the application of state law. THRMOA also noted that utu does not follow a prescribed system of like for like that might be equated with the Western concept of reciprocity because utu is not economic but cultural. THRMOA noted further that utu does not respond only to the specific contribution but also to the nature of the relevant relationship.

CONCLUSIONS

RECOMMENDATIONS

R27

The Law Reform (Testamentary Promises) Act 1949 should be repealed. In its place, a testamentary promise cause of action should be available under the new Act. Other causes of action at common law or equity arising from contributions made towards a person who has since died should continue to operate outside the new Act.

R28

A court should grant a testamentary promise award to a claimant where:

- a. the claimant has rendered services to or performed work for the deceased during the deceased's lifetime;
- b. the services or work must have been substantial in that they required the claimant to contribute significant time, effort, money or other property, or to suffer substantial detriment;
- c. the claimant must not have been fully remunerated for the work or services;
- d. the deceased expressly or impliedly promised to make provision in their will for the claimant in return for the work or services; and
- e. the deceased has failed to make the promised testamentary provision or otherwise fully remunerate the claimant.

R29

The quantum of an award should be the amount promised by the deceased, subject to the court's overriding discretion to grant an award that is reasonable in the circumstances.

6.33 We received largely positive responses to Option One, with the simplification of the law in this area being a primary attraction. Nevertheless, we have concluded that it is not desirable to recommend a single, comprehensive statutory cause of action. This is for several reasons highlighted in submissions:

- (a) Different remedies at general law have particular historical origins and respond to particular policy issues. There is a risk that important avenues of relief may be lost in consolidating these remedies into a single cause of action in place of the wider law.
- (b) Claims based upon detrimental reliance, such as estoppel, should be allowed to continue alongside the proposed cause of action due to the different basis they have and the different type of relief they provide.²⁶ This would mean claimants would need to refer to law outside the new Act to understand their rights fully, significantly detracting from the policy justification of simplicity and efficiency behind the proposal.
- (c) There are potential inefficiencies and complexities in requiring claimants to rely on entirely different law depending on whether a defendant is alive or dead when the claims arise from the same factual circumstances.

6.34 We continue to think that it is appropriate for the law to address claims based on a testamentary promise. The TPA has been an established part of succession law in Aotearoa New Zealand for several decades. We received little feedback during consultation calling for its repeal. Although the claim applies in niche circumstances, it can

²⁶ Estoppel remedies are flexible and largely designed to perform two different functions. The first is a reliance-based remedy. It is to put the plaintiff in the position they would have been in if the representation had not been made and relied upon. The second is an expectation-based remedy. It is to fulfil the expectation relied upon by the plaintiff. See *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567 at [77]. A reliance-based remedy is a fundamentally different enquiry to the unjust enrichment claim we proposed under Option One, which focuses on the restoration of a benefit to the plaintiff: see Peter Twist, James Palmer and Marcus Pawson *Laws of New Zealand Restitution* (online ed) at [2].

provide a useful avenue of relief where a deceased ought to have fulfilled their promise to remunerate someone who has provided work or services.

- 6.35 Instead of recommending a single, comprehensive cause of action, we therefore recommend that a cause of action based on a testamentary promise, as contemplated by the TPA, be included in the new Act. This will allow the law to be modernised to meet contemporary drafting standards. It will also enable several issues with the TPA to be addressed. We set out below what we consider an improved testamentary promise cause of action should look like. Other causes of action at common law or equity arising from contributions made towards a person who has since died should continue to operate outside the new Act.
- 6.36 We considered whether to recommend more fundamental changes to the improved testamentary promise cause of action to better reflect the concepts of *utu*, *whanaungatanga*, *whakapapa* and *mana*. We have not done so for two main reasons. First, there are important differences between the idea of reciprocity that underpins contribution claims in state law and the idea of reciprocity that underpins *utu*, as discussed above. We have concluded that further consideration of, and consultation on, how these matters interact would be required. Second, we have not had the benefit of detailed consultation on whether a testamentary promise cause of action responds to a policy problem recognised in *te ao Māori* and whether it would accord with *tikanga*. In these circumstances, we have made no reference to *tikanga Māori* in the improved testamentary promise cause of action.

Including an improved testamentary promise cause of action in the new Act

- 6.37 In bringing the testamentary promise cause of action into the new Act, we recommend that the law should remain substantially the same as under the TPA. However, we suggest several amendments for how the testamentary promise cause of action might be improved when restated in the new Act.

The cause of action in the new Act should conform to modern drafting standards

- 6.38 The TPA has not been substantively amended since 1961, and it was originally enacted in 1944.²⁷ It is difficult to read and does not conform to modern drafting standards. We therefore recommend that the cause of action as redrafted in the new Act accords with modern drafting standards.

Elements of the cause of action

- 6.39 The TPA has evolved over the course of its lifetime. The original reason for the legislation was summarised in Parliamentary debates when the Law Reform Act 1944 was introduced:²⁸

There is one case, however, in which payment is irrecoverable — the case where one person works for another in the expectation of remuneration being made by will ... In such a case, there is no right whatever, unhappily, for the person performing those services to secure any remedy if the result is not forthcoming ... A person might work for a long time

²⁷ See Law Reform Act 1944, s 3(1); and Law Reform (Testamentary Promises) Amendment Act 1961.

²⁸ (23 November 1944) 267 NZPD 299–300.

and render services, maybe over many years, in the faith of that expectation, and yet be defeated in respect of it, and have no remedy of any sort.

- 6.40 In 1949, amendments removed the requirement that the promise be made before the services or work are performed.²⁹ It is not clear from the discussion of these amendments in Parliament why this change was made, although case law has suggested that the aim was to require a deceased person to keep their word where that word may be taken to relate expressly or by implication to services given or to be given.³⁰
- 6.41 Owing to the breadth of the circumstances in which the TPA applies, there is now some difficulty in identifying with precision the problem the legislation is aimed at remedying. For instance, the primary concern is not solely to hold a deceased to their word; it is also necessary for the claimant to have performed work or services. A promise made out of love or affection, for example, rather than as a reward for the claimant's work or services will not give rise to relief.³¹ Yet, confusingly, it is not necessary for the claimant to have been motivated by the promise.³² Indeed, the promise may be made after the claimant provided the work or services.³³ The TPA cannot, therefore, be understood to be simply remedying the claimant's reliance on a promise.³⁴
- 6.42 We think it is desirable that the cause of action in the new Act is more precise in its purpose. In our view, the objective should be to hold a deceased to their promise where they have received substantial work or services from another and they have promised to make testamentary provision for that person. Accordingly, the elements of the cause of action in the new Act should be:
- (a) the claimant has rendered services to or performed work for the deceased during the deceased's lifetime;
 - (b) the services or work must have been substantial in that they required the claimant to contribute significant time, effort, money or other property or to suffer significant detriment;
 - (c) the claimant must not have been fully remunerated for the work or services;
 - (d) the deceased expressly or impliedly promised to make provision in their will for the claimant in return for the work or services; and
 - (e) the deceased has failed to make the promised testamentary provision or otherwise fully remunerate the claimant.
- 6.43 Many of these elements are drawn from the existing case law. The main addition is that the work or services must be substantial. We recommend that the new Act is clear that the only work or services that would justify a remedy are those that have required the

²⁹ Law Reform (Testamentary Promises) Act 1949, s 3(2)(a).

³⁰ *Jones v Public Trustee* [1962] NZLR 363 (CA) at 374.

³¹ *Re Welch* [1990] 3 NZLR 1 (PC), cited in Bill Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis, Wellington, 2021) at 238.

³² *Byrne v Bishop* [2001] 3 NZLR 780 (CA) at [10].

³³ See for example *Jones v Public Trustee* [1962] NZLR 363 (CA); and *Blumenthal v Stewart* [2017] NZCA 181, [2017] NZFLR 307 at [50].

³⁴ Some cases do, however, speak of the purpose of the legislation, being to remedy reliance on unhonoured promises: *Nelson v Codilla* [2021] NZHC 1958 at [133].

claimant to contribute significant time, effort, money or other property. The court would be required to make a finding in each case as to whether the requisite threshold has been met. We would expect the court to follow the current case law where it gives a wide interpretation to what constitutes work or services.³⁵ This includes cases where the services take the form of the claimant having suffered detriment rather than performing positive acts towards the deceased.

- 6.44 Importantly, the state of mind of the claimant remains largely irrelevant to the inquiry. We think that is preferable given that such inquiries pose difficult evidential issues.³⁶ It also reflects the reality that, when performing work or services for a person of older age, especially if a family or whānau member, a person’s motivations are likely to be complex and multifaceted.³⁷ We therefore consider the primary emphasis of the cause of action should not be on the claimant’s reliance on the promise but rather the fact that they have conferred considerable benefits on the deceased and, in promising to make provision for the claimant, the deceased has accepted the claimant deserves reward.
- 6.45 We recommend that a promise should continue to be construed liberally, that is, it may be express or implied. We recognise that the TPA allows for recovery in situations where work or services have been performed over a long period of time and often within a close personal or familial setting. It may not always be clear exactly when “any statement or representation of fact or intention” to reward the claimant was made.³⁸ The court should continue to be able to look at the facts in the round and make an assessment about whether any representations had in fact been made. The court should continue to take a flexible approach to finding the promise relates to the work or services, including inferring the link from the circumstances if necessary.³⁹ Concerns that this approach will result in the courts granting awards too readily will be mitigated by the requirement that the work or services the claimant provided involved a significant expenditure of time, effort, money or other property.

The cause of action should not focus on what constitutes normal family life

- 6.46 The decision in *Re Welch* established that a claimant’s actions that are the “natural incidents and consequences of life within a close family group” do not constitute work or

³⁵ See *Tucker v Guardian Trust & Executors Co of New Zealand Ltd* [1961] NZLR 773 (SC) at 776, cited in Bill Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis, Wellington, 2021) at 224–225.

³⁶ We note that, in hearings in proceedings under the Law Reform (Testamentary Promises) Act 1949, it is common for evidence to be given orally. As we discuss in Chapter 12, it is preferable that evidence be given by affidavit alone where possible to reduce the length and costs of litigation.

³⁷ See the Court of Appeal’s statement in *Jones v Public Trustee* [1962] NZLR 363 (CA) at 374–375:

[W]e do not consider that the claimant should be refused relief simply on the ground that he may have been influenced in part by more laudable considerations than purely mercenary ones. Thus, in the case of a relative who feels a moral obligation to assist an elderly member of his family, usually it would be unreasonable to conclude that he would not be encouraged and comforted in the knowledge that it was the intention of the deceased that his services should not go unrewarded. Indeed, now that it is clear that the promise may relate to past services, the motive of the person rendering the services ceases to be of any importance in the case of a promise to reward past services.

³⁸ Law Reform (Testamentary Promises) Act 1949, s 2. A promise to make testamentary provision can be implied from circumstances where a promise was made to reward a claimant in the deceased’s lifetime but they did not do so: see *Rennie v Hamilton* [2004] NZFLR 270 (HC) at [33].

³⁹ *Leach v Perpetual Trustees Estate and Agency Co of New Zealand Ltd* CA48/88, 20 March 1990 at 9; and see Nicola Peart (ed) *Family Property* (online looseleaf ed, Thomson Reuters) at [TA3.06(2)] and the cases cited therein.

services for the purposes of the TPA.⁴⁰ In order to distinguish between work or services that are part of family life and those that are not, the courts must undertake an assessment of the “norm” and assess whether the work or services go beyond that norm.⁴¹ We see several problems with this approach:

- (a) Within contemporary Aotearoa New Zealand there is a diverse range of family arrangements and family dynamics. What is to be considered “normal” may be difficult to assess, meaning the law fails to provide predictable outcomes.
- (b) It is not clear from the cases whether the “normal incidents and consequences” of family life should be measured objectively or with reference to the particular family.⁴² If the focus is on the particular family, difficulties may arise as it is generally unsatisfactory to have law that provides substantially different outcomes based on the differing norms of particular families.⁴³ Conversely, a norm that attempts to take families across Aotearoa New Zealand as a whole will inevitably fail to recognise the diversity of families and their dynamics.
- (c) This approach may obscure the reality that, as noted above, a person’s motivations are often complex and multifaceted. Undertaking an exercise to determine the “natural incidents and consequences” of any particular family may detract from what the deceased intended by their promise.

6.47 Given these issues, we recommend that the new Act should no longer invite the court to assess a claimant’s work or services by reference to whether they were considered normal within a particular family setting. Rather, we think the element discussed above that the work or services involved a significant expenditure of time, effort, money or other property provides a better and more objective measure of whether the claimant’s actions justify relief.

Quantum of awards

6.48 Section 3(1) of the TPA requires an award to be:

... of such amount as may be reasonable, having regard to all the circumstances of the case, including in particular the circumstances in which the promise was made and the services were rendered or the work was performed, the value of the services or work, the value of the testamentary provision promised, the amount of the estate, and the nature and amounts of the claims of other persons in respect of the estate.

⁴⁰ *Re Welch* [1990] 3 NZLR 1 (PC) at 7; and see Bill Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis, Wellington, 2021) at 226–233.

⁴¹ *Re Fagan (dec’d); Walker v Fagan* [1999] NZFLR 222 (HC) at 236; and Bill Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis, Wellington, 2021) at 229–232.

⁴² For example, the High Court in *Chapman v P* HC Wellington CIV-2007-485-1871, 2 July 2009 held that the standard is measured against the particular family in question: at [284]–[287]. However, obiter dicta from the Court of Appeal in *Blumenthal v Stewart* [2017] NZCA 181, [2017] NZFLR 307 has questioned whether there may be occasion to consider whether the “norm” can be better defined and that it may then anyway be concluded that it simply requires judicial evaluation, having regard to both “common experience and the circumstances of the particular family setting”: at [47].

⁴³ Assessing different families by different standards may be inconsistent with s 19 of the New Zealand Bill of Rights Act 1990, which affirms the right to freedom of discrimination on the grounds listed in s 21 of the Human Rights Act 1993. These grounds include religious belief, ethnic or national origins, age and family status. Any or all of these may be relevant in the assessment of any particular family, and the law may respond differently depending on a judge’s assessment of these factors.

- 6.49 The Privy Council in *Re Welch*, after noting the factors in section 3(1), held that “whenever a claim to relief is made out under it the criterion as to the relief to be granted is reasonableness.”⁴⁴
- 6.50 As explained above, we consider the objective of the cause of action should be to enforce a deceased’s promise when they have received substantial work or services from the claimant. It follows, in our view, that the starting point for an award under the new Act should be the amount that was promised to the claimant by the deceased. That gives weight to the deceased’s appreciation of the value of the services.⁴⁵
- 6.51 The court should still be required, as it is under the current law, to qualify that amount to what is reasonable in the circumstances. The court would continue to take into account the value of the services or work, the value of the testamentary provision promised, the amount of the estate and the nature and amounts of the claims of other persons in respect of the estate. Because we suggest the objective of the cause of action is to enforce the deceased’s promise, it is arguable it is unnecessary to qualify an award by what is reasonable in the circumstances. However, we see the qualification as necessary because of the problems with relying on only one party’s evidence of the nature or amount of the promise.
- 6.52 Our recommendations differ from the current law, which aims only at reasonableness when determining quantum, having regard to the factors in section 3(1). We prefer our approach as it is consistent with the objective of holding the deceased to their word. We anticipate that, in many cases, this change in approach will not make much difference in practice as often the promise is unquantified, and the court will have to fall back on reasonableness as the starting point for an award.
- 6.53 A court would only make an award to the extent that a claimant’s work or services have been unremunerated. In making that assessment, the court should continue to assess the reciprocal benefits the claimant has received from the deceased.⁴⁶
- 6.54 Lastly, under the current law, the court cannot award more than the amount promised.⁴⁷ We see this limitation as too strict, especially given the inherently discretionary approach to awards under the TPA and our suggested requirement that the work or services be substantial.⁴⁸ We recommend that this upper limitation should be repealed so that a court is able to award more than the amount promised if it considers it appropriate.

Te Ture Whenua Maori Act 1993 and testamentary promises

- 6.55 Under the current law, a court may redistribute interests in Māori freehold land when making an award under the TPA provided the order does not have the effect of alienating any beneficial interests in the land to people who are not eligible to succeed under Te

⁴⁴ *Re Welch* [1990] 3 NZLR 1 (PC) at 6.

⁴⁵ See *Re Welch* [1990] 3 NZLR 1 (PC) at 7; and *Powell v Public Trustee* [2003] 1 NZLR 381, (2002) 22 FRNZ 601 (CA) at [12].

⁴⁶ See *Samuels v Atkinson* [2009] NZCA 556, [2010] NZFLR 980.

⁴⁷ Law Reform (Testamentary Promises) Act 1949, s 3(1); and Dick Webb and others *Family Law in New Zealand* (13th ed, LexisNexis, Wellington, 2007) at [7.935].

⁴⁸ This was the view of the Commission in its previous review of succession law: see *Te Aka Matua o te Ture | Law Commission Succession Law: Testamentary Claims – A discussion paper* (NZLC PP24, 1996) at 87.

Ture Whenua Maori Act 1993 (TTWMA).⁴⁹ In Chapter 3, we recommend that state succession law should have no application to taonga. Instead, taonga should be dealt with consistently with the tikanga of the relevant whānau or hapū. As TTWMA recognises, Māori freehold land is a taonga tuku iho. It seems strange that the TPA overlays the regime governing succession to Māori freehold land. The Government may wish to consider whether and, if so, how testamentary promise awards under the new Act should apply to succession to Māori freehold land.

⁴⁹ Te Ture Whenua Maori Act 1993, s 106(1). Section 108(2) sets out the persons to whom a deceased owner may dispose of their interests in Māori freehold land by will.

CHAPTER 7

Intestacy entitlements

IN THIS CHAPTER, WE CONSIDER:

- the statutory rules for distributing intestate estates.

CURRENT LAW

- 7.1 Intestacy occurs when the whole or part of the deceased's estate is not disposed of by will, even where an ōhākī (an oral expression of testamentary wishes within te ao Māori) has been made. This is because ōhākī (which we discuss in Chapter 16) are unrecognised by state law. Total intestacy arises where the deceased makes no effective testamentary disposition of any of their property, such as where they left no will or their will is invalid¹ or the beneficiaries died before the deceased. Partial intestacy occurs where the deceased fails to dispose of some of their property. In this chapter, we use the word “intestate” to describe a person who has died without having made a valid will in respect of some or all of their property.
- 7.2 Dying intestate is relatively common in Aotearoa New Zealand. It is estimated that around half of all adults (aged 18 or over) do not have a will.² Every year, around one in 10 of the applications for administration filed with te Kōti Matua | High Court (the High Court) is for an intestate estate.³

¹ See Wills Act 2007, s 7.

² The Commission for Financial Capability surveyed 11,069 people online in 2017, with 5,222 respondents (47.2 per cent) stating they had a legal will, 5,343 stated they did not (48.3 per cent), and 504 were unsure (4.6 per cent): Commission for Financial Capability *Financial Capability Barometer Survey 2017*. Fifty-three per cent of respondents to the Succession Survey said they had a will: Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at [156] and table 5.

³ For example, based on statistics extracted from the High Court's case management system, 18,465 applications for probate, letters to administer or elections to administer were filed in 2019. Of these, 1,454 were for letters of administration and another 318 were letters of administration with will annexed: email from Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding data on applications for probate and letters of administration filed with the court annually between 2015 and 2019 (11 August 2020).

- 7.3 The total administration applications filed with the High Court represent around half the number of registered deaths each year.⁴ Those individuals for whom an administration application is not filed probably leave estates that do not require a formal grant of administration in order to distribute the assets of those estates.⁵ It is likely that a significant proportion of those individuals died intestate.
- 7.4 Certain demographic groups are less likely to make wills. Rates of will-making are lower in Māori, Pacific peoples and Asian communities.⁶ Will-making is often associated with significant life events such as buying a home or having a child. Rates of will-making also increase with age so the intestate population is generally expected to be younger than those who die with a will.⁷

The intestacy rules

- 7.5 Section 77 of the Administration Act 1969 sets out the rules for distributing intestate estates consisting of all property other than whenua Māori.⁸ Broadly, the rules prioritise the intestate's partner and children, followed by parents, siblings, grandparents, aunts and uncles (by blood) and cousins. When none of the specified family members are alive to succeed, the Crown will take the estate as bona vacantia (ownerless goods). The Crown may provide for dependants of the intestate or other persons⁹ for whom the intestate might reasonably have been expected to make provision. We summarise the rules under section 77 in the following diagram.¹⁰

⁴ In 2019, 18,465 administration applications were made and there were 33,774 registered deaths of adults aged 18 and over (55 per cent). In 2018, there were 17,561 applications and 32,799 deaths (54 per cent), and in 2017, there were 18,121 applications and 32,937 deaths (55 per cent); email from Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding data on applications for probate and letters of administration filed with the court annually between 2015 and 2019 (11 August 2020). Total deaths figures have been sourced from the Infoshare platform, available at Tatauranga Aotearoa | Stats NZ "Births and deaths: Year ended March 2020 — Infoshare tables" (18 May 2020) <www.stats.govt.nz>.

⁵ Section 65 of the Administration Act 1969 provides that certain assets with a value not exceeding the prescribed amount may be paid to specified individuals without requiring administration of the estate to be obtained. The prescribed amount is currently set at \$15,000: Administration (Prescribed Amounts) Regulations 2009, reg 4.

⁶ In response to the Succession Survey, 41 per cent of Māori respondents, 24 per cent of Pacific respondents and 21 per cent of Asian respondents said they had a will: Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at table 5. The Commission for Financial Capability *Financial Capability Barometer Survey 2017* found that of the 1,602 respondents who identified as Māori, 498 said they had a will (31.1 per cent) compared with 4,098 respondents who identified as European/Caucasian (55.2 per cent).

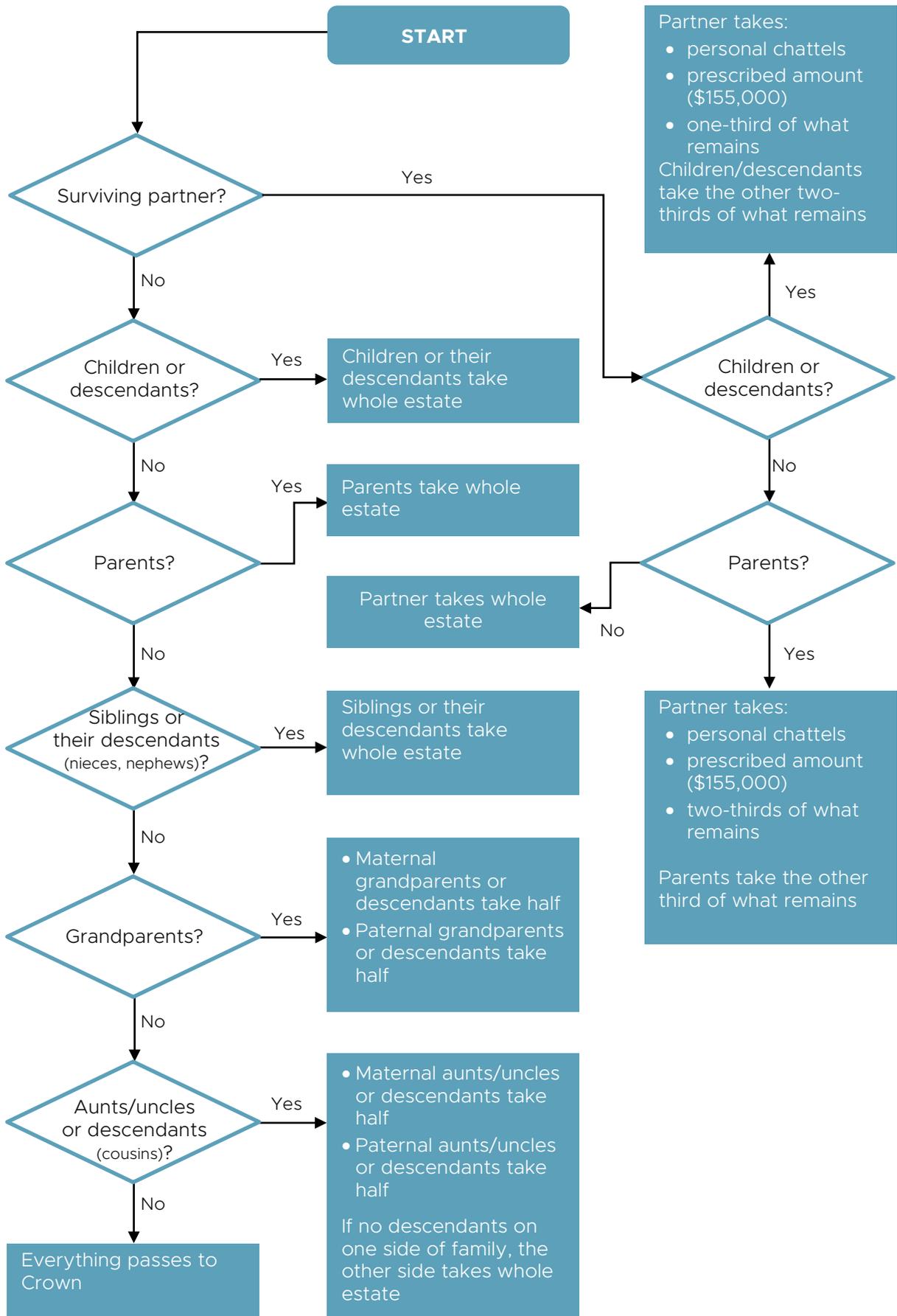
⁷ The Succession Survey found that age was the primary influence on having a will: Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at [159]. In the Commission for Financial Capability *Financial Capability Barometer Survey 2017*, nearly all (97.3 per cent) European/Caucasian respondents aged 75+ had a will but only two-thirds (64.4 per cent) aged 50–54 had a will. The rate of will-making also increased with age for Māori respondents (75 per cent of Māori respondents aged 75+ had a will compared with 29.8 per cent of Māori respondents aged 50–54): Commission for Financial Capability *Financial Capability Barometer Survey 2017*.

⁸ Succession to Māori freehold land on intestacy is determined according to ss 109 and 109A of Te Ture Whenua Maori Act 1993.

⁹ Under s 29 of the Interpretation Act 1999, "person" includes a corporation sole, a body corporate and an unincorporated body.

¹⁰ The same rules apply to both partially and wholly intestate estates.

SUMMARY OF THE DISTRIBUTION OF INTESTATE ESTATES UNDER SECTION 77 OF THE ADMINISTRATION ACT 1969



Intestacy rules for whenua Māori

- 7.6 There are unique intestacy provisions in Te Ture Whenua Maori Act 1993 (TTWMA) that apply to Māori freehold land. Section 109 provides that the persons entitled to inherit upon intestacy are the intestate’s descendants, siblings and their descendants. Where the intestate is survived by children, those children are entitled to equal shares. If any of the intestate’s children died prior to the intestate, leaving children, those children will take their parent’s share in equal portions. This applies to descendants through all degrees. If the intestate leaves no descendants, the intestate’s siblings will share the intestate’s entitlement. This will include half-siblings who also descend from the intestate’s parent or other ascendant from whom they were entitled to the Māori freehold land. If there are no children or siblings, the living descendants of the person “nearest in the chain of title” will succeed.¹¹
- 7.7 A child who is a whāngai may also have intestate succession rights under TTWMA if the tikanga of the relevant iwi or hapū determines that there is a relationship of descent between the child and the child’s birth parents, “new parents” or both.¹² These recent amendments to TTWMA represent a significant change to the position of tamariki whāngai (whāngai children) under TTWMA.¹³ Once a relationship of descent is determined, the tamaiti whāngai (whāngai child) will inherit an equal share as any other child of the deceased.

ISSUES

- 7.8 The intestacy provisions in the Administration Act are old. They consolidated the regime established by the Administration Amendment Act 1944, and there have been few updates since 1969 when the Act was passed. Several issues arise:
- (a) The rules may not reflect contemporary public attitudes and expectations. The Succession Survey results provided several examples of where the current regime may run counter to contemporary public attitudes and expectations. These are discussed in the relevant sections below.¹⁴
 - (b) The rules have not been adjusted to accommodate the growing number of blended families. The rules may need reform to account for changes in family arrangements, particularly increasing rates of repartnering and the associated increase of blended families. We discuss the extent of this issue when we consider the position of step-

¹¹ Where no person is primarily entitled to any beneficial freehold interest, the court shall determine the persons entitled to succeed in accordance with tikanga Māori: Te Ture Whenua Maori Act 1993, s 114.

¹² Te Ture Whenua Maori Act 1993, s 114A. The Māori Land Court may also determine whether the child is a whāngai and whether there is a relationship of descent: s 115.

¹³ Prior to 6 February 2021 when the recent amendments came into force, Te Ture Whenua Maori Act 1993 gave the Māori Land Court power to determine whether or not the whāngai was entitled to succeed to any beneficial interest in any Māori freehold land to the same extent or to a lesser extent as they would have been entitled if they had been the deceased’s child.

¹⁴ They are also set out in Te Aka Matua o te Ture | Law Commission *Review of Succession Law: Rights to a person’s property on death* | *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* (NZLC IP46, 2021) at [6.9].

relationships within the regime and the distribution rules between partners and children.

- (c) The rules pre-date subsequent developments in relationship property law. In particular, the intestacy regime pre-dates the Property (Relationships) Act 1976 (PRA), and a surviving partner’s entitlements on intestacy are not quantified in terms of their relationship property rights. We discuss this issue in the context of the objectives of the intestacy regime, the qualifying criteria for certain relationships and the distribution to partners.
- (d) The intestacy provisions and the Administration Act generally are framed in outdated and inaccessible language. Long, unbroken sentences¹⁵ and uncommon terms and phrases such as “issue” and “absolutely vested interest” make the provisions difficult to comprehend.

7.9 Additionally, the state law does not facilitate the exercise of tino rangatiratanga, including the exercise of tikanga Māori. As a prescribed default system of distribution, the intestacy rules do not reflect the context-specific nature of tikanga. Certain relationships, such as whāngai and customary Māori marriage, are not independently recognised in the current state law. Tikanga may reveal a different basis on which entitlements should be based and therefore have different priorities than those in current state law.

RESULTS OF CONSULTATION

7.10 We received many submissions regarding intestacy on both the consultation website and the Issues Paper. In this chapter, we discuss the results of the consultation within each of the sections below.

CONCLUSIONS

7.11 We make several recommendations to reform the intestacy regime. We discuss each recommendation separately under the sections below. We have included a diagram at the end of this chapter that illustrates how our recommendations for reform of the intestacy regime would work.

Objectives of the intestacy regime

7.12 The intestacy rules are designed to reflect what most people who die intestate would do with their estate had they made a will.¹⁶

7.13 Overseas law reform bodies have used various methods to identify what is the most common approach to distributing assets on death, including analysing wills proved,

¹⁵ See for example Administration Act 1969, s 78(1)(a).

¹⁶ This is the general aim of the present regime in Aotearoa New Zealand: see the speech of the Hon Rex Mason when introducing the Administration Bill: (23 November 1944) 267 NZPD 288–289. See also the speech of the Hon Ralph Hanan when introducing the Administration Amendment Bill 1965: (21 September 1965) 344 NZPD 2875. It is also that most frequently opined in comparable jurisdictions as the principal basis for intestacy rules: see for example Law Commission of England and Wales *Family Law: Distribution on Intestacy* (Law Com No 187, 1989) at [24]; and New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at [1.24]; Manitoba Law Reform Commission *Report on Intestate Succession* (Report 61, 1985) at 7; and Alberta Law Reform Institute *Reform of the Intestate Succession Act* (Report No 78, 1999) at 59.

conducting public surveys and consulting with members of the legal profession and public. In addition to our initial discussions with practitioners and professional trustee corporations, we have used the Succession Survey and the results of our consultation to give us insight into contemporary attitudes about fair distributions where there is no will.

7.14 Nonetheless, the intestacy rules will not always produce what the intestate or their family members would view as the fairest outcome. State law allows the deceased to determine what they would see as a fair outcome by providing their intentions in a will. The law also facilitates a redistribution in certain circumstances, through court awards under the PRA, Family Protection Act 1955 (FPA) and Law Reform (Testamentary Promises) Act 1949 (TPA).

7.15 Most submitters to the Issues Paper did not raise any concerns with the intestacy regime's objective. Notably, however, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) cautioned against seeking to produce intestacy law that determines what most intestate people would have done had they made a will:

Human behaviour and choices are not always predictable. Rather, provision for intestacies should involve what the state considers to be the fairest default provisions, in the absence of testamentary directions. The state, through this review process, distils from various sources what are the appropriate values, rather than second guessing what most intestate people would have done.

7.16 NZLS makes an important point. However, it remains likely in our view that understanding what most intestate people would have done had they made a will is inextricably linked to society's notions of what are the fairest default provisions. Generally, people who make wills choose to leave their estate to their family.

7.17 In addition to this overarching objective, there are other objectives that we consider should underpin the regime:

(a) The rules should be simple to understand and efficient to implement. People should know what will happen to their property if they die without a will. Beneficiaries in an intestacy ought to be able to consult the regime to understand their entitlements. This is particularly important given that individuals eligible to be administrators of the estate are beneficiaries and are unlikely to be professional executors.

(b) The regime should be consistent with the other rights and entitlements family members might have under the new Act, for example a surviving partner's entitlement to relationship property. It would be unhelpful if the intestacy entitlements for surviving partners were commonly less than their relationship property rights, resulting in applications to divide relationship property.

7.18 The recommendations for reform we set out below assume that a partially intestate estate (that is, the part of the estate that is intestate) should be distributed according to the same rules as a wholly intestate estate.

7.19 Additionally, as recommended in Chapter 2, the intestacy regime should remain in the Administration Act at present, but Part 3 of that Act should be repealed and new intestacy

provisions enacted that conform to modern drafting standards.¹⁷ We refer to these as “new intestacy provisions” or “new provisions”.

- 7.20 Finally, as under the current law, a beneficiary in an intestacy should retain rights to make a relationship property, family provision or testamentary promise claim where they are otherwise entitled to make such claims.

Ngā tikanga

- 7.21 The intestacy regime operates as a default distribution of property where the deceased left no valid will according to state law. The process of determining what is tika in the context of succession in te ao Māori generally involves collective debate and decision-making amongst the whānau. In the Issues Paper, we therefore asked whether tikanga would support a default system of distribution.
- 7.22 We also commented that there were no statistically significant differences between Māori and non-Māori to the various intestacy scenarios posed in the Succession Survey. We asked submitters for their feedback on whether tikanga might reveal a different basis on which entitlements should be based and whether different classes of people should be included or excluded. As we discuss in Chapter 5 regarding family provision, whānau is central in tikanga Māori and involves certain rights and obligations.

Results of consultation

- 7.23 Several submitters to the Issues Paper addressed some or all of our questions regarding tikanga and intestacy: Te Hunga Rōia Māori o Aotearoa (THRMOA), Ngā Rangahautira, Public Trust, NZLS, the Family Law Committee of Auckland District Law Society (ADLS), Chapman Tripp, MinterEllisonRuddWatts, Te Kani Williams, and Michael Reason and Azania Watene in a joint submission.
- 7.24 Chapman Tripp submitted that the general objective of the intestacy regime may not align with an ao Māori view:

The general proposition that the intestacy regime should be designed to replicate what most intestate people would have done had they made a will does not fully align with tikanga because it gives supremacy to the individual's wishes, without taking into account how to balance those wishes with obligations to the collective derived from whakapapa and whanaungatanga — values that guide whānau by imposing a collective lens, which are often determinative in Te Ao Māori.

- 7.25 We asked submitters how tikanga responds to a situation where someone dies without expressing any testamentary wishes. THRMOA emphasised that discussion and the ability for kōrero is an essential aspect of tikanga. They submitted that pakeke (adults) in the whānau with the requisite mana would decide or run a process that allows for wider whānau to be heard before a decision is made. Chapman Tripp expressed similar views:

Mā te whānau e whakatau — the relevant whānau ought to discuss and come to a consensus as to how the estate should be divided in the absence of any ōhāki or other expression of testamentary wishes. If there is no consensus, a tikanga-based resolution process, guided by a pūkenga, would take place. Other interested parties (kin and non-

¹⁷ In Chapter 2 we also note that there is merit in the Government considering the consolidation of multiple statutes relevant to the administration and succession of both testate and intestate estates.

kin), where relevant, would also be provided an opportunity to express their whakaaro (thoughts) and participate in the process.

- 7.26 THRMOA, Ngā Rangahautira and Chapman Tripp agreed that tikanga Māori does not support a default system of distribution such as that provided for in the Administration Act. THRMOA submitted that tikanga is context specific and therefore it requires parties to come together to kōrero. Chapman Tripp said tikanga lives through people and actions.
- 7.27 THRMOA further submitted that “there is a legitimate Māori interest in certainty in application of law” and “it is important for individuals subject to law (tikanga or otherwise) to understand it and its potential outcomes”. THRMOA agreed that intestacy regimes should attempt to replicate what most people would do if they had made a will, subject to the categories of land and taonga, where individual freedom must be subject to obligations arising from whakapapa and whānau considerations.
- 7.28 Williams submitted that tikanga should apply before the imposition of state law. He also noted the importance of having a resolution process available to bring matters to a conclusion.
- 7.29 MinterEllisonRuddWatts submitted that, at this point in time, the intestacy regime should not actively oppose tikanga or prevent Māori from dealing with their property in accordance with the applicable tikanga. Over time, it would be positive to evolve the system into one that actively promotes succession in accordance with tikanga for those who want this.
- 7.30 Ngā Rangahautira cautioned against further assimilation of tikanga Māori within the colonial law foundation of Aotearoa New Zealand. In their view, the Commission can help avoid this by recognising Māori tino rangatiratanga and mana motuhake and creating a platform for Māori to lead how tikanga Māori should shape an intestacy regime. Ngā Rangahautira emphasised the need for consultation with iwi, hapū and whānau to ensure the regime “does not become subject to the assumption of Pākehā law supremacy”. Several other submitters emphasised the need for consultation with Māori.
- 7.31 Several submitters commented on specific aspects of the current intestacy rules in state law, and these are referred to in the relevant sections below.

Conclusions

- 7.32 While we recognise tikanga may provide a different outcome than the default rules when distributing an intestate estate, in this Report we do not recommend an entirely separate system governed by tikanga. As noted by submitters, further consultation would be required and Māori would need to take an active role in leading the design of the regime. We agree with THRMOA that it is important that individuals subject to any law understand it and its potential outcomes. This becomes particularly relevant for those who have not been subject to tikanga before but may be under any new proposed regime. Issues would arise about who would be subject to such a regime and how it would interact with state law, as discussed in Chapter 2. Nor do we recommend express recognition of Māori customary marriage, for the reasons discussed in Chapter 4.
- 7.33 Instead, at this stage, we think that exercising kāwanatanga in a responsible manner and facilitating tino rangatiratanga in relation to the intestacy regime can be implemented in four respects.

- (a) As recommended in Chapter 3, taonga should be excluded from distribution under the intestacy regime and instead dealt with in accordance with tikanga.
 - (b) We recommend that tikanga should operate in respect of whether people in whāngai relationships may succeed in an intestacy (discussed below).
 - (c) In Chapter 13, we emphasise measures to help whānau resolve matters in accordance with tikanga. That could mean that, through kōrero, a whānau could decide how a family member's intestate estate is to be distributed, which may be different from the rules in the intestacy regime.
 - (d) Certain whānau members could bring relationship property and family provision claims against an intestate estate in some circumstances. As we explain in Chapters 4 and 5, we consider the claims address situations where we would expect tikanga to ensure adequate provision is made for those whānau members.
- 7.34 Lastly, we are mindful that, while tikanga does not rest on a default system of rules, many Māori may see value in the certainty the intestacy regime can provide. A separate tikanga-based approach to intestacy could be established in the future. Our recommendations in this Report reflect our view as to what can be achieved at the present time.

Classes of parent-child relationships

RECOMMENDATIONS

R30

Individuals considered by law to be the children of the deceased should remain eligible to succeed in an intestacy.

R31

Stepchildren and other classes of children for whom the deceased accepted parental responsibilities (other than whāngai) should remain ineligible to succeed in an intestacy.

R32

Where there is no adoption under the Adoption Act 1955, the eligibility of people in whāngai relationships to succeed in an intestacy should be determined according to the tikanga of the relevant whānau. The share of the estate that the individual will receive should be determined according to the default intestacy rules.

The Government should consider the effect that adoption under the Adoption Act should have on the intestate succession rights of people in whāngai relationships where there has been an adoption under state law. Until that time, the rights of the individuals to inherit in an intestacy should continue to be determined according to state law where a tamaiti whāngai has been adopted under the Adoption Act.

R33

Children in utero at the time of the deceased's death who are later born alive should continue to be eligible to succeed in an intestacy, and children born from posthumous reproduction should continue to be ineligible to succeed in an intestacy.

- 7.35 What parent-child relationships should be recognised under the intestacy regime is relevant to several aspects of intestate succession. In the first instance, it is important to determine which individuals should be considered to be children of the intestate. More broadly, however, parent-child relationships will be relevant to other types of family relationships, such as whether the deceased was in a sibling relationship or a grandparent-grandchild relationship. The following sections set out our conclusions as to which relationships should be recognised in the intestacy regime.

Birth children and children adopted under the Adoption Act

- 7.36 We recommend that children considered by law to be the deceased's children, being birth children¹⁸ and children the deceased formally adopted in accordance with the Adoption Act 1955, should remain eligible to succeed in an intestacy. Apart from instances where an adopted child is a tamaiti whāngai of the deceased, we have heard no concerns about this aspect of the law. Te Tāhū o te Ture | Ministry of Justice (the Ministry of Justice) is currently reviewing the law of adoption in Aotearoa New Zealand, and this includes consideration of the inheritance rights for formally and informally adopted children.¹⁹

Step-relationships

- 7.37 Information about repartnering in Aotearoa New Zealand is limited. Since the 1980s, remarriages have made up approximately one-third of total marriages each year (28 per cent in 2019). This proportion has increased since the 1970s (in 1971, 16 per cent of marriages were remarriages). Statistics on remarriages do not capture people who divorce and then enter a de facto relationship.²⁰ Blended families also appear to be quite common, with one study indicating that one in five children had lived in a stepfamily before age 17.²¹
- 7.38 In the Issues Paper, we took the preliminary view that stepchildren and other classes of children for whom the deceased may have accepted parental responsibilities (“accepted children”, as discussed in Chapter 5) should remain excluded from the intestacy regime. We also proposed that the intestacy rules should not be extended to include guardians or other parental figures. We discuss whāngai relationships below.

Results of consultation

- 7.39 In their submissions on the Issues Paper regarding stepchildren, ADLS, Succeed Legal and Jan McCartney QC supported our proposals regarding stepchildren. Succeed Legal said that including other classes of parent-child relationships beyond biological and adopted

¹⁸ The legal parents of a child are determined in accordance with the Status of Children Act 1969 and the long-existing common law rule that the legal mother is the woman who has given birth to the child: Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [3.3].

¹⁹ Tāhū o te Ture | Ministry of Justice *Adoption in Aotearoa New Zealand: Discussion document* (18 June 2021) at 48–49. The Commission is also reviewing surrogacy and has proposed recognising legal parenthood for surrogate-born children through a separate legal framework rather than using the existing adoption laws: Te Aka Matua o te Ture | Law Commission *Te Kōpū Whāngai: He Arotake | Review of Surrogacy* (NZLC IP47, 2021) at ch 7.

²⁰ Tatauranga Aotearoa | Stats NZ “Marriages, civil unions, and divorces: Year ended December 2019” (5 May 2020) <www.stats.govt.nz>. See also Te Aka Matua o te Ture | Law Commission *Relationships and Families in Contemporary New Zealand | He Hononga Tangata, he Hononga Whānau i Aotearoa o Nāiane* (NZLC SP22, 2017) at 30.

²¹ This is just under one in three Māori children (29 per cent): Arunachalam Dharmalingam and others *Patterns of Family Formation and Change in New Zealand* (Te Manatū Whakahiato Ora | Ministry of Social Development, 2004) at 73.

children would make administration complicated and it is not the role of the intestacy regime to respond to such situations. NZLS, however, submitted that the definition of children should be better defined to encompass stepchildren, whāngai and children born out of fertility processes and posthumous reproduction.

Conclusions

- 7.40 We recommend that stepchildren and other classes of accepted children should remain excluded from the intestacy regime.
- 7.41 Although we recognise that the deceased may have wished to provide for these accepted children, extending the definition of child or descendant would overcomplicate the law, create practical uncertainties and establish an unreasonable responsibility for administrators.²² Administrators may be required to undertake complicated factual analyses about the nature of the child's relationship with the deceased. It may have the unintended result of encouraging rather than dissuading claims against the estate. Where the surviving family are all in agreement that a parent-child relationship existed, they may have no trouble accepting that the child should also share in the estate, but where there is disagreement about that relationship, conflict is likely to arise. It would also be generally inconsistent with whakapapa to include accepted children, and this may not be justifiable outside of certain recognised whāngai relationships.
- 7.42 At times, this approach will produce seemingly unfair results, such as where one of the child's biological parents died when the child was very young and a stepparent assumed the place of that biological parent. In the Succession Survey, 57 per cent of respondents stated that the deceased's estate should be split evenly between two adult children from the deceased's first marriage and two adult stepchildren.²³ However, we do not think the intestacy regime should respond to such situations. Because the dynamics of stepfamilies are likely to be so diverse, we do not think the intestacy regime should make assumptions about the nature of the relationship between stepparents and stepchildren. Preferably, the deceased would have made a will that suits their family circumstances. We discuss in Chapter 16 our recommendations for educating the public on the importance of will-making. In the absence of a will, families can agree to share the estate differently to the intestacy rules and, in certain circumstances, a stepchild child may be eligible to make a claim for a family provision award.²⁴
- 7.43 Correspondingly, we consider that there should not be any extension of the intestacy rules to provide for guardians or other parental figures.

Whāngai

- 7.44 We discuss in Chapter 5 the customary Māori practice of whāngai where a child is raised by someone other than their birth parents, usually another relative from the same whakapapa. In that chapter, we explain that the practice of whāngai is firmly rooted in

²² It would be consistent with the intestacy regimes throughout Australia, the United Kingdom and Canada for the definition of descendants to refer only to natural and legally adopted descendants.

²³ One-third believed that the children from the first marriage should receive a majority share: Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at [185] and figure 17.

²⁴ See Chapter 10 on settlement agreements and Chapter 5 on family provision.

whanaungatanga. It can be a technique for cementing ties among whānau and hapū or for maintaining whakapapa knowledge, tikanga, kawa and tradition.

- 7.45 The intestacy regime in the Administration Act does not contemplate whāngai.
- 7.46 The right of whāngai to succeed according to tikanga varies amongst whānau, hapū and iwi. We have heard from Māori that it would not be appropriate for tamariki whāngai to always be entitled to succeed from their matua whāngai (whāngai parent) on intestacy alongside any children who are considered by law to be the children of the deceased. This is because tikanga concerning whāngai arrangements differs among whānau and hapū. Whether a whāngai should be entitled to succeed according to tikanga is highly contextual and would depend on a range of factors. There may be an expectation that a tamaiti whāngai will receive a share of the estate of the matua whāngai or the birth parents' estates or both. If whāngai were excluded from the intestacy regime, their position would be the same as other accepted children under our recommendations. That is, in the absence of a will, they may reach an agreement with surviving whānau members or claim a family provision award.²⁵

Results of consultation

- 7.47 Most submitters who commented on the eligibility of whāngai to succeed in intestacy supported the option of allowing provision for whāngai depending on the tikanga of the relevant whānau or hapū. These were THRMOA, Ngā Rangahautira, Public Trust, NZLS, Te Kani Williams, Chapman Tripp, TGT Legal, Jan McCartney QC, and Michael Reason and Azania Watene.²⁶ THRMOA and Chapman Tripp suggested that the amount provided should also be determined according to the tikanga of the relevant whānau.
- 7.48 Several submitters commented on the key role that whāngai play in te ao Māori – that they are wanted or chosen in contrast to commonly held views around Pākehā adoption. Ngā Rangahautira submitted that the exclusion of whāngai from the intestacy regime does not give weight to the strength of the role whāngai children play.
- 7.49 Submitters also commented on the traditional and common scenario where whāngai are part of the whānau in that they have a whakapapa connection. In such cases, they said, whāngai have rights to succeed subject to the same considerations that apply to all whānau, the shared whakapapa giving rise to clear whanaungatanga obligations owed to them. In the rarer circumstances where whāngai are not from the whānau and do not have a whakapapa connection, THRMOA and Chapman Tripp agreed that there will still be obligations to that child. The principles of manaakitanga and aroha require a commitment to care for that child.
- 7.50 TGT Legal suggested that the new intestacy provisions might provide a mechanism to enable the relevant whānau or hapū of the deceased to reach consensus on distribution and failure to do so would result in an arbiter making a determination (as in TTWMA).
- 7.51 Public Trust also noted that the practice of informal adoption is customary among other ethnic groups in Aotearoa New Zealand, including Pacific Island nations.

²⁵ See the discussion in Chapter 5.

²⁶ Some ADLS committee members also supported this proposal, while others thought whāngai should be excluded from the regime because that would ensure consistency throughout the country as to the status of whāngai.

Conclusions

- 7.52 We recommend that, where a tamaiti whāngai has not been adopted under the Adoption Act 1955, tikanga should determine whether or not the intestacy regime should be applied to the family members affected by the whāngai relationship. We recommend that a person's standing to succeed as a certain family member in relation to the whāngai relationship be determined by the tikanga of the relevant whānau. This would mean that the share of the estate that the individual will receive is determined according to the default intestacy rules.
- 7.53 For example, where there is no adoption under the Adoption Act, we recommend that tikanga of the relevant whānau should determine:
- (a) the eligibility of a tamaiti whāngai to succeed as “child” to the intestate estate of their matua whāngai;
 - (b) the eligibility of a tamaiti whāngai to succeed as “child” to the intestate estate of their birth parent;
 - (c) the eligibility of a matua whāngai to succeed as “parent” to the intestate estate of their tamaiti whāngai;
 - (d) the eligibility of a birth parent to succeed as “parent” to the intestate estate of their child who is a tamaiti whāngai of a matua whāngai; and
 - (e) the eligibility of a tamaiti whāngai to succeed as “sibling” of the intestate, or the eligibility of an individual to succeed as “sibling” to an intestate tamaiti whāngai.
- 7.54 We recommend that the Government should consider the effect that adoption under the Adoption Act should have on the intestate succession rights of whāngai where there has been an adoption under state law. While this consideration is ongoing, we recommend a continuation of the status quo. Thus, where the tamaiti whāngai has also been legally adopted according to the Adoption Act, we recommend that:
- (a) the adopted child should be eligible to succeed as “child” to the intestate estate of their adoptive parent;
 - (b) the adopted child should be ineligible to succeed as “child” to the intestate estate of their birth parent;
 - (c) the adoptive parent should be eligible to succeed as “parent” of the adopted child;
 - (d) the birth parent should be ineligible to succeed as “parent” of the adopted child; and
 - (e) the adopted siblings should be eligible to succeed as “siblings” and birth siblings should not be eligible to succeed.
- 7.55 Under our recommendations, it would not be the mere existence of a whāngai relationship that would be determined by tikanga but whether that whāngai relationship should create succession rights. The discretion provides flexibility to consider the circumstances of each whāngai relationship, which might include consideration of the reasons why the child became a whāngai, the duration of the whāngai relationship, the presence or absence of a whakapapa connection and the appropriate tikanga in a whānau to reach outcomes that reflect those differences. The flexibility is also important to protect against an individual succeeding under the intestacy regime from multiple people where that would not be tika for the whānau involved.
- 7.56 Introducing whāngai relationships into the intestacy regime will reduce certainty within the distribution of some intestate estates. We consider the importance of acknowledging

whāngai where that is what the tikanga of the relevant whānau provides outweighs any difficulties this may cause to the efficient administration of an estate, and this is what we heard from submitters. Requiring that the share received by the individual continues to be determined according to the new intestacy provisions will alleviate disputes occurring about the amount of each individual's entitlement. However, disputes may arise about the eligibility of a person in a whāngai relationship to succeed. Under current law, the High Court has jurisdiction over whether someone is eligible to receive an entitlement under the intestacy rules.²⁷ As discussed in Chapter 11, we consider it would be appropriate to enable the Family Court to have concurrent jurisdiction over whether a person was in an eligible whāngai relationship, noting that the Family Court would have jurisdiction over this issue in a family provision claim. In that Chapter, we also discuss the potential role of the Māori Land Court in determining such questions, while in Chapter 13 we discuss the out-of-court resolution of disputes.

- 7.57 Each individual should have the ability to succeed only as one category of eligible family members in a single intestacy. For example, where the intestate is a grandparent who was the matua whāngai of their grandchild and tikanga determines that the tamaiti whāngai is eligible to succeed as a “child” of the intestate under the intestacy rules, they should not also be eligible to succeed as a “grandchild” of the intestate.
- 7.58 We heard very little in our consultation about the implications for succession in relation to customary practices of caring for a child other than a birth child undertaken by other ethnic groups in Aotearoa New Zealand. The Government is considering customary adoption in its review of adoption laws and may wish to specifically address succession in that context.²⁸

Unborn children

- 7.59 In Chapter 5, we discuss posthumous reproduction, which refers to children born from gametes (sperm or ova) or embryos collected and stored prior to a person's death or, less commonly, from gametes collected shortly after death.
- 7.60 The Administration Act does not contemplate posthumous reproduction. Section 2(1) of that Act provides that a child living at the death of any person includes a child who is conceived but not born at the death but who is subsequently born alive. The law therefore allows children in utero who are later born alive to succeed on intestacy.²⁹
- 7.61 Neither is posthumous reproduction specifically contemplated in the Status of Children Act 1969. For example, section 5 of the Status of Children Act provides that a child born to a woman within 10 months after the marriage has been dissolved by death is presumed to be the child of that woman and the former husband. The status of a child born from posthumous reproduction will instead be governed by Part 2 of the Status of Children

²⁷ Administration Act 1969, s 5(1).

²⁸ Tāhū o te Ture | Ministry of Justice *Adoption in Aotearoa New Zealand: Discussion document* (18 June 2021) at 29–31.

²⁹ In the Tasmanian case *Re Estate of K* (1996) 5 Tas R 365, (1996) 131 FLR 374, the Court took a broader approach to conception by providing that intestate succession rights could be afforded to a child who is born after the death of their father from a fertilised embryo stored prior to death. In Québec in 2017, the Court of Appeal recognised the filiation (lineage) of a child born from a stored embryo more than a year after the father's death, thus entitling the child to succeed to their father's intestate estate: *Droit de la famille — 171644* [2017] QCCA 1058, [2017] QJ No 9197.

Act, which governs the status of children conceived as a result of assisted human reproduction procedures, and the deceased who produced the ovum or sperm will be considered a donor rather than the legal parent of the child.

- 7.62 In the Issues Paper, we proposed two reform options for consideration if posthumous reproduction is enabled through revised Advisory Committee on Assisted Reproductive Technology (ACART) guidelines:³⁰
- (a) Retain the current law, which has the effect of excluding children born from posthumous reproduction.
 - (b) Amend the law to include children born from posthumous reproduction provided that the child is in utero within 12 months from the grant of administration of the estate unless this time period has been extended by the court.

Results of consultation regarding posthumous reproduction

- 7.63 Several submissions addressed the topic of posthumous reproduction.
- 7.64 Two submitters, MinterEllisonRuddWatts and Chapman Tripp, favoured retaining the current law excluding children born from posthumous reproduction (Option One) because of the risk that the class could be indefinite and because it would not be in contemplation of the deceased (or they would have made specific provision).
- 7.65 Three submitters favoured Option Two: Public Trust, TGT Legal, and Michael Reason and Azania Watene in their joint submission. The submitters noted that the proposed reform would support the rights and best interests of children born from posthumous reproduction and, where there is evidence of consent to the pregnancy, it would most likely align with the intent of the deceased to provide for that child.
- 7.66 Two further submitters, Perpetual Guardian and ADLS, agreed that children conceived prior to death and in utero should be eligible to succeed but were unsure about what should occur in respect of the more complex situation where children are born from posthumous reproduction.

Conclusions

- 7.67 We recommend that:
- (a) children in utero at the time of the deceased's death who are later born alive should continue to be eligible to succeed in an intestacy; and
 - (b) children born from posthumous reproduction should continue to be ineligible to succeed in an intestacy.
- 7.68 In principle, we support children born from posthumous reproduction being eligible to succeed from a parent. We consider this would be in the best interests of such a child, it would recognise that a child born from posthumous reproduction retains their whakapapa connection and it would avoid treating children differently based on the way they came

³⁰ See Advisory Committee on Assisted Reproductive Technology *Proposed Guidelines for the Posthumous Use of Gametes, Reproductive Tissue and Stored Embryos: Stage two consultation document* (Manatū Hauora | Ministry of Health, July 2020) for more detail on the proposed guidelines; and see also Chapter 5.

into the world.³¹ However, the default intestacy rules need to be simple and certain for those that need to apply them, and they should lead to the efficient and expeditious administration of an estate.

- 7.69 In the Issues Paper, we explained that, in order to balance the rights of other entitled family members and to facilitate timely distribution of an intestate estate, there should be a time limit for when the child must be in utero. We proposed 12 months from the grant of administration in Aotearoa New Zealand, which would align with the proposed limitation periods for making a claim against the estate under the new Act.
- 7.70 On further consideration, we conclude that it is unlikely that a child conceived posthumously will be in utero within 12 months of the grant of administration. Posthumous reproduction is likely to require approval from the Ethics Committee on Assisted Reproductive Technology (ECART),³² and the number of applications ECART can consider each year is limited.³³ Therefore the time limit would need to be longer than that proposed to meaningfully include children born from posthumous reproduction, increasing the delay for distributing those estates without certainty that a child will be born.³⁴ Furthermore, some children will not be caught by a longer time limit, and it may be more justifiable to continue the current rule requiring unborn children to be in utero at the time of death than to impose a later arbitrary time after the grant of administration in which a child must be in utero.
- 7.71 We also expect that legal advice will form part of the processes around gamete retrieval and posthumous use, and that will include advice around updating wills. ACART has proposed that, when considering an application for ethics approval, ECART must be satisfied that the intending parent(s) have been encouraged to obtain independent legal advice, including advice on the implications for inheritance rights.³⁵
- 7.72 Finally, under our recommendations, where the intending parent was the intestate's partner and the intestate had no child from a different relationship, the partner will inherit everything anyway.³⁶ In all other situations, the intending parent should be taken to have

³¹ See Manitoba Law Reform Commission *Posthumously Conceived Children: Intestate Succession and Dependents Relief — The Intestate Succession Act: Sections 1(3), 6(1), 4(5), 4(6) and 5* (Report 118, 2008) at 16; and Law Reform Commission of Saskatchewan *Reform of The Intestate Succession Act, 1996: Final Report* (2017) at 15.

³² Advisory Committee on Assisted Reproductive Technology *Proposed Guidelines for the Posthumous Use of Gametes, Reproductive Tissue and Stored Embryos: Stage two consultation document* (Manatū Hauora | Ministry of Health, July 2020) at [65].

³³ Te Aka Matua o te Ture | Law Commission *Te Kōpū Whāngai: He Arotake | Review of Surrogacy* (NZLC IP47, 2021) at [5.21]; and Chapter 5.

³⁴ British Columbia allows the descendant to inherit where they were born two years after the deceased's death, and in Manitoba, the Law Reform Commission recommended that the posthumously conceived children should be eligible to inherit if they were conceived within two years of the grant of administration: see *Wills, Estates and Succession Act* SBC 2009 c 13 at s 8.1; and Manitoba Law Reform Commission *Posthumously Conceived Children: Intestate Succession and Dependents Relief — The Intestate Succession Act: Sections 1(3), 6(1), 4(5), 4(6) and 5* (Report 118, 2008) at 24 and recommendation 1.

³⁵ Advisory Committee on Assisted Reproductive Technology *Proposed Guidelines for the Posthumous Use of Gametes, Reproductive Tissue and Stored Embryos: Stage two consultation document* (Manatū Hauora | Ministry of Health, July 2020) at 41.

³⁶ See the discussion below on the distribution between partner and descendants.

made the decision cognisant of the fact that the child would not have any right to inherit from the intestate parent.

- 7.73 Legal parenthood laws in Aotearoa New Zealand are not fit for purpose, and the absence of any consideration of posthumous reproduction in the Status of Children Act is one example of this.³⁷ While we are not proposing a change to the intestacy rules to provide for posthumous reproduction, the current laws may affect a posthumously conceived child's rights when there is a will in place but that will provides for the deceased's "children" and the deceased was deemed not to be the parent of the posthumously conceived child.³⁸ The Government may wish to give further consideration to the current laws on legal parenthood in relation to children born from posthumous reproduction.³⁹

Defining "issue"

RECOMMENDATION

R34

The term "descendants" should be used in the new intestacy provisions in place of the term "issue."

- 7.74 The current law uses the term "issue" but does not define it.⁴⁰ In the Issues Paper, we suggested our preference for replacing this with the better-understood term "descendants".
- 7.75 Public Trust, NZLS, Morris Legal and Chris Kelly all generally agreed in their submissions that the term "issue" is outdated and that descendants or lineal descendants would be preferable. NZLS did note, however, that it would be more accessible to simply use "children". Michael Reason and Azania Watene noted in their joint submission that the term "descendants" is also inaccessible to the average lay reader.
- 7.76 The primary goal when replacing the term issue should be to make the intestacy regime easier to understand. We recommend that the new provisions use the term "children" wherever possible and refer to the term "descendants" where the context makes it necessary. It should be made clear in the legislation that the next generation will only inherit where their parent was eligible to take an absolute interest but did not survive the deceased. As explained above, the terms "children" and "descendants" should not be defined to include step relationships and children born from posthumous reproduction but should include whāngai when the tikanga of the relevant whānau determines that they should be included.

³⁷ Aspects of legal parenthood are being considered by the Commission's review of surrogacy and the Ministry of Justice's review of adoption in Aotearoa New Zealand: see Te Aka Matua o te Ture | Law Commission *Te Kōpū Whāngai: He Arotake | Review of Surrogacy* (NZLC IP47, 2021) at ch 7; and Tāhū o te Ture | Ministry of Justice *Adoption in Aotearoa New Zealand: Discussion document* (18 June 2021).

³⁸ Nicola Peart "Life beyond Death: Regulating Posthumous Reproduction in New Zealand" (2015) 46 VUWLR 725 at 743.

³⁹ The Commission began this work in 2003: see Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005).

⁴⁰ The intestacy regime in Aotearoa New Zealand is not alone in failing to define "issue". The term "issue" is used frequently in intestacy regimes internationally and is rarely defined.

Defining “personal chattels”

RECOMMENDATIONS

R35

The definition of personal chattels used in the new intestacy provisions should be amended to be consistent with the definition of family chattels in the PRA, including the recommended change in the PRA review, so that the definition is amended to refer to those items “used wholly or principally for family purposes” (see R11 in the PRA review).

R36

Heirlooms and items of special significance should not be expressly excluded from the definition of family chattels in an intestacy.

7.77 Under the current law, the intestate’s surviving partner is entitled to receive the intestate’s “personal chattels”. The Administration Act defines personal chattels, in relation to any person who has died, to mean:⁴¹

all vehicles, boats, and aircraft and their accessories, garden effects, horses, stable furniture and effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors, and consumable stores, which immediately before his or her death were owned by him or her or in which immediately before his or her death he or she had an interest as debtor under a security interest as defined in the Personal Property Securities Act 1999, or as purchaser under a hire purchase agreement; but does not include any chattels used exclusively or principally at the death of the deceased for business purposes or money or securities for money

7.78 We conclude that a surviving partner should remain entitled to certain items, as we explain further below. However, the current definition of personal chattels is outdated.

7.79 In the Issues Paper, we proposed that the definition of personal chattels should be modernised with reference to the definition of “family chattels” in the PRA as amended in accordance with our recommendations in the PRA review.⁴² We expressed our preference for the definition to expressly exclude taonga and proposed the possibility of also expressly excluding heirlooms. However, we took a preliminary view that items of special significance to the deceased should not be excluded from the definition.

Results of consultation

7.80 All submissions addressing the definition of personal chattels agreed that the definition needed to be modernised. Public Trust, NZLS, ADLS, Succeed Legal and Morris Legal expressed their support for amending the definition to accord with the definition of family

⁴¹ Administration Act 1969, s 2(1).

⁴² Property (Relationships) Act 1976, s 2 definition of “family chattels”. In the PRA review, we recommended amending the definition of family chattels to those items “used wholly or principally for family purposes”: Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R11 and [3.86]–[3.89].

chattels in the PRA. Several submitters also said that taonga should be expressly excluded from the definition.

- 7.81 NZLS submitted that heirlooms should also be excluded from the definition, in line with the PRA. Succeed Legal commented that, where a deceased left a will, a personal representative is often left with the responsibility of dividing and determining assets between beneficiaries and therefore it is not of significant hardship to require an administrator to make a similar determination regarding an heirloom under intestacy. However, they would also support continuing the current law, which does not expressly exclude heirlooms.

Conclusions

- 7.82 We recommend that “personal chattels” in the Administration Act is replaced by “family chattels”, which would mean chattels of the following kind owned by the intestate and used wholly or principally for family purposes:

- (a) household furniture;
- (b) household appliances, effects, or equipment;
- (c) articles of household or family use or amenity or of household ornament, including tools, garden effects and equipment;
- (d) motor vehicles, caravans, trailers, or boats and accessories of any of these items; and
- (e) household pets.

- 7.83 It would include any of these chattels purchased under a hire purchase or conditional sale agreement or an agreement for lease or hire.⁴³

- 7.84 However, it would exclude:

- (a) chattels used wholly or principally for business purposes; and
- (b) money or securities for money.

- 7.85 As we recommend in Chapter 3 that taonga should be excluded from automatic distribution according to state succession law, it is not necessary to expressly exclude taonga from the definition of family chattels.

- 7.86 We recommend that there is no express exclusion for heirlooms in the definition of family chattels in intestacy.

- 7.87 In the PRA context, the courts have explained that an heirloom is an item of particular importance that is passed down from one generation to another in accordance with some special family custom.⁴⁴ There are good reasons both for and against specifically excluding heirlooms from the definition of family chattels.

- 7.88 In favour of expressly excluding heirlooms is that situations may arise where the intestate’s children are devastated that an heirloom passes to the surviving partner. It

⁴³ Consideration should also be given to the Personal Property Securities Act 1999 when addressing the definition of family chattels in the new Act and the new Relationship Property Act.

⁴⁴ *Humphrey v Humphrey* FC Christchurch FAM-2003-009-3044, 25 May 2005 at [112]. See also *H v F* FC Auckland FAM-2005-004-1312, 27 January 2006 at [48]; and *Stuart v Stuart* FC Christchurch FAM-2003-00-5175, 16 March 2005 at [19].

may also contradict the intestate's intentions. Excluding heirlooms from the definition of family chattels would mean that these do not automatically pass to the surviving partner, and an administrator will then be required to value and distribute the heirlooms between the surviving partner and other family members. This also improves consistency with the PRA, which was supported by most of the few submissions we received on this point.

- 7.89 However, there are also good grounds for no express exclusion of heirlooms. First, we have not heard in our consultation that the absence of an express exclusion causes problems in practice. Second, in comparable jurisdictions that define certain chattels that a surviving partner takes in intestacy, it is uncommon for heirlooms to be expressly excluded from that definition.⁴⁵ Third, it may be onerous to require an administrator to determine whether an item was an heirloom (although a personal representative is often left with the responsibility of dividing and determining assets between beneficiaries so, in many cases, this additional exercise may be of little consequence).⁴⁶
- 7.90 We have concluded that there is not a policy problem that warrants reform. We would hope that, in most cases, family could come to a negotiated solution about who should take possession of an heirloom. We also note that, where a person is in possession of heirlooms and has a preference about what should happen to those heirlooms when they die, that person should be encouraged to make a will.
- 7.91 In the PRA review, the Commission recommended that items of special significance should be expressly excluded from the definition of family chattels.⁴⁷ This would include items that have special meaning to a partner and are irreplaceable in that a similar substitute item or its monetary value would be an insufficient replacement.⁴⁸ We do not propose that this exception is made to the definition of family chattels in the intestacy rules. One of the purposes of distinguishing personal chattels from other property is to reduce conflict over the succession of particular items. Carving out items of special significance to the intestate might undermine this benefit and, unlike heirlooms, an item of special significance to the intestate may not be significant to the intestate's children or may be significant to the intestate's partner.
- 7.92 Where the intestate is survived by a partner and descendants, the surviving partner should continue to be entitled to the intestate's family chattels based on the amended definition set out above. This approach will discourage conflict over ownership of the items and help to avoid delay for administrators. We also anticipate that the intestate's partner will have depended on several of the items for day-to-day living. A surviving partner's entitlement to the family chattels should cause less disruption for the surviving partner than if the chattels were to be sold or distributed to other beneficiaries.

⁴⁵ Scotland is the only jurisdiction across the United Kingdom, Australia and Canada to exclude heirlooms: see Succession (Scotland) Act 1964, ss 8(6)(b)–(c). Section 8(6)(c) defines heirloom to mean any article that has associations with the intestate's family of such nature and extent that it ought to pass to some member of that family other than the surviving spouse of the intestate. The position of heirlooms was raised by the Law Commission of England and Wales and Australia's National Committee, but neither made recommendations to exclude heirlooms from the definition of personal chattels: Law Commission of England and Wales *Distribution on Intestacy* (Law Com WP No 108, 1988) at 19; and New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at [4.17]–[4.19].

⁴⁶ As raised by Succeed Legal in their submission.

⁴⁷ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R21.

⁴⁸ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R22.

Qualifying relationships

RECOMMENDATIONS

- R37** The same criteria that qualify a partner for relationship property entitlements (R11–R14) should apply to qualify a partner to succeed in an intestacy.
- R38** Separated surviving partners should remain eligible to succeed in an intestacy provided no more than two years have elapsed since the surviving partner and the intestate ceased living together as a couple.
- R39** Where a partner has died within two years of separation, and the couple has divided their relationship property by entering an agreement that does not conform to the new Act's requirements, the surviving partner should remain eligible to succeed in an intestacy. The court should, however, retain power to give effect to a non-compliant settlement agreement if non-compliance has not caused material prejudice to the parties.

- 7.93 The current law provides that the intestate's husband, wife, civil union partner or surviving de facto partner⁴⁹ may succeed. A de facto partner of less than three years will be an eligible partner only where there is a child of that relationship or the surviving partner had made substantial contributions to that relationship.⁵⁰ Where there is more than one qualifying relationship, the partners share evenly in the property allocated for a surviving partner.⁵¹
- 7.94 The Administration Act does not specify what the position should be when married or civil union partners have separated and entered into a settlement agreement but have not obtained a formal dissolution or separation order. Cases have reached different conclusions about whether the surviving former spouse or civil union partner should remain eligible in the intestacy.⁵² The uncertainty only arises in respect of spouses and civil union partners because, until the marriage or civil union is formally dissolved, they technically remain married or in a civil union. De facto partners, on the other hand, cease to be in a de facto relationship when they cease to live together as partners.

Results of consultation

- 7.95 In the Issues Paper, we expressed our preferred view that a surviving partner from a de facto relationship should be eligible in an intestacy where they would also be eligible

⁴⁹ As defined in the Property (Relationships) Act 1976, ss 2 and 2C–2D: see Administration Act 1969, s 2(1) definition of “de facto relationship”.

⁵⁰ Administration Act 1969, s 77B. See also ss 2E and 14A of the Property (Relationships) Act 1976.

⁵¹ Administration Act 1969, s 77C.

⁵² The courts have interpreted s 77C of the Administration Act 1969 differently. See *Re Trotter* HC Christchurch CIV-2009-409-2584, 10 May 2010; *W v P* [2012] NZFC 3293; and *Warrender v Warrender* [2013] NZHC 787, [2013] NZFLR 565.

under the PRA (as amended pursuant to our recommendations in the PRA review), including short-term de facto relationships.⁵³

- 7.96 Submitters commented on what should amount to a qualifying relationship when considering one partner's entitlements when the other partner dies. We discuss these comments in Chapter 4 regarding relationship property entitlements. In respect of intestacy, Succeed Legal questioned whether it would be in line with societal views to exclude from intestacy entitlements de facto relationships of less than three years where there is no child of the relationship or where there have not been substantial contributions.
- 7.97 In the Issues Paper, we also presented our preliminary view that a surviving partner who had separated from the intestate prior to their death should remain eligible to succeed under the intestacy regime provided no more than two years had elapsed since they ceased living together as a couple. Partners would also be able to contract out of and settle claims against each other's estates under the new Act provided the agreements conform to the new Act's procedural requirements. However, we contemplated that this proposal would not exclude partners who had informally settled the division of their relationship property. Where one partner dies within two years of separation, the other partner would remain eligible under the intestacy regime. Noting that this approach may mean the partner gets a windfall at the expense of other beneficiaries and be contrary to the intestate's intentions, we asked submitters to comment on whether there should be a mechanism whereby the affected beneficiaries should be able to challenge the partner's eligibility because of the informal settlement of their relationship property matters.
- 7.98 We received submissions from ADLS, Succeed Legal, Morris Legal and TGT Legal about the proposals for separated partners. All four submitters agreed with the proposal to place a two-year limit on a former partner's eligibility. They also agreed with the proposal to preclude former partners from being eligible to claim in intestacy where those partners have settled their relationship property division or contracted out of eligibility and these agreements have met the procedural requirements discussed in Chapter 10.
- 7.99 ADLS, Succeed Legal and Morris Legal disagreed with the proposal to take account of informal settlement agreements because it would undermine the preference for settlement agreements to meet the procedural requirements. Morris Legal submitted alternative options, including deeming the surviving former partner as having elected a division of relationship property or having a mechanism whereby affected family members could make a claim in these circumstances.

Conclusions

- 7.100 We recommend that people who, prior to the death of their partner, were in qualifying relationships for the purposes of relationship property entitlements should also be in qualifying relationships for the purposes of the intestacy regime. Those qualifying criteria are set out in Chapter 4. By way of summary, a qualifying relationship would include:

⁵³ These are discussed in Chapter 4.

- (a) surviving spouses, civil union partners and de facto partners who have been in a de facto relationship for three years or more;⁵⁴
- (b) partners in a de facto relationship of less than three years that meet the additional eligibility criteria of:
 - (i) there being a child of the relationship and the court considers it just to make orders;⁵⁵ or
 - (ii) the applicant has made substantial contributions to the relationship and the court considers it just to make an order for division; and
- (c) separated partners provided that no longer than two years have elapsed between the partners ceasing to live together in the relationship and the death.

7.101 Where the intestate is survived by more than one qualifying partner, we think these partners should share evenly in the property allocated for a surviving partner.⁵⁶ This would not represent a change from the current law.⁵⁷

7.102 While we recognise that our recommended approach to separated partners may require an administrator to make difficult factual determinations about the date of separation, we favour it because it enables consistency between the treatment of married, civil union and de facto partners.⁵⁸

7.103 In Chapter 10, we recommend that partners should be able to contract out of and settle claims against each other's estates under the new Act provided the agreements conform to the new Act's procedural requirements. If the partners have separated and entered an agreement that purports to settle all entitlements and claims to the other's property, even if the marriage or civil union has not been formally dissolved, we recommend that the terms of the agreement should mean the surviving partner is ineligible to receive in the deceased partner's intestacy.

7.104 Where couples have settled the division of their relationship property without entering an agreement that conforms to the new Act's requirements and one partner dies within two years of separation, the other partner should remain eligible under the intestacy regime. The court should, however, retain power to give effect to a non-compliant settlement agreement if non-compliance has not caused material prejudice to the parties

⁵⁴ The rules applying to de facto relationships would include a presumption that two people are in a qualifying de facto relationship if they have maintained a common household for a period of at least three years: see *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R26.

⁵⁵ In the PRA review, we said the court must be satisfied it is just to make "division" orders, but that could be applied to intestacy entitlements.

⁵⁶ Note several Australian jurisdictions expressly provide that the surviving partners can enter a written agreement or obtain a court order within a set period to distribute the property differently: Succession Act 2006 (NSW), s 125; Succession Act 1981 (Qld), s 36; Intestacy Act 2010 (Tas), s 26; Administration and Probate Act 1958 (Vic), ss 70Z–70ZE. The distribution of personal chattels can cause difficulties where there are contemporaneous partners, and some jurisdictions make special provision for these: see for example Administration and Probate Act 1969 (NT), s 67(3).

⁵⁷ Administration Act 1969, s 77C. See Chapter 4 for our proposed rules to share relationship property contested by surviving partners from contemporaneous relationships.

⁵⁸ The inconsistency in the current law may constitute discrimination under human rights law: New Zealand Bill of Rights Act 1990, s 19(1); and Human Rights Act 1993, s 21.

(discussed further in Chapter 10).⁵⁹ Under this mechanism, a personal representative or an affected beneficiary in an intestacy could apply to the court to give effect to the non-complying settlement agreement.⁶⁰

Distributing to descendants when their parent died prior to the intestate

RECOMMENDATION

R40

The per stirpes/by family distribution of intestate estates should continue.

7.105 In the Issues Paper, we presented two options for distributing an intestate estate where the family member of the intestate who would otherwise receive a share has died but has children:

- (a) Option One: Retain the existing per stirpes (by family) distribution. Distribution by family works by dividing a deceased parent's share in equal portions among their living children.
- (b) Option Two: Introduce a limited per capita (by head) distribution at each generation. This would mean that, when some but not all of one generation had died before the intestate, each child would take an equal portion of what their parent would have inherited (the per stirpes/by family distribution would apply), but when an entire generation has predeceased the intestate, that generation's children would all take an equal share (the per capita/by head distribution would apply).

7.106 The diagram below describes how these options would work using the example of an intestate woman with two sons who predeceased her and six grandchildren, four from one son and two from the other.

- (a) Under Option One, son A's four children would get one-quarter of their father's half of the estate (one-eighth of the estate each) and son B's children would get a half of their father's half of the estate (one-quarter of the estate each).
- (b) Under Option Two, the six grandchildren would each get one-sixth of the whole estate. If son B was still alive, both options would lead to the same result: Son B would get half of the estate, and son A's four children would each get a quarter of son A's half (one-eighth of the estate).

⁵⁹ Comparable to s 21 of the Property (Relationships) Act 1976.

⁶⁰ Comparable to s 21H of the Property (Relationships) Act 1976.

Property outside the estate

RECOMMENDATION

R41

The intestacy regime should continue to take no account of property that does not fall into the estate.

7.110 Currently, the intestacy regime takes no account of property that does not fall into the estate, such as property the intestate owned as joint tenant that has accrued to the surviving joint tenants by survivorship or property the intestate disposed of before their death, such as by gift. Some may consider it unfair that a person who has received property from the intestate during the intestate's lifetime in addition receives the full extent of their entitlement under the intestacy regime. In the Issues Paper, we proposed that the intestacy regime should continue to take no account of property that does not fall into the estate.

Results of consultation

7.111 Of the few submitters who addressed this point, most agreed with the proposal, including Public Trust, NZLS, Succeed Legal and TGT Legal. ADLS, however, submitted that the intestacy rules should take account of property outside the estate to achieve an equitable sharing of the estate property. ADLS provided the example of a deceased who had settled assets on trust to the benefit of a partner with no benefit to descendants.

Conclusion

7.112 We recommend that the intestacy regime should continue to take no account of property that does not fall into the estate.

7.113 An intestacy regime that seeks to take account of gifts made before the intestate's death or assets that pass by survivorship would be complicated. International approaches vary. Some jurisdictions require administrators to take account of lifetime gifts made within a certain time period (normally five years) unless a contrary intention can be proved.⁶⁵ Other jurisdictions require administrators to take lifetime gifts into account only where there is evidence the intestate intended the gift to be an advancement on the recipient's share of the estate.⁶⁶ Such provisions are generally aimed at achieving fairness or equality. However, they may not reflect the intestate's intention because, for example, the intestate may have intended jointly owned property to pass by survivorship on their

⁶⁵ See for example Australian Capital Territory, Northern Territory and South Australia: Administration and Probate Act 1929 (ACT), s 49BA; Administration and Probate Act 1969 (NT), s 68(3); Administration and Probate Act 1919 (SA), s 72K.

⁶⁶ This is common in Canadian provinces: see The Intestate Succession Act CCSM 1990 c 185, s 8; Wills, Estates and Succession Act SBC 2009 c 13, s 53; Wills and Succession Act SA 2010 c W-12.2, ss 109 and 110; Intestate Succession Act RSNWT 1988 c I-10, s 11; Estates Administration Act RSO 2014 c E.22, s 25; Devolution of Estates Act RSNB 1973 c D-9, s 73; Intestate Succession Act RSNS 1989 c 236, s 13; Estate Administration Act RSY 2002 c 77; and Intestate Succession Act RSNWT (Nu) 1988, c I-10, s 11.

death. It may be a considerable task for an administrator to scrutinise transactions the intestate made in the five years before death. Disputes may also occur about the value of the advancement or whether any oral or written statement made by the intestate is sufficient proof of their intention.

- 7.114 Many jurisdictions have done away with these types of provisions in the context of intestacy, and this has commonly been the recommendation of law reform bodies, including the Australian National Committee for Universal Succession Laws, the South Australian Law Reform Institute, the Law Commission of England and Wales and the Law Reform Commission of British Columbia.⁶⁷
- 7.115 The intestacy regime's function is to distribute property that the intestate did not dispose of through a will. It seems contrary to this aim to unwind dispositions or survivorship arrangements made before death.
- 7.116 In Chapter 8, we recommend that, where a family member wishes to claim relationship property rights or family provision under the new Act but there is insufficient property in the estate, there should be rights in some circumstances to recover the deceased's property that falls outside the estate. We recommend that there should be an ability to claw back property that the deceased disposed of with intent to defeat a person's rights or the deceased's interest in joint tenancy property. Consequently, although an administrator would not be required to take into account property falling outside an estate, a claimant could still exercise rights to recover property through these anti-avoidance mechanisms in some cases.

Statutory trusts for minors

RECOMMENDATION

R42

A minor who is eligible to succeed in an intestacy should continue to take a vested interest held on trust until they reach 18 years.

- 7.117 Section 78 of the Administration Act sets out the rules relating to statutory trusts for descendants and other classes of relatives. The section is complicated, and its relationship to the distribution rules in section 77 is sometimes misunderstood.⁶⁸
- 7.118 The effect of section 78 is that, if a beneficiary in an intestacy is under 18 years,⁶⁹ their share of the estate is held on trust for them. If a beneficiary dies before turning 18, their

⁶⁷ New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at Recommendation 43; South Australian Law Reform Institute *South Australian Rules of Intestacy* (Report 7, 2017) at Recommendation 43–Recommendation 44; Law Commission of England and Wales *Family Law: Distribution on Intestacy* (Law Com No 187, 1989) at [62]; and Law Reform Commission of British Columbia *Report on Statutory Succession Rights* (LRC 70, 1983) at 38–39.

⁶⁸ Chris Kelly made this comment in his submission.

⁶⁹ It is only since 30 January 2021 that this has changed to 18 years: see Trusts Act 2019, sch 4 pt 1. Previously, those under 20 years or otherwise married or in a civil union could take an absolute interest: Trustee Act 1956, s 40.

share of the estate will be distributed to the intestate's next of kin as if the minor beneficiary had predeceased the intestate.

- 7.119 Several other jurisdictions provide for the absolute vesting of a minor's share at any age.⁷⁰ This means that a minor's share is ascertained and the minor has the right to it immediately. One of the justifications for absolute vesting at any age is that it allows a minor's share to pass to the minor's children if the minor dies before the age of 18.⁷¹ In the Issues Paper, we expressed our preliminary view that the statutory trust regime for minors should continue.⁷²

Results of consultation

- 7.120 Public Trust, NZLS and ADLS all submitted that minor beneficiaries should continue to take a vested interest held on trust until they reach 18 years of age. The only other submitter on this subject, MinterEllisonRuddWatts, also agreed that minors should take a vested interest. However, they considered that this should be until the person reaches 25 years.

Conclusion

- 7.121 We recommend that a minor should continue to take a vested interest held on trust until they reach 18 years. This approach avoids the possibility that a further grant of administration is required when a beneficiary dies before turning 18.
- 7.122 There will be circumstances in which it is disadvantageous for the share of the estate to be held on trust, such as where the minor's share is of low value and the trust incurs professional management fees. A child's interests are generally best served by the person responsible for their daily care having sufficient cash assets or income. In such circumstances, trustees should have the discretion to distribute the capital. The ability to make such advancements is governed by sections 62–64 of the Trusts Act 2019.⁷³

The prescribed amount for partners

RECOMMENDATION

R43

The prescribed amount which surviving partners of the intestate take in an intestacy when there are descendants or parents of the intestate should be repealed.

⁷⁰ For example NSW, Tasmania, Western Australia, South Australia, Queensland and Victoria: see Succession Act 2006 (NSW), s 138; Intestacy Act 2010 (Tas), s 39; Administration Act 1903 (WA), s 17A; South Australian Law Reform Institute *South Australian Rules of Intestacy* (Report 7, 2017) at [4.7.1]; and New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at [12.9].

⁷¹ South Australian Law Reform Institute *Cutting the cake: South Australian rules of intestacy* (Issues Paper 7, 2015) at [298].

⁷² Note we recommend in Chapter 18 that all new provisions should conform to modern drafting standards.

⁷³ Sections 62–64 of the Trusts Act 2019 replaced ss 40–41 of the Trustee Act 1956, which were overly complex and restrictive: see Te Aka Matua o te Ture | Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [6.11]–[6.15].

- 7.123 Under the current law, a surviving partner is entitled to a prescribed amount in priority to other entitlements where the intestate is also survived by descendants or parents. The prescribed amount is set by regulation and is currently \$155,000 plus interest.⁷⁴
- 7.124 The prescribed amount (sometimes referred to as a statutory legacy) is a method that aims to protect the partner against hardship. Overseas law reform bodies have suggested that one of the main objectives of the prescribed amount is to enable a surviving partner to purchase the intestate's interest in the family home so the partner does not have to move.⁷⁵
- 7.125 In the Issues Paper, we explained that there are several issues arising from the use of a prescribed amount and the way it currently operates:
- (a) It does not reflect the apparent public preference that an estate be shared between partners and children on a fixed proportion basis regardless of the total estate size.⁷⁶
 - (b) It can produce inequitable outcomes. In small estates, the prescribed amount may mean that children receive little or none of the estate, potentially leading to FPA claims for further provision. In other cases, the prescribed amount may not be set high enough to provide the partner with a sufficient legacy. There may be times where the partner's total share of the estate is less than their relationship property entitlement.⁷⁷
 - (c) It is inflexible and does not take into account different ownership structures of the intestate's assets (such as tenancy in common compared with joint ownership).
 - (d) The single fixed sum does not account for geographic variation in housing prices.
 - (e) It is infrequently reviewed and is not responsive to changes in housing prices over time.⁷⁸

Results of consultation

- 7.126 In the Issues Paper, we proposed repealing the prescribed amount for partners.
- 7.127 All the submitters to the Issues Paper who commented on the prescribed amount agreed that it should be repealed. This included Public Trust, Perpetual Guardian, NZLS, ADLS,⁷⁹ Chapman Tripp, MinterEllisonRuddWatts, Succeed Legal, TGT Legal and Te Kani Williams. Public Trust said that, in their experience, the current prescribed amount does not reflect what the intestate would have done if they had left a will.

⁷⁴ Administration (Prescribed Amounts) Regulations 2009, reg 5.

⁷⁵ Law Commission of England and Wales *Intestacy and Family Provision Claims on Death: A Consultation Paper* (Law Com CP No 191, 2009) at [3.9] and [3.14]; and Law Reform Commission of Saskatchewan *Reform of The Intestate Succession Act, 1996: Final Report* (2017) at 9.

⁷⁶ Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at [182] and figure 17.

⁷⁷ This is because, where an intestate is survived by a partner and descendants, the partner will receive the personal chattels, \$155,000 prescribed amount and one-third of the remaining estate.

⁷⁸ The current amount was set in 2009. The average house price in Aotearoa New Zealand in August 2021 was \$937,148: Property Value "Residential House Values" <www.propertyvalue.co.nz>.

⁷⁹ We note that ADLS considered that a prescribed amount should be retained for partners where the intestate is survived by a partner and parent(s) but no descendants.

7.128 On the consultation website, we asked submitters what they thought of the current intestacy regime. The most common criticism that we received related to the prescribed amount. Submitters criticised the prescribed amount either because they considered it was too low and had not kept up with the rise in house prices or because it would leave children with no inheritance when the entire estate was worth less than \$155,000. Several submitters told us that any fixed amount was problematic and should be replaced with a proportion of the estate.

Conclusions

7.129 The prescribed amount for partners should be repealed because of the numerous issues identified above. Submitters unanimously agreed with this recommendation. In the Issues Paper, we explained that the Succession Survey results indicated a preference for sharing the estate between partners and children on a fixed proportion basis that did not differ depending on the estate size.⁸⁰ The current method for distributing between partners and children means the respective proportions are impacted by the total value of the estate. In its place, we recommend that surviving partners are entitled to a fixed portion of the estate, which we discuss further below.

7.130 We acknowledge that moving away from a prescribed amount is a significant change to the intestacy regime and would differ from many comparable jurisdictions.⁸¹ Where overseas law reform bodies have reviewed their intestacy regimes, they have tended to recommend an increase to these prescribed amounts, generally with the view that any increase should reflect rising house prices and inflation.⁸² We considered this option of increasing the prescribed amount and legislating for CPI adjustments but do not see it as a satisfactory solution because it does not accord with the apparent public preference that an estate be shared between partners and children on a fixed proportion basis regardless of the total estate size. For example, we have heard that children sometimes miss out entirely because a family home passes by survivorship to the surviving partner, leaving the estate below the value of the current prescribed amount. Children may feel aggrieved when they receive no inheritance from a parent because of the prescribed amount in an intestacy regime, particularly when their parent's partner is not the child's parent. It is also difficult to set a prescribed amount that reflects house prices given the range in house values across different areas in Aotearoa New Zealand.⁸³

⁸⁰ In the scenario, respondents were asked to divide a deceased woman's estate between her two adult children and her second husband. Respondents were first told that the estate was worth \$1 million. They were then asked whether their answer would change if the estate was worth \$150,000. Only seven per cent said they would. About 50 per cent of respondents said that the two adult children should get more than half of the estate regardless of whether it was worth \$1 million or \$150,000: Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at [182] and figure 17.

⁸¹ For example, with the exception of Québec, Newfoundland and Labrador, New Brunswick and Prince Edward Island, a prescribed amount for partners is used in the intestacy regimes throughout Canada, Australia and the United Kingdom.

⁸² See for example New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at Recommendation 6; and Law Reform Commission of Saskatchewan *Reform of The Intestate Succession Act, 1996: Final Report* (2017) at 9.

⁸³ See a similar discussion on a partner's protected interest in the family home under the Property (Relationships) Act 1976 in Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [18.14].

Partner, no descendants but one or more parent

RECOMMENDATION

R44

Where an intestate is survived by a partner, no descendants but one or more parent, the intestacy regime should provide that the partner takes the entire estate.

- 7.131 Under the current law, where the intestate is survived by a partner, no descendants but one or more parent, the partner will take the personal chattels, the prescribed \$155,000 and two-thirds of anything that remains. The parent(s) take the remaining third.
- 7.132 In the Issues Paper, we proposed that the partner should take the entire estate in this situation rather than the intestate's parent or parents receiving a share. We had received feedback from lawyers that this was an area where their clients were commonly surprised by the current law. Additionally, nearly three-quarters (73 per cent) of respondents to the Succession Survey agreed or strongly agreed that a surviving partner should get all of an intestate estate when the intestate is also survived by their mother and brother.⁸⁴
- 7.133 This proposal was overwhelmingly supported by submitters to the consultation website. A small number of submitters felt that particular circumstances should entitle the parent to a share. These included where the parents had contributed to the estate in the form of a gift or loan to buy a home, where the intestate was maintaining a parent at the time of death or regularly during their lifetime, where the parent is in poverty, where the estate was particularly large, or where the intestate was a younger adult. A small minority of submitters disagreed with the proposal, with several suggesting that parents should get some share of the intestate's estate – one-quarter, one-third or one-half – and two submitting that parents should never receive a share of the estate.
- 7.134 Several submitters to the Issues Paper specifically addressed this proposal. NZLS, MinterEllisonRuddWatts, TGT Legal and Chris Kelly supported the proposal. However, ADLS and Jan McCartney QC disagreed, particularly because of a general concern about the growing population of older people and the financial support that they require. ADLS submitted that, when the pool of relationship property assets exceeds a prescribed amount of \$700,000, the intestacy provisions should provide for a parent to receive a minimum of 15 per cent of the estate.
- 7.135 Public Trust submitted that consideration should be given to whether the intestate's parents should receive some of the estate when the children are under a certain age, such as 25 years:

We have noted that in practice where children under this age write a will, they continue to leave all, or a significant portion of, their estate (sometimes half) to their parents (not their partner) or they may opt to leave a significant portion of their estate to their parents/siblings and the other portion to their partner. Either way, parents of children at this stage are still commonly a major beneficiary of their estates.

⁸⁴ Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values – A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at [164] and figure 16.

Conclusion

- 7.136 We recommend that the partner should take the entire estate where the intestate is also survived by one or more parent but no descendants. This change would better reflect the expectations of New Zealanders, as illustrated by the results of the Succession Survey and the strong support for the proposal in consultation.
- 7.137 As the largest professional trustee corporation in Aotearoa New Zealand, Public Trust is in a good position to identify trends among will-makers. It is notable that, in its experience, a person under 25 who has a partner tends to leave a significant portion of their estate to their parent(s). We have considered the possibility of providing an alternative distribution option for those under 25, but we do not recommend this for several reasons:
- A relationship would need to meet the qualifying criteria discussed earlier. Generally, this will mean that the couple were married, in a civil union or in a de facto relationship for three years or more, and this is therefore less likely to occur when the intestate is under 25 years of age.
 - Many people aged under 25 will have little property. Those with more property, such as those that own a home, may be more likely to have a will.
 - An arbitrary age limit may have the unintended effect of triggering grievances, for example, by parents of a child who dies aged 26.
 - It appears from the Succession Survey results and the consultation responses that there is strong public support for prioritising partners. This, combined with the fact that New Zealand's general law and policy does not impose any obligations on a child to support a parent, is reason not to require that a parent takes a share when the intestate is also survived by a partner but no descendants. A child who wants to provide for their parent on death should make a will to that effect.

Partner and descendants

RECOMMENDATION

R45

A surviving partner of an intestate should take the whole of the estate where all the intestate's children are of that relationship. Where one or more of the intestate's children are of another relationship, the intestate's partner should take the family chattels and 50 per cent of the remaining estate, and the intestate's children should share evenly in the remaining 50 per cent.

- 7.138 Under the current law, where the intestate is survived by a partner and descendants, the partner takes the personal chattels, the prescribed amount of \$155,000 and one-third of what remains. As explained above, we consider there are several problems with the use of a prescribed amount.
- 7.139 A theme that has emerged in this review is the difficulty presented by situations where a deceased leaves a surviving partner and children from a former relationship. The difficulty lies in balancing the different family members' interests. When the intestate's surviving partner is the parent of the intestate's children, it might be expected that any wealth the surviving partner takes from the estate would eventually be passed to the children on the

surviving partner's death (the conduit theory). However, where the surviving partner is not the parent of the children, there is less chance of the surviving partner acting as a “conduit” towards the intestate’s children from a different relationship. The Succession Survey suggested that there is some preference for partners taking a greater proportion of the estate where they share children compared with where the children are from a former relationship.⁸⁵

7.140 We presented three options for reform in the Issues Paper.

- (a) Option One: The partner takes the whole of the estate where all the intestate’s descendants are of that relationship. Where one or more of the intestate’s children are of another relationship, the intestate’s partner takes the family chattels and 50 per cent of the remaining estate, and the intestate’s children share evenly in the remaining 50 per cent.
- (b) Option Two: The partner’s share decreases depending on the number of descendants. A partner would take the family chattels and two-thirds of the remaining estate where there is one child (or their descendants where the child died before the intestate parent) or one-half where there are two or more children (or their descendants). It would be irrelevant whether or not the intestate’s children are also children of the partner.
- (c) Option Three: The partner’s share is a set percentage and does not change depending on the number of descendants or the relationship of those descendants to the surviving partner. In the Issues Paper, we proposed that a surviving partner would take the family chattels and half of the remaining estate while the other half would be divided evenly between the intestate’s children (or their descendants where the child died before the intestate parent).

7.141 Some submitters did not prefer any of the options presented. Jan McCartney QC submitted that the division should be relative to the estate size, and Professor Bill Atkin submitted that the starting point should be to calculate the partner’s relationship property entitlement.

7.142 For some submitters to the consultation website, ensuring that a surviving partner could remain in their home was the most important factor, irrespective of the options presented. One submitter to the consultation website suggested that the division should be a matter of agreement for the parties. The submitter suggested that the estate could be held on trust until an agreement was reached, and if no agreement was reached within 10 years, the estate should pass to charity.

Results of consultation regarding Option One

7.143 Fifteen submitters to the consultation website preferred Option One. One submitter who had experience working in the probate registry said that Option One was along the lines

⁸⁵ When presented with a scenario involving a surviving husband and the couple’s two adult children, 64 per cent of respondents favoured the husband getting more than a per capita share of the estate. This was around 42 per cent when the children were from a former relationship: Ian Binnie and others *Entitlements to Deceased People’s Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at [169] and figure 17.

of what most will-makers would do. Several submitters thought that Option One should also depend on the age of the children in the partner's care. For example, where the children of that relationship are under 20 or 25 years, the partner would be entitled to the whole estate but in addition to this changing where there is one or more children of a different relationship, it might also differ when the children are over the prescribed age.

7.144 Eight submitters to the Issues Paper expressed support for Option One. This included Public Trust, Perpetual Guardian, NZLS,⁸⁶ Succeed Legal, TGT Legal, Morris Legal, Chapman Tripp and Chris Kelly.⁸⁷ These were the reasons provided:

- (a) It would give the surviving parent the financial ability to continue raising the children in the same manner they did before the intestate's death and building their wealth.
- (b) More often than not, children ultimately inherit their deceased's parent's share by way of the surviving parent.
- (c) It would best reflect what most people would do with their estate had they made a will.
- (d) It was simple and struck a balance between the entitlements of a partner and those of the descendants, particularly where the descendants are not the biological children of the surviving partner.
- (e) Statutory trusts can be difficult to administer, and it would avoid the need for them in cases where the children were of the same relationship and younger than 18 years.
- (f) It may create better equity in smaller estates.

7.145 However, two submitters, Perpetual Guardian and Succeed Legal, questioned whether its interaction with family provision claims might be problematic. Succeed Legal noted that it might be more difficult when the intestate's children are all of the same relationship but are not in the care of the surviving partner, and they were unsure whether it would be sufficient to rely on a family provision award for those children in such cases.

7.146 Chapman Tripp presented a modified version of Option One whereby the estate would be divided into equal fractions when there were children from another relationship and the surviving partner would take one fraction plus a fraction for each of their children. The other children would each take their own fraction. In Chapman Tripp's view, the intestacy provisions should also be consistent with the rules for family provision, thus intestacy should only benefit dependent children and should exclude adult children without financial need.

Results of the consultation regarding Option Two

7.147 Eight of the submitters to the consultation website preferred Option Two, although one of these submitters proposed that the partner's share might be split in half again so that another portion could be shared among other family members. No further explanations were given by submitters about their reasons for preferring Option Two.

7.148 In addition to their comments in support of Option One, TGT Legal also saw "merit in Option Two, on the basis that it may be more equitable for children to receive specific

⁸⁶ NZLS submitted that it favoured Option One of the options presented but also stated earlier in its submission that it did not believe the intestacy provisions required amendment.

⁸⁷ Chris Kelly submitted that a surviving partner should take two-thirds rather than half of the remaining estate where one of the intestate's descendants is from a different relationship.

entitlements on intestacy (depending on the number of children) so as to mitigate the risk under Option One of the surviving partner being an unreliable conduit”.

- 7.149 No other submitter to the Issues Paper favoured Option Two. Perpetual Guardian said that an issue with Option Two is that where there are minors a trust will need to be in place.

Results of the consultation regarding Option Three

- 7.150 Thirty-one submitters to the consultation website favoured Option Three – more than twice the number that favoured Option One and nearly four times the number that favoured Option Two. However, submitters expressed a wide range of views about the proportions that partners and children (or their descendants) should share.
- 7.151 Six submitters agreed that a partner should receive 50 per cent and the children should share the other 50 per cent. Two submitters felt that the partner’s share should be more than 50 per cent. Conversely, seven submitters considered that the estate should be distributed in equal shares between each individual partner and child, and one submitter thought that the children should share in more than 50 per cent of the estate. Two submitters considered that the size of the estate should make a difference to the proportions, so that a partner would receive a lesser share in a lower-value estate. For three submitters, the relative financial need or dependence of the partner and the children mattered. The length of the relationship mattered to a few individuals for determining the respective proportions.
- 7.152 Three submitters to the Issues Paper preferred Option Three – ADLS, MinterEllisonRuddWatts and Bill Patterson. Patterson stated that it is the simplest option and it would eliminate any delay in the partner receiving their share while descendants are located.

Conclusions on the distribution between partners and descendants

- 7.153 We recommend that a surviving partner should take the whole of the estate where all the intestate’s children are of that relationship (Option One in the Issues Paper). Where one or more of the intestate’s children are of another relationship, the intestate’s partner should take the family chattels and 50 per cent of the remaining estate, and the intestate’s children should share evenly in the remaining 50 per cent. In all situations, a descendant will inherit in their parent’s place where their parent predeceased the intestate.⁸⁸
- 7.154 We favour this approach for several reasons:
- (a) It would best reflect the practices of most will-makers. International studies have indicated a general preference for prioritising a partner over children, particularly where the children are also of that relationship.⁸⁹ The Succession Survey

⁸⁸ See the discussion above about distributing to descendants using the per stirpes/by family method.

⁸⁹ A survey of 548 wills proved in the NSW Probate Registry in 2004 revealed that around 75 per cent of will-makers with a partner and children chose to give the entire residue of their estate to their partner: New South Wales Law Reform Commission *I give, devise and bequeath: an empirical study of testators’ choice of beneficiaries* (Research Report 13, 2006) at [3.9]. A survey of 800 wills filed with the court in Alberta in 1992 identified similar results. Of 260 wills involving a surviving spouse and children, 164 (63 per cent) allocated the entire estate to the spouse: see Alberta Law Reform Institute *Reform of the Intestate Succession Act* (Report No 78, 1999) at 190. Older studies conducted in England and the United States are also cited in that report: at 52. A public attitudes survey conducted in the United Kingdom in 2010

respondents also indicated a preference for prioritising a partner with shared children compared with children of a former relationship, but the majority still favoured splitting an estate evenly between children and partner (either in equal shares or with half the estate being allocated to the partner).⁹⁰

- (b) A surviving parent will often act as a conduit for their children. Children may share the benefit of the surviving parent inheriting in two possible ways. If the children are young, their interests are normally best served by better equipping the surviving parent, and if they are adults, they are likely to inherit any unconsumed portion of property from their surviving parent.⁹¹ If the surviving partner is not the parent of the intestate's children, there is less likelihood the partner would act as a conduit for the intestate's children.
- (c) It eliminates the need for trusts for children of that relationship who are under 18. At times, trusts can be a cumbersome way of providing for minor children.⁹² Difficulties may arise for parents seeking access to funds from trustees for the child's benefit.⁹³
- (d) It avoids fragmenting the estate where the surviving partner is the parent of the children. This may have advantages such as allowing a partner to remain in the home.
- (e) It was supported by most submitters to the Issues Paper, including Public Trust, Perpetual Guardian and NZLS.

7.155 This approach is preferred in several jurisdictions in Australia, Canada and the United States.⁹⁴

found that 51 per cent of respondents would allocate the whole estate to the wife where a married man was survived by his wife and two children over 18 and a further 29 per cent would prioritise the wife. Similar results were seen when respondents were asked about young children: Alun Humphrey and others *Inheritance and the family: attitudes to will-making and intestacy* (National Centre for Social Research, August 2010) at 39–40. Note that, when respondents were asked about a cohabitant instead of a wife, only a third (32 per cent) said that the whole estate should be allocated to the partner: at 43.

⁹⁰ When asked what should happen to the estate when an intestate is survived by their partner and the couple's two adult children, 64 per cent said the partner should get more than a per capita share. When presented with a scenario where the children were from an earlier relationship, around 42 per cent thought the partner should get more than a per capita share: Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at [169] and figure 17. For Māori respondents, these figures were 55 per cent and 35 per cent respectively: at [173] and [179].

⁹¹ See Lawrence W Waggoner "The Multiple-Marriage Society and Spousal Rights under the Revised Uniform Probate Code" (1991) 76 Iowa L Rev 223 at 232–233; and the discussion of conduit theory in Law Commission of England and Wales *Intestacy and Family Provision Claims on Death: A Consultation Paper* (Law Com CP No 191, 2009) at [3.100]–[3.111].

⁹² See the discussion in Law Commission of England and Wales *Family Law: Distribution on Intestacy* (Law Com No 187, 1989) at [36].

⁹³ This concern was raised in consultation in NSW: see New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at [3.45].

⁹⁴ This includes New South Wales, Victoria, Tasmania, Manitoba, Alberta and British Columbia: see Succession Act 2006 (NSW), ss 112 and 113; Administration and Probate Act 1958 (Vic), ss 70K–70L; Intestacy Act 2010 (Tas), ss 13 and 14; The Intestate Succession Act CCSM 1990 c 185, ss 2(2) and 2(3); Wills and Succession Act SA 2010 c W-12.2, s 61; and Wills, Estates and Succession Act SBC 2009 c 13, s 21. It was recommended by the Law Reform Commission of Saskatchewan: see Law Reform Commission of Saskatchewan *Reform of The Intestate Succession Act, 1996: Final Report* (2017) at 10. It also forms part of the Uniform Probate Code that has been enacted by many American states: see Uniform Probate Code § 2-102.

Descendants but no partner

RECOMMENDATION

R46

Where an intestate is survived by descendants but no partner, the intestate's children should share the estate evenly. Per stirpes/by family distribution should apply to the shares available to descendants.

- 7.156 Under the current law, where the intestate is survived by descendants but no partner, all of the estate is held on statutory trusts for the descendants.
- 7.157 In the Issues Paper, we proposed no change to the current law. The submissions we received all agreed with our proposal. This included Public Trust, NZLS, ADLS, MinterEllisonRuddWatts, TGT Legal, Jan McCartney QC and Chris Kelly.

Conclusions

- 7.158 We recommend that the current law should continue, so that where the intestate is survived by descendants but no partner, the intestate's children should share the estate evenly passing to descendants on a per stirpes/by family basis (meaning that children share evenly in the share that their parent would have taken had they been alive). No descendant should take a share of the estate where their parent has also taken a share.⁹⁵
- 7.159 We are confident that this is consistent with public expectations and what most intestate people would do if they were to make wills. No submitter to the Issues Paper disagreed with the proposal, and this aspect of the distribution regime has not been raised as an issue in any of our consultation.

No partner or descendants but siblings and parents

RECOMMENDATION

R47

Where an intestate is not survived by a partner or any descendants, the intestate's parents should share the estate evenly. If the intestate is survived by only one parent, that parent should take the whole estate.

- 7.160 Under the current law, the intestate's parents will take priority over the intestate's siblings.
- 7.161 In the Issues Paper, we commented that while we were not aware of any research into the distribution preferences of New Zealand will-makers when survived by parents and siblings, a public attitudes survey conducted in England and Wales revealed that people

⁹⁵ Any descendant under 18 years would take a vested interest in trust as discussed above.

favoured equal sharing or giving priority to parents.⁹⁶ We expressed our preliminary view that the current priority to parents should be preferred.

- 7.162 We received few submissions regarding this aspect of the distribution regime. Public Trust, NZLS, ADLS, TGT Legal and Chris Kelly all agreed that the intestate's parents should retain priority to inherit in advance of the intestate's siblings. Jan McCartney QC submitted that the estate should be distributed in equal shares between parents and siblings in this situation.

Conclusions

- 7.163 Where the intestate is not survived by a partner or any descendants, the intestate's parents should have priority above siblings.⁹⁷
- 7.164 This is the position under current law as well as in most comparable jurisdictions.⁹⁸ We prefer this distribution mechanism because it allows for the intestate's siblings to inherit from their parents when the parents die. We also note that it received support from five of the six submitters to the Issues Paper.
- 7.165 The alternative option of distributing the estate equally between siblings and parents has the disadvantage of requiring the estate to be divided between more people. In some estates, each beneficiary could receive very little. It may also be more complicated for administrators, particularly when property needs to be sold so that its value can be shared.

No partner, descendants or parents but siblings and nieces and nephews

RECOMMENDATION

R48

Where an intestate is survived by siblings, nieces and nephews but no partner, descendants or parents, the intestate's siblings should share the estate evenly. Per stirpes/by family distribution should apply to the shares available to nieces and nephews or their descendants.

- 7.166 Where the intestate is survived by siblings, nieces and nephews but no partner, descendants or parents, the current law prioritises siblings over nieces and nephews.
- 7.167 Again, this was generally supported by the few submissions we received, including NZLS, TGT Legal and Chris Kelly. One submitter said that the intestacy regime should not extend

⁹⁶ Alun Humphrey and others *Inheritance and the family: attitudes to will-making and intestacy* (National Centre for Social Research, August 2010) at 63; and Gareth Morrell, Matt Barnard and Robin Legard *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families* (Final Report, National Centre for Social Research, 2009) at 17–18. These preferences were also reflected in consultation responses to the New South Wales Law Reform Commission: see New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at [9.10].

⁹⁷ Under the current law, siblings include half-brothers and half-sisters. We do not propose any change to this.

⁹⁸ This includes England and Wales, Northern Ireland, all Australian states (although in Western Australia, siblings get a share of the estate if it is over a certain value: see Administration Act 1903 (WA), s 14) and all common law Canadian provinces (in Québec, the estate is partitioned equally between the parents and siblings: see Civil Code of Québec CQLR c CCQ-1991, § 674). In Scotland, a surviving parent or parents has the right to one-half of the estate and any surviving siblings have the right to the other half: Succession (Scotland) Act 1964, s 2(1)(b).

beyond distributing to a deceased's siblings. Instead, that submitter would prefer to see estates being transferred to the Crown and used to benefit charities.

Conclusion

- 7.168 We recommend no change to the current law. Where the intestate is survived by siblings, nieces and nephews but no partner, descendants or parents, siblings should inherit in priority to nieces and nephews subject to the per stirpes/by family distribution method discussed above.
- 7.169 Administrators would benefit from the ease of transferring the estate to siblings given it is likely to be a smaller class of recipients than nieces and nephews. It also allows for a sibling's share to be distributed to their children if the sibling predeceased the intestate.

No partner, descendants, parents or siblings (or their descendants) but grandparents, aunts and uncles

RECOMMENDATION

R49

Where an intestate is not survived by any partner, descendants, parents, siblings or siblings' descendants, the current distribution method between grandparents and their descendants according to the parental lines should apply.

- 7.170 Under the current law, where the intestate is not survived by any partner, descendants, parents, siblings or siblings' descendants, the estate is split equally between the maternal and paternal grandparents and aunts and uncles.⁹⁹ Priority is given first to grandparents and then to aunts and uncles. This means that a per stirpes/by family distribution will apply. If there are no surviving aunts or uncles (or descendants) on one kinship line, the estate will pass to the other.
- 7.171 In the Issues Paper, we presented two alternative options for the method of distribution:
- (a) Option One: Retain the existing division between the parental lines.
 - (b) Option Two: Introduce a generational distribution. This would mean that aunts and uncles are entitled to the estate only when there is no partner, descendant, parent, sibling (or their descendant) or grandparent.

Results of consultation

- 7.172 Most submissions on the Issues Paper favoured retaining the status quo, Option One. These were Public Trust, NZLS, ADLS, Chapman Tripp, Morris Legal,

⁹⁹ Note that the maternal/paternal terminology does not recognise that legal parenthood does not require motherhood or fatherhood. It does not, for example, recognise the at least 1,476 same sex couples living with children recorded in the 2013 Census: data included in Table 20: Family type with type of couple, available at Tatauranga Aotearoa | Stats NZ "2013 Census QuickStats about families and households" (4 November 2014) <www.stats.govt.nz>. See also Te Aka Matua o te Ture | Law Commission *Relationships and Families in Contemporary New Zealand* | *He Hononga Tangata, he Hononga Whānau i Aotearoa o Nāiane* (NZLC SP22, 2017) at 35. Our preference is to adopt a gender-neutral option. This would also have the benefit of future-proofing the legislation for the potential to have more than two legal parents: see Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [6.67].

MinterEllisonRuddWatts and Succeed Legal. Public Trust said that there was good basis and public opinion to support its retention. For Morris Legal and Chapman Tripp, the current law was the fairer solution and would prevent whole estates being distributed to the next of kin on one side. Morris Legal also agreed that gender-neutral language should be used. Succeed Legal preferred Option One because it is a known process and there is not sufficient need to adjust.

- 7.173 Of the submitters who commented on this proposal on the consultation website, most favoured Option Two. Some said that they had no preference between the two options, and a minority favoured the current law (Option One). Most submitters did not express a reason for their preference, but two submitters commented that they preferred Option Two because it prioritised looking after the oldest relatives. One submitter with experience working in the probate registry said that it is so rare that it is of no consequence, and several submitters considered that none of these relatives should inherit.

Conclusions

- 7.174 Where the intestate is not survived by any partner, descendants, parents, siblings or siblings' descendants, we recommend retaining the current distribution method between grandparents and their descendants according to the parental lines. This was Option One in the Issues Paper.
- 7.175 There are good reasons in support of both the options presented in the Issues Paper. However, Option One was endorsed by several submitters including Public Trust, NZLS and ADLS. It is persuasive that Public Trust commented that there was good basis and public opinion to support the retention of the current law given that Public Trust is likely to have the most comprehensive experience dealing with the administration of intestate estates. Option One also avoids the entire estate going to next of kin on one side of the family when there are next of kin on both sides.¹⁰⁰ We noted in the Issues Paper that people may consider it unfair when, for example, the intestate's maternal grandmother takes everything when there are living paternal aunts and uncles.
- 7.176 Option Two may be considered simpler to understand and apply, and its equal treatment of relatives of the same generation might be more likely to reflect how most intestate people would distribute their estate in that situation. It also received the greatest support from submitters to the consultation website. Option Two may improve efficient estate administration but may also slow it down. For example, if there is a single surviving grandparent, an administrator does not need to identify each aunt or uncle, but if the paternal aunts and uncles were easily identifiable and the maternal aunts and uncles were not, this could delay the paternal aunts and uncles getting their share (a problem that would not arise under Option One).

¹⁰⁰ Manitoba Law Reform Commission *Report on Intestate Succession* (Report 61, 1985) at 32. See also Alberta Law Reform Institute *Reform of the Intestate Succession Act* (Report No 78, 1999) at 154–156.

No living grandparent, aunt, uncle, cousin or closer relative (*bona vacantia* estates)

RECOMMENDATIONS

R50

Where the intestate is not survived by any of the relatives listed above (partner, descendants, parents, siblings, siblings' descendants, grandparents, grandparents' descendants), the Crown should take the estate as *bona vacantia*.

R51

The Crown should have discretion to distribute any or all of the estate to the following parties on application:

- a. Dependants of the intestate (whether kindred or not).
- b. Any organisation, group or person for whom the intestate might reasonably be expected to have made provision.
- c. Any other organisation, group or person.

7.177 Under the current law, when the intestate is not survived by any of the relatives listed above, the estate would be considered ownerless and be taken by the Crown as *bona vacantia* (ownerless property). The Crown may distribute any or all of the estate to provide for the intestate's dependants (whether kindred or not) and other persons for whom the intestate might reasonably have been expected to make provision. Applications are made to Te Tai Ōhanga | The Treasury, which performs the distribution function on behalf of the Crown. At present, it is rare for estates to vest in the Crown as *bona vacantia*.¹⁰¹

7.178 In the Issues Paper, we proposed that the Crown retains its discretion to distribute any or all of a *bona vacantia* estate, but we asked whether the list of possible recipients should be extended to include any other organisation or person on the grounds that a broad list would allow charities, community groups, whānau, hapū or iwi groups or other organisations to utilise funds that would otherwise vest in the Crown. We explained that several Australian states preferred a broader list.¹⁰²

Results of consultation

7.179 Several submitters to the Issues Paper commented on *bona vacantia* estates. Public Trust, NZLS, TGT Legal and Morris Legal agreed that the Crown should have broader discretion to distribute *bona vacantia* estates. Morris Legal agreed that the current

¹⁰¹ Only two estates, one valued at \$1.028 million in 2017 and one valued at \$13,390.10 in 2018 have vested in the Crown between January 2017 and August 2021. In August 2021, Te Tai Ōhanga | The Treasury provided corrected information to the Commission regarding *bona vacantia* estates, as The Treasury's earlier information shared with the Commission excluded the estate worth \$1.028 million in 2017: email from Te Tai Ōhanga | The Treasury to Te Aka Matua o te Ture | Law Commission regarding *bona vacantia* estates (26 August 2021). No application had been made regarding these estates.

¹⁰² See for example s 38 of the Intestacy Act 2010 (Tas); and s 137 of the Succession Act 2006 (NSW). Both provisions were enacted following recommendation by Australia's National Committee and are modelled on s 20 of the Property Law Act 1974 (Qld): see New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at Recommendation 39 and [10.38]–[10.40].

provision should be amended to resemble the provisions in Tasmania and New South Wales but should also include references to whānau, hapū and iwi groups.

7.180 MinterEllisonRuddWatts supported the Crown having discretion to distribute bona vacantia estates provided that the process was simple and transparent. The Crown should not benefit from unreasonable fees, and advances should not be made to organisations with direct or indirect political affiliations.

7.181 Ngā Rangahautira submitted that the current system of vesting intestate estates in the Crown grants the Crown greater power than described under te Tiriti o Waitangi:

The inherently relational nature of tikanga Māori means that parties listed beyond those under the Administration Act 1969 might have rights and responsibilities in the property of the intestate. Vesting the estate in the Crown therefore undermines the tino rangatiratanga of whānau, hapū and iwi who may have rights and obligations in the property. Due to this, the estate should not be vested in the Crown but left to whānau, hapū and iwi to distribute.

7.182 Additionally, several submitters said they would prefer for an intestate estate to become bona vacantia at an earlier stage. Chris Kelly submitted that the distribution of an intestate estate should not extend beyond nieces and nephews before it is distributed to the Crown. ADLS submitted that it should not extend beyond aunts and uncles, and another submitter said that it should not extend beyond the intestate's siblings. The submitters said that it can involve significant time and resources to find distant relatives. This may dissipate the value of an intestate estate, which is particularly significant in a modest estate. One submitter said that it is unlikely a person who made a will would distribute it to distant relatives anyway. For example, under the current regime, it is possible for an intestate estate to be passed to grandchildren or great-grandchildren of cousins of the intestate.

Conclusion

7.183 We recommend that the estate is taken by the Crown as bona vacantia where the intestate is not survived by a relative closer than a descendant of their grandparent.

7.184 Additionally, the Crown should have discretion to distribute any or all of the estate to the following parties on application:

- (a) Dependants of the intestate (whether kindred or not).
- (b) Any organisation, group or person for whom the intestate might reasonably be expected to have made provision.
- (c) Any other organisation, group or person.

7.185 Discretionary distribution provisions are a fair solution to the practical difficulties involved in locating and making decisions in respect of other relatives. We recommend that the current provision is extended to include any other organisation, group or person. Distribution could be made to trustees for the parties if necessary. A broad list would allow charities, community groups, and whānau, hapū or iwi groups to utilise funds that would otherwise vest in the Crown. When the intestate is Māori, there is a strong case for the Crown to distribute the estate to the intestate's hapū or iwi, in recognition of iwi and hapū tino rangatiratanga and the importance of the collective in te ao Māori. Māori land records and membership records from hapū and iwi entities are readily accessible for this purpose.

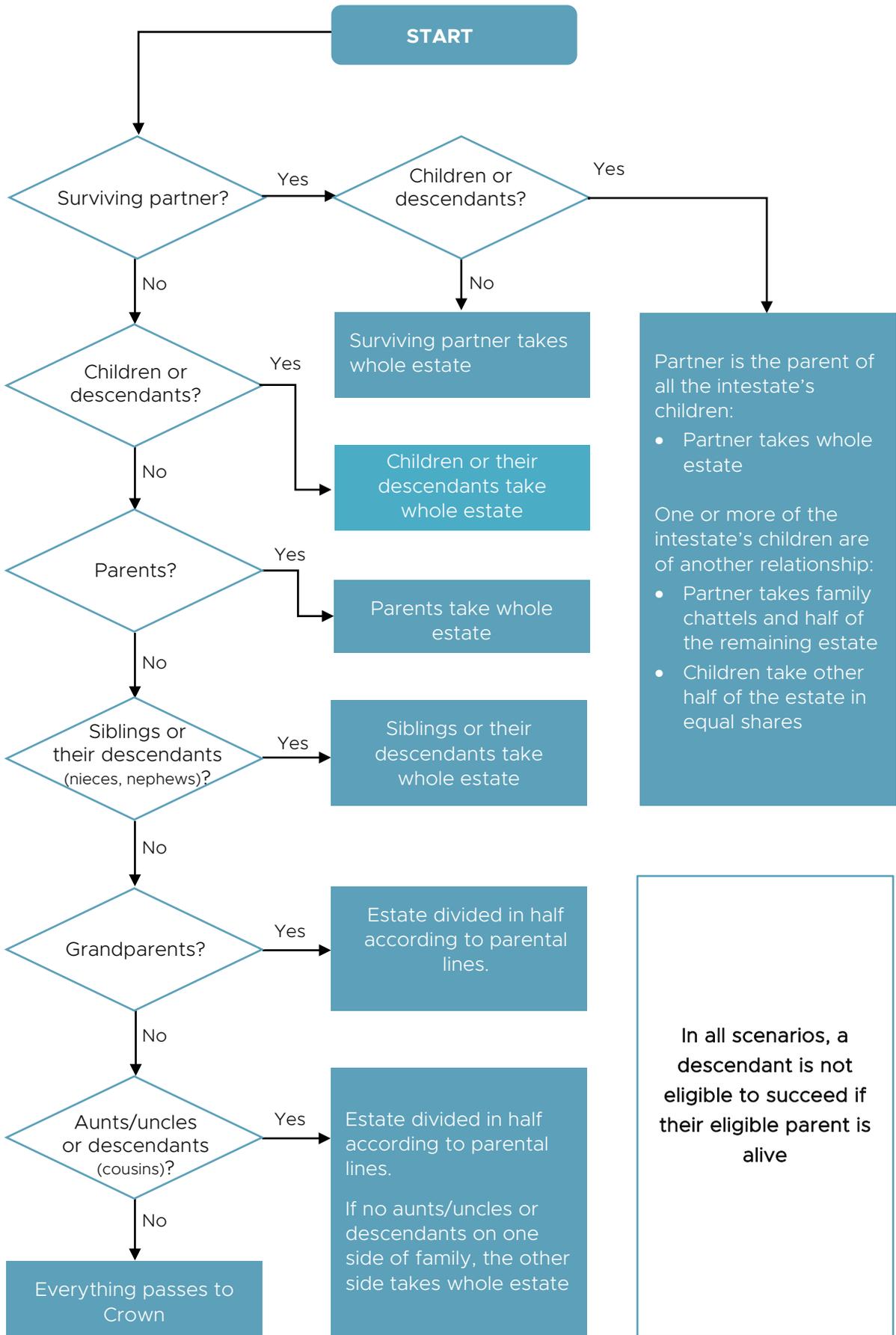
7.186 The Treasury should create and publish guidance about its process for considering applications. Priority should be given to dependants of the intestate (whether kindred or

not) followed by any by any organisation, group or person for whom the intestate might reasonably be expected to have made provision. However, if no dependants are forthcoming in a reasonable period, the Treasury should not delay in distributing any or all of the bona vacantia estate.

7.187 As noted, it is currently rare for estates to vest in the Crown as bona vacantia. However, this is not the case in all jurisdictions, particularly where the distribution rules do not extend to more-remote relatives.¹⁰³ We did not consult on limiting the list of eligible relatives, but we acknowledge that there are compelling reasons to do this, particularly where an estate is of modest value and extensive resources are spent searching for distant relatives. The few submitters that suggested limiting the list of eligible relatives had different views about where the list should end. Further consultation would be required to establish a consensus. Should the Government consider limiting the list of eligible relatives, it would become even more important for The Treasury to have transparent processes for considering applications to distribute bona vacantia estates.

¹⁰³ For example, in NSW in the period 2001–2005 the Public Trustee paid A\$24,289,946.86 into Treasury from 92 estates (averaging A\$264,000 each). During that period, the limit was set at aunts and uncles rather than first cousins or more remote relatives: see New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at [10.4].

SUMMARY OF THE RECOMMENDED NEW INTESTACY REGIME



In all scenarios, a descendant is not eligible to succeed if their eligible parent is alive

Part Three

MAKING AND RESOLVING CLAIMS AGAINST ESTATES



CHAPTER 8

Awards, priorities and anti-avoidance

IN THIS CHAPTER, WE CONSIDER:

- the property from which a court can make awards when someone claims against an estate;
- the respective priority of awards from an estate; and
- the powers the court has to make awards from property outside an estate (anti-avoidance mechanisms).

CURRENT LAW

- 8.1 The terms of a will determine the distribution of the will-maker's estate. Where there is no will, the intestacy regime in the Administration Act 1969 governs how the deceased's estate is to be distributed.¹
- 8.2 Despite the terms of a will or the intestacy regime, a court may make awards under the Family Protection Act 1955 (FPA) and Law Reform (Testamentary Promises) Act 1949 (TPA) from the property of the deceased's estate.² Awards under the FPA are made from the net estate after creditors' claims have been satisfied.³ Awards under the TPA can be made from the gross estate.⁴ Te Kōti Matua | High Court has held that, in principle, its powers under the TPA provide the court power to give priority to a TPA claimant over

¹ Succession to Māori freehold land, both when the deceased left a will or died intestate, is governed by Te Ture Whenua Māori Act 1993.

² Family Protection Act 1955, s 4 (for the purposes of the Act, an estate is deemed to include all property that is subject of a donatio mortis causa); and Law Reform (Testamentary Promises) Act 1949, s 3(5).

³ Bill Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis, 2021) at 221; and *McCormack v Foley* [1983] NZLR 57 (CA) at 66.

⁴ Law Reform (Testamentary Promises) Act 1949, s 3; and *McCormack v Foley* [1983] NZLR 57 (CA) at 64.

- the creditors of the estate in some cases.⁵ Entitlements in an intestacy are distributed after an administrator has paid the deceased's debts.⁶
- 8.3 Awards under the FPA and TPA fall rateably on the estate.⁷ The court has power to exonerate any part of the estate from an award.⁸ Awards under the FPA may be made as periodic payments or as a lump sum.⁹ Likewise, awards under the TPA may be for the payment of a periodic amount or lump sum,¹⁰ although the court has the additional power to order that specific property vest in the claimant where the promise relates to that property.¹¹
- 8.4 A surviving partner's entitlements under the Property (Relationships) Act 1976 (PRA) are generally limited to the relationship property of the estate.¹² The PRA provides that the rights of creditors generally continue as if the PRA had not been enacted,¹³ and each partner has the right to deal with their property before the court orders a relationship property division.¹⁴ The exceptions to this general rule include a partner's right to lodge a notice of claim over land in which they claim an interest under the PRA¹⁵ and a partner's protected interest in the family home which takes priority over the other partner's unsecured creditors.¹⁶
- 8.5 Those with successful claims against an estate under other statutes, common law and equity will be regarded as unsecured creditors of the estate. As such, they will take priority over awards under the FPA and PRA (subject to a surviving partner's protected interest in the family home).
- 8.6 Aside from creditors' claims, awards under the PRA take priority over awards under the FPA and TPA.¹⁷ The FPA and TPA do not address which awards are to take priority over the other. The courts have taken the view, however, that neither Act takes priority.¹⁸ Rather, the courts' approach has been to "resolve the conflict in such manner as will best

⁵ *Bristow v Smith* [2013] NZHC 2866, (2013) 31 FRNZ 610 at [43] and [45]. The Court reasoned that its powers under ss 3(5)–(6) of the Law Reform (Testamentary Promises) Act 1949 to order the incidence for the payment of debts from the estate gave it powers to order that an award under the Act should take priority over the payment of a debt to a creditor. The High Court noted at [43] it was taking a different view to obiter comments made by the Court of Appeal in *McCormack v Foley* [1983] NZLR 57 (CA) at 71 and 76 in which Richardson and McMullin J opined that these provisions gave no express power to determine priorities between creditors and claimants.

⁶ Section 26 of the Administration Act 1969 provides that the whole estate is in the hands of the administrator for the payment of debts.

⁷ Family Protection Act 1955, s 7(1); and Law Reform (Testamentary Promises) Act 1949, s 3(5).

⁸ Family Protection Act 1955, s 7(2); and Law Reform (Testamentary Promises) Act 1949, s 3(6).

⁹ Family Protection Act 1955, s 5(2).

¹⁰ Law Reform (Testamentary Promises) Act 1949, ss 3(1) and (4).

¹¹ Law Reform (Testamentary Promises) Act 1949, s 3(3).

¹² Property (Relationships) Act 1976, s 94(2).

¹³ Property (Relationships) Act 1976, s 20A.

¹⁴ Property (Relationships) Act 1976, s 19.

¹⁵ Property (Relationships) Act 1976, s 42. A notice lodged under s 42 has the effect of a caveat.

¹⁶ Property (Relationships) Act 1976, s 20B.

¹⁷ Property (Relationships) Act 1976, ss 58, 60(6) and 78(1)(c).

¹⁸ *Hamilton v Hamilton* [2003] NZFLR 883 (HC) at [60].

meet the justice of the particular case and produce a just result as [among] all the parties”.¹⁹

Property may fall outside an estate

- 8.7 It is possible, however, that the property the deceased owned during their life will not fall into their estate. Property that may fall outside the estate includes:
- (a) property the deceased has gifted before they died, such as transferring their property to be held on trust;
 - (b) the deceased’s joint tenancy interests that accrue to the remaining joint tenant(s) by survivorship when the deceased dies, such as a home that is jointly owned with a partner;
 - (c) a bank account or insurance policy for which the deceased has nominated a third-party beneficiary to receive property when they die;
 - (d) property that is the subject of a binding contract in which the deceased agreed to provide that property to the other party under their will;²⁰ and
 - (e) powers of appointment or powers to control a trust that have not been exercised by the deceased during their lifetime.²¹
- 8.8 Situations may arise when, due to the property falling outside the estate, the estate contains insufficient property to satisfy claims against it. The court has limited powers to bring the property into the estate in order to meet claims against the estate.

Anti-avoidance mechanisms under the current law

- 8.9 The PRA contains some “clawback” mechanisms. The court can make an order to recover property when it was disposed of with intent to defeat a partner’s rights.²² When a disposition of property to a trust or company has a defeating effect but there has been no intention to defeat, the court has limited powers to provide compensation to the affected partner.²³
- 8.10 The PRA classifies property passing by survivorship to the surviving partner according to the status it would have had if the deceased had not died, meaning joint tenancy assets owned by the couple do not escape division.²⁴ However, there is some uncertainty

¹⁹ *Hamilton v Hamilton* [2003] NZFLR 883 (HC) at [60], citing the dictum in *Re Hayward* [1989] 1 NZLR 759 at 767.

²⁰ The current position is that the court has no jurisdiction to interfere with parts of a will that implement such a contract: see *Breuer v Wright* [1982] 2 NZLR 77 (CA).

²¹ See *Re Kensington (Deceased)* [1949] NZLR 382 (CA). See also *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551, where the Kōti Mana Nui | Supreme Court held Mr Clayton’s collection of powers under the trust deed amounted to property for the purposes of the Property (Relationships) Act 1976.

²² Property (Relationships) Act 1976, s 44.

²³ Property (Relationships) Act 1976, ss 44C and 44F.

²⁴ Property (Relationships) Act 1976, s 83.

whether a court can recover property that has passed from the deceased partner to a third party through survivorship.²⁵

- 8.11 The FPA and the TPA contain no mechanisms through which the court can award property outside the estate. However, there are ways claimants can access that property. In particular, section 88(2) of the PRA allows the personal representatives, with the leave of the court, to apply for a relationship property division on behalf of the estate. The purpose of division initiated by the personal representatives is usually to recover relationship property that was held as joint tenants with the deceased's surviving partner that would otherwise pass to them through survivorship.²⁶ In most cases, division is sought to increase the size of the estate to satisfy FPA claims,²⁷ although leave has also been sought where there is insufficient property to meet gifts under the will.²⁸ The estate's rights to seek a relationship property division therefore operate as a clawback mechanism.
- 8.12 In recent cases, adult claimants have argued that their deceased parent owed them fiduciary duties to protect their economic interests, particularly by the deceased parent providing for the children from their estate.²⁹ This is relevant because a court may remedy a breach of fiduciary duty by recognising a constructive trust in favour of a claimant. A fiduciary may pass property to a third party with the effect that the property would not form part of their estate when they die. If they passed property to a third party when the third party knew the disposition breached the fiduciary's duties, a court may find the third party holds the property subject to the constructive trust. Consequently, claimants can obtain priority to the property subject to the constructive trust whether it falls into the estate or not. To date, the courts have refused to strike out these claims, instead ordering the claim should be determined through trial.³⁰

NGĀ TIKANGA

- 8.13 In the Issues Paper, we recognised the importance of weaving tikanga into the matters we discussed in relation to making and resolving claims against an estate. We sought feedback on any other areas where state law ought to recognise and respond to tikanga. We received no direct feedback on the implications of tikanga and kawa for the matters discussed in this chapter, which restricts our ability to recommend how tikanga ought to be woven into our recommendations. Whanaungatanga, mana, kaitiakitanga, aroha and

²⁵ In *Hau v Hau* [2018] NZHC 881, [2018] NZFLR 464, the Court noted that the couple's family home was relationship property even though it had passed to the deceased's brother through survivorship. The Court noted, at [50], there was no express power under the Property (Relationships) Act 1976 for the Court to recover the property but held Parliament could not have intended the Act's property regime to be automatically excluded by the operation of survivorship.

²⁶ See Nicola Peart (ed) *Family Property* (online looseleaf ed, Thomson Reuters) at [PR88.05].

²⁷ See for example *Public Trust v W* [2005] 2 NZLR 696 (CA).

²⁸ See for example *Public Trust v Relph* [2009] 2 NZLR 819 (HC); and *Crotty v Williams* FC Hamilton FAM-2002-19-1082, 29 August 2005. Leave has also been sought when the surviving partner killed the deceased and the estate has sought to prevent the surviving partner from benefiting from their crime: *H v T* HC Christchurch CIV-2006-409-2615, 5 June 2007. The Succession (Homicide) Act 2007 now addresses this situation.

²⁹ *A v D* [2019] NZHC 992, [2019] NZFLR 105; and *Rule v Simpson* [2017] NZHC 2154.

³⁰ We have heard from counsel for the plaintiffs that the claims in *Rule v Simpson* [2017] NZHC 2154 have settled and will not be proceeding to trial. At the time of writing this Report, the trial in *A v D* [2019] NZHC 992, [2019] NZFLR 105 has been heard but no judgment has been issued.

manaakitanga may be relevant. We have also been told that many Māori may value certainty, to enable understanding of the consequences of their property dealings prior to and after their death.

- 8.14 The key issues discussed in this chapter are how the different claims against an estate should relate to each other in terms of priority and what property should be available to meet the claims. As submitters said when addressing matters concerning te ao Māori, default sets of rules do not sit happily with tikanga. We are mindful, however, of the need for the new Act to state as clearly as possible from what property a court can make orders and how a court is to reconcile competing claims to the same property. Because of these concerns and because we have received limited feedback in consultation, tikanga is not expressly part of our recommendations for reform in this chapter. It should be noted, however, that whenua Māori and taonga would not be subject to awards or the new Act's anti-avoidance provisions. In addition, as we conclude in Chapter 13, it is important that Māori have the option to resolve matters pursuant to tikanga as an alternative to the new Act and the court process.

RECOMMENDATIONS IN THE PRA REVIEW

- 8.15 In the PRA review, we made several recommendations regarding property and anti-avoidance, including the following:
- (a) The notice of claim procedure should be expanded to enable a partner to lodge a notice of claim on the title of land held on trust against which the partner claims under the PRA.³¹
 - (b) The court's power to restrain dispositions of property made with intent to defeat a person's rights (section 43) should be replaced by a broad power for the court to make interim restraining orders consistent with the court's interlocutory injunction jurisdiction.³²
 - (c) Sections 44 (empowering the court to recover property disposed of with the intention to defeat a person's rights under the PRA) and 44F (empowering the court to order compensation in respect of dispositions of property to a qualifying company with the effect of defeating rights under the PRA) should continue unchanged.³³
 - (d) Section 44C, applying to dispositions of property to trusts, should be replaced with a new provision that gives the court powers to grant relief in respect of trusts where it is "just" and:³⁴
 - (i) either or both partners disposed of property to a trust when the relationship was in reasonable contemplation or since the relationship began and that disposition has defeated the rights of either or both partners;

³¹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R65 and [11.107].

³² Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R92 and [15.67]–[15.70].

³³ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [11.102]–[11.106].

³⁴ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R58–R63 and [11.65]–[11.101].

- (ii) trust property has been sustained by the application of relationship property or the actions of either or both partners; or
- (iii) any increase in value of the trust property or benefit derived from the trust property is attributable to the application of relationship property or the actions of either or both partners.

ISSUES

Restricting entitlements and claims to estate property may limit their effectiveness

- 8.16 The PRA, FPA and TPA reflect policy choices concerning to whom the deceased owed duties to provide for on their death. However, the effectiveness of these entitlements and claims may be undermined if the deceased avoids those duties by ensuring property does not fall into their estate and instead passes to recipients of their choosing through other means.
- 8.17 There is no data available that directly indicates the extent of avoidance behaviour. However, there are some reasons to believe it is not uncommon:
- (a) Cases have come before the courts concerning estates that hold insufficient property to meet claims because the deceased's property passed to others without falling into the estate.³⁵
 - (b) Data from Toitū te Whenua | Land Information New Zealand shows that, in recent years, the number of transmissions of interests in land by survivorship is roughly equal to the number of transmissions to an executor or administrator (excluding interests in whenua Māori). This indicates it is common for the deceased's interests in land to pass by survivorship.³⁶ It should be noted, however, this data indicates the rates of joint tenancies rather than revealing the extent to which joint tenancies have a defeating effect on claims against estates.
 - (c) We have heard from lawyers that avoidance behaviour occurs.³⁷
 - (d) During consultation, some submitters shared experiences with us in which the bulk of the deceased's property passed to another without falling into the estate, thereby defeating family members' expectations of inheriting that property.

The current clawback mechanisms are complex and burdensome

- 8.18 The mechanism in section 88(2) of the PRA is a multi-step process that can be convoluted and cause delay. Personal representatives must obtain leave and issue proceedings. If the personal representatives are unwilling to seek leave, a prospective claimant might

³⁵ See for example *Public Trust v W* [2005] 2 NZLR 696 (CA); *A v D* [2019] NZHC 992, [2019] NZFLR 105; and *Hau v Hau* [2018] NZHC 881, [2018] NZFLR 464.

³⁶ Email from Toitū Te Whenua | Land Information New Zealand to Te Aka Matua o te Ture | Law Commission regarding data on land transfers by survivorship (29 October 2019). Transmission instruments are lodged with Toitū Te Whenua | Land Information New Zealand to transfer property to an executor, administrator or survivor.

³⁷ We received this feedback primarily through the responses we received from the Practitioner Survey we issued in April 2020 to lawyers who work in succession law.

first apply to have the court replace the personal representatives.³⁸ If the personal representatives do seek leave and they are successful, the process of dividing relationship property can be long and complex. A full division of relationship property can be a disproportionate response when only a modest amount of property falling outside an estate is needed to satisfy obligations to beneficiaries or claimants. It can therefore frustrate the deceased's testamentary intentions and cause unnecessary costs to the estate. Personal representatives may find themselves in difficult situations having to disregard the will and seek division on behalf of claimants.

- 8.19 The recent cases concerning fiduciary duties owed to children to provide for them on death have left the law uncertain. In *A v D*, the Court applied conventional principles of fiduciary law in the context of an abusive parent-child relationship and knowing receipt by trustees.³⁹ The development of this area of law is likely to be quite specific and fall outside our review. *Rule v Simpson*, on the other hand, is not so limited. The plaintiff argued that a parent generally owes fiduciary duties to care for and protect a child's economic interests. If the claim had gone on to be successful at trial,⁴⁰ it may have established much broader fiduciary duties on parents to provide for their children on death.⁴¹

RESULTS OF CONSULTATION

Issues

- 8.20 Several submitters, including Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), the Family Law Committee of Auckland District Law Society (ADLS), Chapman Tripp, MinterEllisonRuddWatts and Jan McCartney QC broadly agreed with the issues we discussed in the Issues Paper. NZLS cautioned, however, that change to the law in this area has the potential to increase litigation and uncertainty. NZLS stressed that any reform should promote reasonable predictability for decisions and transactions a person may make prior to death.

Property claimable

- 8.21 In the Issues Paper, we proposed that awards should be available in relation to certain entitlements and claims against an estate:
- (a) The court should have power to grant a surviving partner their share of relationship property that they would otherwise have been entitled to under the PRA had the partners separated during their lives (relationship property awards).

³⁸ In a costs decision, the High Court held it would be open for a Family Protection Act claimant to seek leave to divide relationship property as a derivative action if the personal representative neglected their duty of even-handedness to the claimant by failing to seek leave themselves under s 88(2) of the Property (Relationships) Act 1976: *Nawisielski v Nawisielski* [2014] NZHC 2039, [2014] NZFLR 973.

³⁹ *A v D* [2019] NZHC 992, [2019] NZFLR 105.

⁴⁰ Counsel for the plaintiffs in *Rule v Simpson* [2017] NZHC 2154 has confirmed the case has settled.

⁴¹ *Rule v Simpson* [2017] NZHC 2154.

- (b) A court should have power to make family provision awards to a surviving partner and certain children of the deceased in place of its powers currently arising under the FPA (family provision awards).
 - (c) A court should have power to make awards under the single, statutory cause of action we had proposed for contributions made to the deceased or estate (contribution awards). Contribution awards would replace any award arising under common law and equity that a claimant would otherwise have been able to claim. We have now concluded, in Chapter 6, that the option for a single statutory cause of action for contribution awards should not be introduced. Rather, a testamentary promise cause of action based on the existing law under the TPA, with some amendments, should be restated within the new Act. Causes of action arising under common law and equity in respect of contributions to a deceased should continue to apply outside the Act.
- 8.22 We then made the following proposals in the Issues Paper for which property should be used to meet awards under the new Act:
- (a) Relationship property awards should be sourced from relationship property assets of estates, subject to the court's discretion to order that the award be met from the whole or part of the estate.
 - (b) Family provision awards should fall rateably against the whole estate subject to the court's discretion to order that the award be met from only part of the estate.
 - (c) Contribution awards may take several forms. We proposed the court should have power to make awards in respect of specific property. Alternatively, the court should have power to make monetary awards rateably against the whole estate, subject to a discretion to order that the award be met from only part of the estate.
- 8.23 If the estate has insufficient property to meet an award, we proposed a court could make awards from the property it recovers through its clawback powers. This would depend on what anti-avoidance mechanisms are included in the new Act, which is addressed below.
- 8.24 Most submitters who commented on these proposals broadly agreed. They included Public Trust, NZLS, ADLS and MinterEllisonRuddWatts. Some submitters made comments on what should constitute an estate for the purposes of entitlements in an intestacy. We discuss further what property should be available for distribution in an intestacy in Chapter 7.

Priorities

- 8.25 Submitters generally agreed with the position in the Issues Paper that creditors' claims should take priority over awards under the new Act. We also proposed that the court should have discretion to order that specific property of the estate be awarded to meet contribution claims in priority to unsecured creditors when:
- (a) the deceased promised to transfer that property to the claimant; or
 - (b) the property has been provided or improved by the claimant or it is the proceeds of sale or exchange of that property or is property acquired with the proceeds of sale or exchange.

- 8.26 Public Trust and MinterEllisonRuddWatts expressly agreed with this proposal, although McCartney disagreed that an award to a contribution claimant should be capable of ranking above an unsecured creditor.
- 8.27 We proposed in the Issues Paper that, if an estate has insufficient property to fully satisfy relationship property awards, family provision awards and contribution awards, the property of the estate should be applied to satisfy claims in the following order of priority:
- (a) To meet contribution awards.
 - (b) To meet relationship property awards.
 - (c) To meet family provision awards.
- 8.28 Submitters generally agreed with this order of priority. NZLS noted that contribution claims could encompass proprietary interests that would be recognised by a court under the current law through a constructive trust or similar remedy and that such interests should be given priority.
- 8.29 Bill Patterson and McCartney emphasised that cases involving claims against estates are very fact specific. Rather than a fixed order of priority, they favoured a discretionary approach that would allow the court to determine priorities between competing claims on a case-by-case basis.

Anti-avoidance

- 8.30 Some submitters to the consultation website shared experiences in which the bulk of a deceased's property had passed to another without falling into the estate. For example, one submitter spoke of an instance where funds held in a joint account with an elderly person passed to the other person named on the account. Another submitter explained how a deceased had made considerable gifts during their lifetime to defeat claims against their estate.
- 8.31 Some submitters to both the consultation website and the Issues Paper were concerned at the ease in which the current law allows people to avoid obligations to family by structuring their affairs in a way to pass on property without it forming part of their estate. The use of trusts and joint tenancies were examples of defeating mechanisms that were frequently mentioned. Some submitters, however, took the opposite view. They strongly discouraged the introduction of mechanisms that could unwind what they saw as carefully considered and legitimate estate planning structures.
- 8.32 In the Issues Paper, we proposed three options for addressing dealings with property resulting in insufficient property in an estate to meet awards under the new Act:
- (a) Option One: Maintain the current law.
 - (b) Option Two: A limited clawback approach targeted at:
 - (i) dispositions of property the deceased made with intent to defeat an entitlement or claim under the new Act;
 - (ii) dispositions of property the deceased made within five years of their death that have the effect of defeating an entitlement or claim under the new Act; and
 - (iii) situations where the deceased owned property as joint tenants with another and the deceased's interest has passed by survivorship on their death.

- (c) Option Three: A comprehensive clawback approach that would target all property the deceased could have retained or reclaimed during their lifetime so that the property would have been available to meet claims against their estate when they died.
- 8.33 Under Option One, we proposed that the personal representatives' rights to seek a division of relationship property would continue for the purpose of accessing relationship property assets from the surviving partner. For Option Two and Option Three, however, we proposed the removal of personal representatives' rights to seek a relationship property division on behalf of the estate. We observed that a relationship property division is often sought in order to recover property that has passed by survivorship to the surviving partner. The better approach, we suggested, was to allow claimants to apply for the clawback of particular property if Option Two or Option Three were favoured rather than having to rely on the personal representatives to initiate a relationship property division.
- 8.34 Feedback from submitters to the Issues Paper was mixed. Six submitters favoured Option One. They included Perpetual Guardian, NZLS and several lawyers. Their main concern was that new anti-avoidance mechanisms would create uncertainty. Many submitted that Option Two and Option Three would cause estate planning measures to be set aside too lightly, noting that often a deceased will have structured their affairs with care to provide for family members.
- 8.35 Six submitters supported Option Two, including Public Trust and several lawyers. Most explained the option balances freedom for the deceased to structure their property affairs as they would like and preventing the deceased from avoiding obligations to provide from their estate. Some submitters, however, criticised this option. Some thought that setting a transaction aside because it was made in order to defeat entitlements and claims under the new Act is too uncertain or could lead to transactions being set aside too easily. TGT Legal supported the option but did not favour allowing dispositions of property to be clawed back simply because they had a defeating effect. They preferred a focus on transactions that were made with an intent to defeat.
- 8.36 ADLS said it agreed with Option Two and Option Three. It was the only submitter to express support for Option Three.
- 8.37 Several submitters agreed that personal representatives' ability to seek leave on behalf of the estate under section 88(2) of the PRA to divide relationship property was problematic. They supported its repeal, instead enabling affected claimants to apply directly to the court to claw back property. Public Trust and ADLS, on the other hand, submitted that the right of the estate to divide relationship property should be retained to enlarge the estate to meet claims.
- 8.38 Lastly, we proposed in the Issues Paper that a surviving partner should have a right under the new Act to lodge a notice of claim over land held in the estate to protect a relationship property interest, similar to partners' current rights to lodge notices of claim under the PRA.⁴² Public Trust and ADLS supported the proposal. No submitter opposed it.

⁴² Property (Relationships) Act 1976, s 42.

CONCLUSIONS

Property claimable

RECOMMENDATIONS

- R52** A surviving partner's relationship property entitlements under the new Act should be met from the relationship property of the estate. The court should have discretion to order that the entitlements be met from the whole or part of the estate.
- R53** Family provision awards should be met rateably against the whole estate. The court should have discretion to order that awards are met from only part of the estate.
- R54** Testamentary promise awards should be met rateably against the whole estate. The court should have discretion to order that awards are met from only part of the estate.

Relationship property claims

- 8.39 We have recommended in Chapter 4 that a “top-up” approach is appropriate when a partner elects to take their relationship property entitlements on the death of their partner.⁴³ We recommend that a court should source any property needed for the top-up from relationship property assets of the estate because this is the property attributable to the relationship. Submitters supported this approach.
- 8.40 The court should also, however, be able to order that the top-up award be met from the whole or part of the estate. The court has discretion under the current law to order that an award falls on a specific portion of the estate.⁴⁴ This may be appropriate when, for example, the surviving partner should receive additional compensation beyond their interest in items of relationship property.⁴⁵ The court could also order that awards be sourced in a way that is least likely to disrupt the other beneficiaries' interests and the deceased's testamentary intentions (where there is a will). This discretion should be in addition to the court's powers we discuss in Chapter 4 to depart from the top-up approach altogether and award specific items of relationship property to the surviving partner instead of the gifts under the will.
- 8.41 A court should have further powers to make awards from the property it recovers through its anti-avoidance powers (see discussion on anti-avoidance below).

⁴³ If a partner elects to take their relationship property entitlements, they will receive their gifts under the will plus a top-up from the relationship property up to the value of their relationship property entitlements.

⁴⁴ Property (Relationships) Act 1976, s 94(3).

⁴⁵ See for example additional compensation available under ss 17 and 18B of the Property (Relationships) Act 1976; and *B v Adams* (2005) 25 FRNZ 778 (FC), cited in Nicola Peart (ed) *Family Property* (online looseleaf ed, Thomson Reuters) at [PR94.01].

Family provision claims

- 8.42 In Chapter 5, we recommend that the court should have power to make family provision awards to certain family members, including surviving partners. We present two options under which children and grandchildren of the deceased should be eligible to claim.
- 8.43 For all family provision awards, regardless of which option for reform in relation to children and grandchildren is implemented, we recommend that awards should be met rateably against the whole estate, with the court having the discretion to order that awards be met from only part of the estate. This is the position under the current law. It gives the court a high degree of flexibility to make awards from property in a way that is least likely to disrupt the other beneficiaries' interests and the deceased's testamentary intentions (where there is a will). Submitters supported this approach.
- 8.44 A court should be able to make awards from the property it recovers through its anti-avoidance powers (see discussion on anti-avoidance below).

Testamentary promise claims

- 8.45 We recommend that testamentary promise awards under the new Act should be met rateably across the entire estate, with the court having discretion to order that awards be met from only part of the estate. In addition, we recommend that the court's current powers under the TPA to award specific property should continue where the deceased's promise related to that property.⁴⁶ Like our approach to family provision, this recommendation continues the current law and gives the court flexibility.
- 8.46 A court should be able to make awards from the property it recovers through its anti-avoidance powers (see discussion on anti-avoidance below).

Priorities

RECOMMENDATIONS

- R55** Creditors' rights should take priority over all entitlements and claims under the new Act.
- R56** If an estate has insufficient property to fully satisfy relationship property awards, family provision awards and testamentary promise awards, the new Act should give relationship property awards priority. The new Act should not prescribe an order of priority between family provision awards and testamentary promise awards but instead enable the court to determine priority in each case.

⁴⁶ Law Reform (Testamentary Promises) Act 1949, s 3(3).

Relationship between creditors' rights and entitlements and claims against the estate under the new Act

- 8.47 We recommend that creditors' rights should take priority over all entitlements and claims under the new Act.⁴⁷ This approach will extend the rule in the PRA that creditors' rights are generally unaffected by the PRA. It is also consistent with the current position that FPA awards are made from the net estate. Those with successful claims against an estate under other statutes, common law and equity will continue to be regarded as unsecured creditors of the estate.
- 8.48 We note this approach departs from the current position under the TPA. We take the view that testamentary promise awards under the new Act should rank behind creditors' claims and be made from the net estate for the following reasons:
- (a) The TPA itself is not clear on whether a claim under the Act can rank over creditors' claims, and the courts have expressed divided views.⁴⁸ Stating that testamentary promise awards rank behind creditors will bring clarity and resolve the position. If, on the contrary, the new Act gave testamentary promise awards priority in certain circumstances, the new Act would need to guide the court when priority should be given, which could lead to uncertainty.
 - (b) We understand that, in practice, personal representatives will discharge the estate's debts before considering a TPA claim.
 - (c) If there are estates in which TPA claims are considered alongside creditors' claims, giving creditors priority will make the resolution of creditors' claims quicker.
 - (d) This is a default rule to rank TPA claims. Greater priority can be achieved through contract or other proprietary arrangement.
- 8.49 In the PRA review, we recommended that the Government should undertake further policy work in relation to the provision of a protected interest in the family home.⁴⁹ If the Government concludes that a partner should continue to have a protected interest in certain property that takes priority over unsecured creditors, we recommend that the protected interest should be available to a surviving partner under the new Act.

Priorities among the different entitlements and claims in the new Act

- 8.50 If an estate has insufficient property to fully satisfy relationship property awards, family provision awards and contribution awards, we recommend that the property of the estate should be applied to satisfy relationship property awards in the first instance. Remaining property should be used to satisfy testamentary promise awards and family provision awards. We recommend that the new Act should not state an order of priority between

⁴⁷ In addition, we suggest retaining the general rule that estates, both testate and intestate, are distributed once creditors' claims have been satisfied.

⁴⁸ As noted above, the High Court in *Bristow v Smith* [2013] NZHC 2866, (2013) 31 FRNZ 610 differed with the obiter views of the Court of Appeal in *McCormack v Foley* [1983] NZLR 57 (CA) in holding that it had power to order the incidence of awards under the Act and payment of debts to creditors in such a way as to grant priority to the award.

⁴⁹ *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [18.13]–[18.17]. We recognised the difficulties of the protected interest because it is available only to homeowners and it is questionable whether the extent of the interest provides effective protection.

testamentary promise awards and family provision awards but rather give the court discretion to allocate priority in each case.

- 8.51 This order of priority continues the primacy given to relationship property entitlements under the current law. We consider it is appropriate to give priority to relationship property entitlements above testamentary promise awards because, in most qualifying relationships, the surviving partner's contributions to the relationship will be more extensive than the work or services the testamentary promise claimant rendered to the deceased. Further, a testamentary promise is personal to the deceased. Giving relationship property awards priority will ensure testamentary promise awards are met from the deceased's share of relationship property and not borne by the partners jointly.
- 8.52 There may, however, be cases where the work or services a testamentary promise claimant has provided to the deceased may have preserved or enhanced the couple's relationship property. A surviving partner claiming relationship property may therefore receive a windfall from the contributions of the claimant. Nevertheless, we do not consider the priorities should be reversed in these instances. If the deceased had honoured their promise to the claimant, whatever provision is made for them under the will would be subject to the surviving partner's relationship property entitlements. It would be odd if a greater priority could be obtained because the deceased had not fulfilled their promise. Instead, a claimant would need to bring an alternative claim to obtain priority over relationship property entitlements, such as breach of contract, quantum meruit or claiming a constructive trust where the factual situation supports such a claim.
- 8.53 There are several reasons relationship property awards should rank higher than family provision awards:
- (a) Relationship property awards recognise the entitlement the surviving partner has to a share in the couple's relationship property because of their contributions to the relationship. This entitlement should therefore qualify what property can legitimately be called the "deceased's property" from which family provision awards can be made.
 - (b) After a relationship property division, half the relationship property held in the estate should generally remain. Family provision claims can be met from this property.
 - (c) If the surviving partner is the parent of the deceased's children, the law imposes obligations on that partner to maintain the children while they are young. Giving the surviving partner priority is unlikely to result in the children going without provision. If the surviving partner is not the children's parent, the children could potentially look to their other parent(s) for maintenance in addition to whatever family provision awards can be made from the remaining estate.
 - (d) Relationship property awards currently rank higher than FPA awards.⁵⁰ We are not aware of criticism of this approach.

⁵⁰ Property (Relationships) Act 1976, s 78. But see *Hare v Hare* [2019] NZHC 2801, in which the Court held that a charging order the Commissioner of Inland Revenue had obtained in respect of a bankrupt's unpaid child support over the bankrupt's family home constituted security for a debt and thus took priority over the bankrupt's wife's protected interest in the home.

- 8.54 We recommend that the new Act should express no order of priority between testamentary promise awards and family provision awards but instead enable the court to determine priority on a case-by-case basis. This approach continues the current law.⁵¹ As noted by several submitters, there is likely to be diversity in the nature of testamentary promise and family provision claims. It is helpful for the court to have flexibility to assess the merits of the respective claims. We would expect the court to consider factors like the extent of the work or services a testamentary promise claimant provided to the deceased and the needs of family provision claimants.
- 8.55 Similarly, if there is more than one testamentary promise award or more than one family provision award, we recommend that the new Act should state no order of priority but instead refer the matter to the discretion of the court.

Anti-avoidance mechanisms

RECOMMENDATIONS

R57

Where there is insufficient property in an estate to meet all entitlements and awards under the new Act, the Court should have power to recover property to the estate from a third party when that property:

- a. has been disposed of with intent to defeat an entitlement or claim under the new Act; or
- b. was owned by the deceased as joint tenant and it has accrued to the remaining joint tenant(s) by virtue of survivorship with the effect of defeating an entitlement or claim.

R58

The court should have power to order that:

- a. the recipient of the property transfer the property or part of it to vest in the estate; or
- b. the recipient of the property pay reasonable compensation to the estate.

R59

The court should not order the recovery of the property or the payment of compensation if the recipient of the property received it in good faith and provided valuable consideration. The court should have discretion whether to order the recovery of property or the payment of compensation where the recipient received it in good faith and it is unjust to order that the property be recovered.

R60

Claimants under the new Act should be able to apply to the court directly for the recovery of property from a third-party recipient. Personal representatives' rights to apply for a division of relationship property on behalf of the estate should be repealed.

⁵¹ *Hamilton v Hamilton* [2003] NZFLR 883 (HC) at [60].

R61

A surviving partner should retain the additional rights they have to recover property to satisfy relationship property claims based on recommendations in the PRA review (R58–R66).

R62

A surviving partner should be able to lodge a notice of claim over land of the estate in which they claim a relationship property interest.

- 8.56 Anti-avoidance mechanisms must balance the competing policy objectives of:
- (a) respecting the deceased’s right to structure their property affairs as they wish and third parties’ rights to rely on those structures; and
 - (b) ensuring sufficient property is available to meet entitlements and successful claims.
- 8.57 In addition, as stressed by several submitters, the law should lead to predictable outcomes. Predictable outcomes enable people to understand the legal consequences of their property dealings prior to and after their death. It is also important to minimise the risk of disputes and consequent costs and delays in the administration of estates.
- 8.58 The extent of the anti-avoidance provisions in the new Act should reflect a decision as to which policy objectives are considered to be of greatest importance. We note the considerable difference of opinion expressed in the submissions we received on this question.
- 8.59 We conclude that having no or limited ability to recover property from outside the deceased’s estate undermines the rights the new Act would purport to give claimants. Some form of anti-avoidance is therefore justified. This review provides an opportunity to address the issue and consider the best form that anti-avoidance mechanisms could take. We therefore recommend the new Act contain provisions that would enable the court to recover property where the property:⁵²
- (a) has been disposed of with intent to defeat an entitlement or claim under the new Act; or
 - (b) was a property interest the deceased owned as joint tenant that has accrued to the remaining joint tenant(s) by virtue of survivorship with the effect of defeating an entitlement or claim.
- 8.60 The first ground is based on the long-standing provisions that enable dispositions of property to be set aside in the PRA and the Property Law Act 2007.⁵³ Some submitters

⁵² These grounds for when the court may order the recovery of property are based on the second option for reform we proposed in Chapter 9 of the Issues Paper. However, the recommendation omits an additional ground for recovery in respect of property that was disposed of within five years of the deceased’s death with the effect of defeating an entitlement or claim under the new Act. We suggested this property might be recovered even where there had been no intention to defeat an entitlement or claim. We have not recommended this as a ground to recover. Several submitters were concerned at the test being too uncertain and that transactions may be set aside too easily. We also note the potential burden created by having to scrutinise the deceased’s transactions up to five years prior to death.

⁵³ Property (Relationships) Act 1976, s 44; and Property Law Act 2007, ss 344–350.

raised the question of how the test applied in *Regal Castings v Lightbody* would apply in this context.⁵⁴ In that case, the Kōti Mana Nui | Supreme Court equated knowledge of the defeating effect of a transaction with an intention to bring it about. NZLS and Jan McCartney QC believed the *Regal Castings* test could work in this context. TGT Legal noted that, unlike the PRA and the Property Law Act, the clawback may not relate to quantifiable entitlements. Therefore, the *Regal Castings* test may not be applicable or appropriate as the threshold may be too low. TGT Legal noted, however, that they expected this is something the courts would examine when cases arise.

- 8.61 In our view, the *Regal Castings* test is applicable to entitlements and claims under the new Act. Testamentary promise and family provision awards will be discretionary in nature. However, we expect that a person may dispose of property knowing the transaction would defeat an entitlement or claim against their estate, even if they are not sure about the exact amount a court would likely grant as an award. In response to concerns that the threshold may be too low, we note that the recipient of the property may be able to rely on the defences set out below to prevent recovery.
- 8.62 The second ground is joint tenancy interests that accrue by survivorship. When a joint tenant dies, their interest in the property is extinguished and the interest of the remaining joint tenant(s) is correspondingly enlarged.⁵⁵ Situations arise where any surviving joint tenant receives the benefit of a property interest that the deceased could have reclaimed into their estate by severing the joint tenancy prior to their death. For this reason, joint tenancies are a mechanism for ensuring a designated person receives a benefit from the deceased in a similar way to if the deceased had made a gift in their will to that person. Joint tenancies are therefore a way in which entitlements to and claims against a deceased's estate may be defeated.
- 8.63 We note, however, that a joint tenancy arrangement can be very different to dispositions with intent to defeat. The parties may have acquired property as joint tenants for perfectly legitimate reasons. Nevertheless, we have included joint tenancy interests accruing by survivorship as a specific ground for recovery owing to their prevalence. This is seen in the case law and was particularly mentioned by submitters.⁵⁶ Additionally, we note that unfairness to the surviving joint tenant can be avoided if the survivor is able to invoke the defences to recovery we discuss below.
- 8.64 When either ground applies, the court should have power to order that:⁵⁷
- (a) the recipient of the property transfer the property or part of it to the estate; or

⁵⁴ *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.

⁵⁵ Toni Collins "Concurrent Interests in Land" in *Hinde McMorland & Sim Land Law in New Zealand* (online looseleaf ed, LexisNexis) at [13.005], citing *Wright v Gibbons* [1949] HCA 3, (1949) 78 CLR 313 at 328.

⁵⁶ *Public Trust v W* [2005] 2 NZLR 696 (CA); *Ruocco v Wright* HC Christchurch CIV-2008-409-311, 16 December 2008; and *Public Trust v Thomasen* HC Auckland CIV-2009-404-3702, 13 October 2010. Note s 83 of the Property (Relationships) Act 1976 requires joint tenancy interests that have passed to the surviving partner to be classified as if the deceased partner had not died.

⁵⁷ In a technical sense, when the deceased owned property as joint tenants with another, the surviving joint tenant does not receive the property as if the deceased had disposed of their interest. Nevertheless, we use the term "recipient" here to mean the remaining joint tenant(s) to whom the deceased's interest has accrued by survivorship. They will have received a benefit from the effect of survivorship, and in that sense, they can be described as a recipient.

- (b) the recipient of the property pay reasonable compensation to the estate.
- 8.65 For the purposes of these provisions, property should include the proceeds of sale or exchange or, if the property is money, other property bought with that money.⁵⁸ This would enable tracing of the property, subject to the protections for recipients discussed further below.
- 8.66 The court would only recover the property necessary to satisfy the award it wished to make under the new Act. Third-party recipients from whom the property is sought would need to be joined as parties to the proceeding.⁵⁹
- 8.67 We acknowledge the concern raised by some submitters that the introduction of anti-avoidance provisions of this nature will create uncertainty. We make several observations in response:
- (a) As noted, the extent of the court's powers to address transactions and arrangements that defeat claims reflects the importance given to the awards. In our view, it is problematic for legislation to provide rights that can be so easily avoided.
 - (b) Without anti-avoidance provisions expressed in the new Act, claimants are still likely to seek priority in other ways. Recent claims for breach of fiduciary duty and constructive trusts over express trusts demonstrate that claimants are willing to make, and the courts are receptive towards, innovative arguments to recover property a person has alienated from their personal estate.⁶⁰ Uncertainty will persist in some form whether anti-avoidance provisions exist within the new Act or not. The inclusion of express anti-avoidance provisions should limit the extent to which courts feel required to develop alternative remedies, thereby providing more certainty.
 - (c) As noted below, we consider that relying on personal representatives to apply for a relationship property division is a problematic anti-avoidance mechanism and should be repealed. It would be unsatisfactory to remove this avenue of recovery without replacing it with a more principled device.
 - (d) Lastly, depending on what reforms are introduced for family provision awards, there is potential that few anti-avoidance claims will be made in practice. One option we have proposed is for family provision awards to be restricted to surviving partners, children under 25 and disabled children. Adult children would be unable to make claims and, consequently, would be unable to apply to recover property outside an estate.

Defence to an application to recover property

- 8.68 Importantly, the court should not order the recovery of property under the anti-avoidance provisions if a recipient of the property received it in good faith and provided valuable

⁵⁸ Compare Property Law Act 2007, s 345(2); and Property (Relationships) Act 1976, s 44(2)(c).

⁵⁹ We propose that any party should be able to join the third-party recipients. The parties would include the personal representatives and a third-party recipient who has already been joined. The court should also be able to join parties on its own initiative. This may prevent one party unfairly shouldering the burden when there are potentially multiple third parties who have received property against whom orders could be sought.

⁶⁰ *Rule v Simpson* [2017] NZHC 2154; *A v D* [2019] NZHC 992, [2019] NZFLR 105; *Murrell v Hamilton* [2014] NZCA 377; *Vervoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807; and *Hawke's Bay Trustee Co Ltd v Judd* [2016] NZCA 397.

consideration. This defence should apply when the recipient received the property from the deceased or when they received it through a subsequent transaction. Alternatively, the court should have discretion whether to order the recovery of property where the recipient received it in good faith, and it is unjust to order that the property be recovered.

- 8.69 Similar defences apply in relation to the PRA and Property Law Act's anti-avoidance provisions on which our recommendation is based. Drawing on the law that has developed under these statutes, "valuable consideration" should constitute more than nominal consideration, which would be sufficient to support a contract, but without needing to equate to the value of the property received.⁶¹ In the case of a joint tenancy, the court would need to determine whether the surviving joint tenant has provided valuable consideration across the duration of the joint tenancy to support the deceased's non-severance of the joint tenancy prior to their death.⁶² This would require the court to consider matters such as contribution of funds to the purchase price, responsibilities for maintaining the property and servicing debt.
- 8.70 When the recipient has not provided valuable consideration, they may still be protected where they have received the property in good faith and it would be unjust to order that the property be recovered. This test differs from the traditional formulation, which contains the additional requirement that recipients must have altered their position. We prefer a broader and more flexible approach to address the diverse range of circumstances that may come before the court.
- 8.71 These defences could protect recipients who received the property in circumstances where it may be inappropriate for the court to order recovery, such as donations to charity.

Relationship between anti-avoidance and contracting out agreements

- 8.72 In Chapter 10, we discuss contracting out agreements. Contracting out agreements are agreements through which partners decide what provision someone receives from an estate rather than under the rules of the new Act. It is possible that, under an agreement, a party would receive more property than they would be entitled to had they claimed under the new Act. As a result, the agreement may have a defeating effect on parties who would otherwise claim against the property disposed of under the agreement. We therefore recommend that property a party claims title to pursuant to the terms of a contracting out or settlement agreement be recoverable if it fits within the grounds for recovery under the anti-avoidance mechanism in R57.

Personal representatives' ability to apply for relationship property division should be repealed

- 8.73 Claimants should have the right to apply to the court directly for clawback orders if there was insufficient property in the estate to meet their entitlements or claims under the new Act. This would avoid the need for personal representatives to seek relationship property

⁶¹ See *Welch v Official Assignee* [1998] 2 NZLR 8 (CA) at 12. See also the discussion in *McIntosh v Fisk* [2017] NZSC 78, [2017] 1 NZLR 863 at [81] and *Allied Concrete v Meltzer* [2015] NZSC 7, [2016] 1 NZLR 141 at [76] regarding the concept of value under the Property Law Act 2007 and s 296(3) of the Companies Act 1993; and *Te Aka Matua o te Ture | Law Commission A New Property Law Act* (NZLC R29, 1994) at [319].

⁶² A similar approach is taken under the Succession Act 2006 (NSW).

divisions to meet claims. We therefore recommend the repeal of personal representatives' rights under section 88 of the PRA to apply for a division of relationship property on behalf of the estate.

- 8.74 While we recognise personal representatives may sometimes seek division to ensure there is sufficient property in the estate for the gifts the deceased purported to make under their will, we do not consider a full division of relationship property is a principled or proportionate response. Rather, the better approach is for will-makers to ensure their wills provide gifts that are capable of being made from the estate. Education for will-makers and adequate professional advice should help (see our proposals in Chapter 16 regarding the need for education). Further, we do not consider it desirable to allow personal representatives to claw back property on behalf of beneficiaries if the gifts under the will cannot be made from the estate. Aspects of the deceased's succession planning regarding property outside their estate should not be undone to compensate for deficiencies in other aspects of their succession planning. Instead, the clawback mechanisms should only be available to claimants for whom the new Act has established a basis to recover property outside the estate despite the deceased's intentions.

Surviving partner's additional rights under the PRA retained

- 8.75 A partner seeking relationship property division should retain rights to apply for relief through the additional remedies in the PRA, including the revised section 44C in respect of dispositions to trusts recommended in the PRA review.⁶³
- 8.76 Likewise, we recommend that a surviving partner should retain the right to lodge a notice of claim in respect of relationship property claims under the new Act.⁶⁴ The notice could be lodged against land of the estate and land that could be recovered through the anti-avoidance provisions. The few submitters who addressed this issue supported the proposal.

A more extensive anti-avoidance regime should not be introduced

- 8.77 We have considered whether to recommend the third option presented in the Issues Paper to introduce a more comprehensive anti-avoidance regime. We have decided not to make this recommendation for two primary reasons. First, the option received very little support during consultation. Second, we note that few jurisdictions have implemented similar regimes. In Australia, the Uniform Succession Laws project⁶⁵ recommended all states and territories adopt a "notional estate" approach whereby certain property falling outside the estate is deemed to be part of the estate for the

⁶³ We recognise that, under this option, the revised s 44C recommended in the PRA review would grant a partner remedies in respect of trusts that would not be available to family provision or contribution claimants. In the PRA review, we identified the use of trusts as a particular issue that can frustrate the just division of relationship property: *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [11.15]–[11.17].

⁶⁴ See *Property (Relationships) Act 1976*, s 42.

⁶⁵ The Uniform Succession Laws project was initiated by the Standing Committee of Attorneys-General in Australia in 1991. Its brief was to review the laws in Australian jurisdictions relating to succession and to recommend model national uniform laws. The Queensland Law Reform Commission took responsibility for coordinating the project: National Committee for Uniform Succession Laws *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP28, 1997) at i.

purpose of meeting family provision claims.⁶⁶ However, to date, New South Wales is the only Australian state or territory that has adopted this recommendation.⁶⁷ Several other state law reform bodies have rejected it on the basis that there is insufficient evidence of a problem and a notional estate approach is a significant incursion into property rights.⁶⁸ In Canada, a small minority of jurisdictions have adopted a notional estate-style regime.⁶⁹ Most jurisdictions have limited or no mechanisms to claim against property outside an estate. England and Wales have a fairly extensive notional estate-style regime,⁷⁰ but the Scottish Law Commission strongly recommended against it.⁷¹

⁶⁶ See National Committee for Uniform Succession Laws *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP28, 1997) at 76–87 and 93–94.

⁶⁷ Succession Act 2006 (NSW), pt 3.3.

⁶⁸ Victorian Law Reform Commission *Succession Laws* (Report, 2013) at [6.183]–[6.186]; South Australian Law Reform Institute *‘Distinguishing between the Deserving and the Undeserving’: Family Provision Laws in South Australia* (Report 9, 2017) at Recommendation 27 and [8.4.1]; and Tasmania Law Reform Institute *Should Tasmania Introduce Notional Estate Laws?* (Final Report No 27, 2019) at Recommendation 1 and [5.9.12].

⁶⁹ Succession Law Reform Act RSO 1990 c S.26, pt V; and Dependants Relief Act RSY 2002 c 56.

⁷⁰ Inheritance (Provision for Family and Dependants) Act 1975 (UK), ss 8–13.

⁷¹ Scottish Law Commission *Report on Succession* (Scot Law Com No 215, 2009) at [1.20].

CHAPTER 9

Use and occupation orders

IN THIS CHAPTER, WE CONSIDER:

- the law enabling a court to grant occupation orders, tenancy orders and furniture orders (use and occupation orders) over property of an estate, such as housing, furniture and other household items.

CURRENT LAW

9.1 Personal representatives are required to distribute a deceased's estate according to the deceased's will or according to the intestacy regime. There may, however, be individuals who relied on the deceased for housing or furniture and other household items. If the deceased's will or an intestacy does not provide for these individuals, the distribution of the estate may require them to relinquish possession of the property. The law provides several ways in which a court may award certain individuals use and occupation orders notwithstanding the requirements of the will or the intestacy regime.¹

Occupation orders under the PRA

- 9.2 Section 27 of the Property (Relationships) Act 1976 (PRA) enables the court to grant a partner occupation of the family home or other premises forming part of the relationship property (an occupation order). In proceedings following the death of one partner, an order enables the surviving partner to occupy the premises to the exclusion of any other person who would otherwise be entitled to occupy the premises.²
- 9.3 There is no mechanism under the PRA for the deceased's children to apply for an occupation order. Only a partner may apply. However, when determining whether to

¹ "Use and occupation orders" is used here to refer to an occupation order, tenancy order or furniture order. In keeping with our terms of reference, this chapter does not consider occupation orders over whenua Māori under Te Ture Whenua Maori Act 1993 except to the extent relevant to our discussion of tikanga relevant to use and occupation orders.

² Property (Relationships) Act 1976, s 91(2).

grant an occupation order to a partner, the court must have particular regard to the need to provide a home for any minor or dependent child of the relationship.³

9.4 The court may require a partner to pay occupation rent.⁴ The purpose of occupation rent is to compensate for the denied or delayed access for those entitled to the property.⁵

9.5 The case law shows that the courts generally grant occupation orders for short periods.⁶

Tenancy orders under the PRA

9.6 Section 28 of the PRA empowers the court to vest the tenancy of a dwellinghouse in a partner (a tenancy order). When a partner dies, the court may only make the order if:⁷

(a) the tenancy has vested in either the personal representative of the deceased or the surviving partner; and

(b) the surviving partner is residing in the dwellinghouse or at the date of death and the deceased partner was the sole tenant of the dwellinghouse or a tenant in common with the surviving partner.

9.7 As with occupation orders, the court must have particular regard to the need to provide a home for any minor or dependent child of the relationship.⁸

9.8 Tenancy orders will rarely be made when a partner dies. If the tenancy is in the names of both partners, it is likely the surviving partner will be able to continue the tenancy without the need for orders from the court. If, however, the deceased was the sole tenant under a residential tenancy, it is likely the tenancy will terminate on their death.⁹

Furniture orders under the PRA

9.9 Section 28B of the PRA enables the court to grant a partner the use of furniture, household appliances and household effects (a furniture order) in a home to which the court has granted an occupation order under section 27.¹⁰

9.10 Section 28C of the PRA allows the court to grant a partner exclusive possession of furniture, household appliances and household effects (a furniture order) independently of any occupation order made under section 27. The court will only grant an order if it is

³ Property (Relationships) Act 1976, s 28A(1).

⁴ Occupation rent can be payable as compensation for post-separation contributions under s 18B of the Property (Relationships) Act 1976 (as modified by s 86) or in the form of interest under the court's ancillary powers under s 33(4).

⁵ See for example *E v G* HC Wellington CIV-2005-485-1895, 18 May 2006 at [24]; and *Picard v Martin* [2020] NZHC 1206 at [87].

⁶ Nicola Peart "Occupation orders under the PRA" [2011] NZLJ 356 at 356. Peart's review of 28 cases decided from 2002 found occupation orders were granted in 18 of the cases. Orders for a finite period were made in six cases. In five cases, the period ranged from four to 22 months. In 10 cases, orders were made pending sale or division of relationship property.

⁷ Property (Relationships) Act 1976, s 91(3).

⁸ Property (Relationships) Act 1976, s 28A(1).

⁹ Residential Tenancies Act 1986, s 50A(1). The court has no power under the Property (Relationships) Act 1976 to extend a tenancy beyond its terms, which in this context would mean the terms set by the Residential Tenancies Act 1986.

¹⁰ Note, in a relationship property division, the "family chattels" are relationship property: Property (Relationships) Act 1976, s 8(1)(b). In an intestacy, a surviving partner is entitled to the deceased's "personal chattels": Administration Act 1969, s 77.

satisfied the items are reasonably required to equip another dwellinghouse in which the partner will be living.¹¹ The court may make an order for such a period and on such terms as it sees fit.¹² The court must have particular regard to any need of the applicant partner for the items to provide for the needs of any children of the relationship where those children live or will be living with the partner.¹³

Occupation orders under the FPA

9.11 The Family Protection Act 1955 (FPA) contains no provisions expressly empowering the court to grant a claimant use or occupation orders over property in the estate. Nevertheless, there are instances where the court has granted occupation rights under section 4 of the FPA to ensure “adequate provision” is made for the claimant.¹⁴ More often, however, rather than grant specific occupation rights, the court will award a portion of the estate or capital from the estate to ensure the claimant can retain the deceased’s home or obtain alternative accommodation.¹⁵

NGĀ TIKANGA

9.12 In the Issues Paper, we recognised the importance of weaving tikanga into the law relating to how to make and resolve claims against an estate and sought feedback on where state law ought to recognise and respond to tikanga and any kawa necessary to enliven that tikanga. We did not receive any submissions that commented expressly on tikanga relevant to use and occupation orders, although submitters raised several matters of relevance.

9.13 When a whānau member needs accommodation or requires household items following the death of someone on whom they relied, we expect tikanga relating to whanaungatanga, manaakitanga and aroha would respond to ensure that person’s needs are met, particularly tamariki. As explained by Chapman Tripp in their submission, whanaungatanga recognises the familial and relational ties that exist in te ao Māori.

9.14 We expect this to be the case even if the whānau member in question lacked a whakapapa connection to the deceased and the estate. Chapman Tripp observed that, although whakapapa is an important base for whanaungatanga, there are other relationships built on compassion that ought to also carry the same expectations of care and reciprocity. Te Hunga Rōia Māori o Aotearoa (THRMOA) commented that Te Ture Whenua Maori Act 1993 (TTWMA) “has largely got this right” in the context of Māori land. (Under TTWMA, a surviving partner may take a life interest and is entitled to receive certain benefits from the estate, even though they cannot succeed to the land itself.)¹⁶

9.15 Lastly, we expect tikanga would shape the process through which a whānau member’s rights to use and occupy property of the estate are determined. Submitters stressed that

¹¹ Property (Relationships) Act 1976, s 28C(3).

¹² Property (Relationships) Act 1976, s 28C(6).

¹³ Property (Relationships) Act 1976, s 28C(4).

¹⁴ See for example *Re Patterson* HC Nelson M84/92, 19 February 2001.

¹⁵ See for example *Re Torrie* HC Christchurch CIV-2005-409-144, 12 October 2005; *C v D* FC Kaikohe FAM-2007-027-37, 30 May 2008; and *D v M* [2012] NZFC 6722.

¹⁶ Te Ture Whenua Maori Act 1993, ss 116 and 328.

default rules may not sit well with tikanga. Rather, outcomes are reached through kōrero among the whānau.

RECOMMENDATIONS IN THE PRA REVIEW

- 9.16 In the PRA review, we made several recommendations to elevate children’s interests in relation to use and occupation orders. Those recommendations included the following:
- (a) There should be a presumption in favour of granting a temporary occupation or tenancy order on application by a principal caregiver of any minor or dependent children of the relationship. A court may decline to make an order if the respondent partner satisfies the court that an application is not in the child’s best interests or would otherwise result in serious injustice.¹⁷
 - (b) In some circumstances, the family home should be classified as separate property.¹⁸ The court’s power to grant occupation orders should extend to the family home regardless of whether it is relationship property or separate property.¹⁹ There should also be a limited jurisdiction to grant occupation orders over property held on trust where either or both partners or any child of the relationship are beneficiaries of the trust or either or both partners are trustees.²⁰ The court would, however, retain discretion to withhold an order, having regard to the circumstances of the trust, including the interests of other beneficiaries.²¹
 - (c) There should be express reference to the court’s powers to award occupation rent when appropriate in the circumstances as a condition of any occupation order.²² However, there should not be guidance for how a court should calculate occupation rent. The decision will depend on many factors, and the court should have broad discretion to take all relevant matters into account.
 - (d) The court’s power to grant furniture orders should be extended to other types of property that would come under the new definition of family chattels.²³
 - (e) The court should not take into account any misconduct of a partner when considering whether to grant an occupation, tenancy or furniture order unless that misconduct

¹⁷ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R69 and [12.62]–[12.68].

¹⁸ Specifically where the home was acquired by a partner before a relationship or as a gift or inheritance. See Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [3.74]–[3.79].

¹⁹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R94 and [15.97].

²⁰ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R94 and [15.97]–[15.100].

²¹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [15.100].

²² Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R95 and [15.104]–[15.106].

²³ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R70 and [12.70].

amounts to gross misconduct that has significantly affected the extent or value of the relationship property.²⁴

ISSUES

- 9.17 In the Issues Paper, we highlighted several issues with the current law. First, the current law provides no express power for the minor or dependent children of the deceased or their principal caregiver to seek a use or occupation order. Currently, if the children's accommodation interests and needs are inadequately provided for under the will or in an intestacy, they must rely on the surviving partner to apply for an order under the PRA.²⁵ There may be instances, however, where the surviving partner is unwilling to apply, or the surviving partner is not the principal caregiver of the children.
- 9.18 There is an obligation under the United Nations Convention on the Rights of the Child (the UNCROC), to which Aotearoa New Zealand is a signatory, that, in matters affecting children, the best interests of the child shall be a primary consideration.²⁶ To ensure compliance with the UNCROC, the law should make better provision for the use and occupation rights of the deceased's minor children following the death of their parent.
- 9.19 Second, under the current law, the court's powers to grant occupation orders to a surviving partner only extend to the family home and other property forming part of the relationship property. As explained in the PRA review, in many instances, the couple's family home may not be relationship property.²⁷ For instance, the home may be held on a trust connected with the family. If the recommendations in the PRA review are implemented, the family home may be one partner's separate property.
- 9.20 It is important that the court has adequate powers beyond relationship property to ensure partners do not suffer hardship immediately after the death of their partner. The surviving partner will often be an older person with limited means and therefore may be particularly vulnerable if they are required to find alternative accommodation soon after the death of their partner. While the new Act will provide a surviving partner with relationship property entitlements and rights to claim provision from an estate, in many instances, those entitlements or awards might not grant partners with the ability to remain in the deceased's home.
- 9.21 Lastly, as noted in the PRA review, the court's power to make furniture orders under the PRA is restricted in terms of the types of property included.²⁸ Broadening the property available beyond "furniture, household appliances, and household effects" could better support the best interests of those surviving the deceased, including children.

²⁴ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R41–R43.

²⁵ As noted above, the children could apply for further provision from the estate under the Family Protection Act 1955, but the courts are more likely to grant a capital award from the estate rather than use and occupation rights.

²⁶ United Nations Convention on the Rights of the Child, 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 3.

²⁷ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [15.84]–[15.87].

²⁸ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [12.70].

RESULTS OF CONSULTATION

- 9.22 In the Issues Paper, we proposed that the new Act should express the court's powers to make occupation, tenancy and furniture orders in favour of a surviving partner or a principal caregiver of any minor or dependent child of the deceased. We suggested that, while these orders may delay distribution of the estate and add costs to administration, the benefits of having such orders outweighed these disadvantages.
- 9.23 We received submissions on the Issues Paper regarding use and occupation orders. Additionally, we received several submissions on the consultation website that commented on the importance of allowing a surviving partner or minor children to stay in the family home. All submitters agreed that we had identified the major issues with the current law.
- 9.24 Submitters were generally supportive of our proposals in the Issues Paper. We heard from Perpetual Guardian that use and occupation orders are more frequently seen in disputes around separation and are not commonly used in the context of estates. However, we heard from submitters that there is a place for them in this context and that their benefits outweigh the potential detriment caused.
- 9.25 Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) highlighted as a preliminary consideration that our proposals dealing with use and occupation orders on one partner's death must be integrated with the correlating provisions under the PRA on separation, either in the PRA's current form or under an amended version of the legislation if our recommendations are implemented.

Occupation orders

- 9.26 Submitters to the Issues Paper were generally supportive of our proposal that a court should have the ability to grant an occupation order to a surviving partner or a principal caregiver of any minor or dependent child of the deceased.
- 9.27 A number of submitters, including NZLS and Professor Bill Atkin, emphasised that a surviving partner should not be left worse off on death than on separation and that it is important to ensure surviving partners do not suffer hardship when a relationship ends in this way. Accordingly, both NZLS and Atkin submitted that orders that would be available to a partner under the PRA during their lifetime should also be available on their partner's death.
- 9.28 Several submitters also emphasised that a surviving partner or family members living with the deceased should not be forced to sell the family home and indeed that having to do so adds dislocation to the pain of having lost someone. Submitters highlighted the positive benefits of occupation orders in these respects, acknowledging that retaining a roof over a surviving partner's head for a time could be more valuable than receiving chattels or jewellery and that such orders are a solution to ensure a surviving partner is able to retain their standard of living and continue in a similar financial position after their partner's death.
- 9.29 Opinions differed significantly on the length of time to which the recipient of an order should be entitled to have occupation of a property. Most submitters suggested such orders should be of a temporary nature and should not create long-standing rights because an order is to assist a recipient to transition to an independent living situation. Atkin agreed that such orders are likely to be transitional (and it will be rare where they

are for a longer period of time) but said they should not necessarily be limited to being temporary. Some website submitters, however, suggested that a surviving partner caring for children under the age of 18 should have the right to remain in the property until any dependent children reach the age of 18. Other submitters to the website proposed that a surviving partner should only be able to benefit from an occupation order until they have repartnered. Several submitters suggested that a surviving partner should be entitled to a life interest in the property and be able to remain in the property until they choose to move out. Conversely, certain submitters proposed specific periods of time, ranging from six months to 10 years.

- 9.30 We received several submissions on what property should be subject to an order. One submitter said that a partner should not have a claim on a family home if it was not purchased together. All other submitters supported our proposal that if an occupation order is granted, it should be in respect of any property of the estate, as well as property the deceased owned as joint tenant and property held on trust where a child is a beneficiary of the trust.
- 9.31 Submitters, including Perpetual Guardian, NZLS and Succeed Legal said that use and occupation orders could delay the administration of an estate, increase administration costs and impact other beneficiaries in an estate. Atkin observed that the granting of orders will usually turn on a balancing of factors. We also heard from submitters that balancing these factors will be particularly difficult in blended family situations, for example, where the deceased has made a gift of property to one or more children from a previous relationship, but the court makes an occupation order in favour of the surviving partner of the deceased who has caregiving responsibilities for dependent children.
- 9.32 A majority of submitters, however, believed that the benefits of an occupation order in favour of the deceased's children would outweigh the detriment to an estate in terms of costs and the potential delay in distribution. Public Trust submitted that such delay may be necessary to ensure the welfare of the surviving partner or dependent children of the deceased.

Tenancy orders

- 9.33 In the Issues Paper, we proposed that a court should also have the ability to grant a tenancy order to a surviving partner or a principal caregiver of any minor or dependent child of the deceased, although we considered that such orders would be rare.
- 9.34 We received limited feedback in relation to tenancy orders. Those who did comment on this matter confirmed that tenancy orders are rare, and Perpetual Guardian reiterated that such orders are generally intended to be only temporary. MinterEllisonRuddWatts did note that the requirement in the UNCROC to take a child-centred approach applies to rented homes as well. They also said that tenancy orders would be better located in the Residential Tenancies Act 1986.

Presumption in favour of minor or dependent children of the deceased

- 9.35 In the Issues Paper, and as recommended in the PRA review, we proposed that, where the deceased left any minor or dependent child, the new Act should contain a presumption in favour of granting a temporary occupation or tenancy order to the principal caregiver of the child for the benefit of the child. We suggested that a court may decline to make an order if it is satisfied that an application is not in the child's best

interests or would otherwise result in serious injustice, which the court would determine, having regard to a number of relevant factors.

- 9.36 We received mixed views on this proposal in consultation. Some submitters, including Public Trust and MinterEllisonRuddWatts, supported our suggestions, agreeing that the best interests of any child should be a primary consideration and that it was appropriate the court should be able to protect the interests of minor and dependent children in this way. Chapman Tripp suggested that, when considering an occupation order, the court should take into account whether the child was living in the accommodation prior to the death of the deceased and whether the living situation would enhance the wellbeing of the child.
- 9.37 Other submitters were more hesitant. The Family Law Committee of Auckland District Law Society submitted that children’s interests should not be elevated higher than they are now and cautioned that our proposals would lead to children being used in support of a surviving partner’s claim to property, which would run counter to treating children’s best interests as a primary consideration. NZLS and Succeed Legal submitted that it may not be appropriate to prioritise the best interests of the child in an estate administration context. Succeed Legal suggested this was only a primary area of concern where both parents have died, while NZLS submitted that, while it is important the court has adequate powers to ensure dependent children do not suffer hardship on the death of a parent, a presumption in their favour would unnecessarily and inappropriately fetter the discretion of the court.
- 9.38 As a separate consideration, Public Trust submitted that, if we are to recommend orders for the benefit of dependent children, it is important to establish a clear definition of “dependent”.

Furniture orders

- 9.39 In the Issues Paper, we proposed that a court should have the power to grant furniture orders to a surviving partner or principal caregiver of any minor or dependent child of the deceased. We suggested that, when doing so, the court should consider the best interests of the child as a primary consideration. We also proposed that the types of property that may be the subject of a furniture order should be extended to other types of property that would come under the new Act’s definition of family chattels.²⁹
- 9.40 Although we received limited feedback on these suggestions, those submitters who did comment were supportive of our proposals.

Occupation rent

- 9.41 In the Issues Paper and as recommended in the PRA review, we proposed that the court should have power to order that the recipient of an occupation order pay occupation rent to the estate (or trust as the case may be). We suggested, however, that the new Act should not contain guidance on how such rent should be calculated, on the basis that the decision will depend on many factors and the court should have broad discretion to take all relevant matters into account.

²⁹ The definition of family chattels is discussed further in Chapter 4.

- 9.42 We received several submissions on this issue, all of which affirmed that the court should have the power to order that the recipient of an order pay rent to the estate or trust. Atkin was cautious, however, that occupation rent could be potentially chilling to claims for an occupation order and submitted that occupation rent should seldom be imposed if the recipient of an occupation order was fulfilling childcare responsibilities.
- 9.43 Opinions differed on whether the new Act should contain guidance factors on the calculation of rent. Public Trust submitted that the court should have broad discretion to take into account relevant factors and that there should be no prescribed formula on the calculation of rent. Morris Legal, conversely, submitted that the new Act should include guidance factors, including the market rent of the property, whether the recipient was paying any rent towards the property during the deceased's lifetime, and the financial circumstances of the recipient, the deceased and the beneficiaries of the estate or trust.

Relationship between use and occupation orders and family provision and relationship property claims

- 9.44 In the Issues Paper, we noted that use and occupation orders are conceptually distinct from family provision claims. Whereas a family provision award should reflect the extent of the particular claimant's rights to family provision, a use or occupation order should be targeted more towards the applicant's immediate accommodation needs. It should be possible for an order to exceed the deceased's duties to make provision for the applicant, including being available to an adult dependent child who is not eligible for a family provision award.
- 9.45 For these reasons, we said that these orders should be distinct, and a court should not be able to satisfy a family provision claim by awarding use or occupation rights to the applicant. To the extent a use or occupation order goes beyond the deceased's duties to make provision for the applicant, we suggested the court might require the applicant to pay occupation rent, which in some cases could be offset against a family provision award.
- 9.46 Some submitters suggested the provisions relating to use and occupation orders should be located alongside those concerning family provision or relationship property claims. Succeed Legal said that dependent children should be sufficiently provided for under FPA claims as opposed to use and occupation orders, as provision under an FPA claim ensures that their guardian can provide for the future accommodation and other needs. Several submitters, however, commented that a surviving partner should not be required to sell the property they have lived in to finance family provision claims, particularly those of adult children.

CONCLUSIONS

RECOMMENDATIONS

R63

The new Act should provide the court with powers to make:

- a. occupation orders;
- b. tenancy orders; and
- c. furniture orders

in favour of a surviving partner, a principal caregiver of any minor child of the deceased or a dependent child of the deceased.

For the purposes of granting occupation, tenancy and furniture orders, a child of the deceased should include:

- a. an accepted child, being a child for whom the deceased had assumed, in an enduring way, the responsibilities of a parent; and
- b. a whāngai.

R64

The court should have power to grant an occupation order over any property of the estate, as well as:

- a. property the deceased owned as a joint tenant that would accrue to the remaining joint tenant(s) by survivorship; and
- b. property held on trust where the deceased or any minor or dependent child of the deceased are beneficiaries of the trust (including as a discretionary beneficiary).

R65

The court should consider the best interests of any minor or dependent children as a primary consideration. Where the deceased left any minor or dependent child, the new Act should contain a presumption in favour of granting a temporary occupation or tenancy order to the principal caregiver of the child for the benefit of the child. A court may decline to make an order if it is satisfied that an order is not in the child's best interests or would otherwise result in serious injustice.

R66

The new Act should expressly refer to the court's powers to award occupation rent when appropriate in the circumstances as a condition of any occupation order.

R67

The property available for a furniture order should extend to other types of property that would come under the new Act's definition of family chattels.

Occupation orders

- 9.47 We recommend that a court should have the ability to grant an occupation order to a surviving partner or a principal caregiver of any minor or dependent child of the deceased.
- 9.48 An occupation order allows a surviving partner the use of a home for a period, which gives them stability as they transition to a life in which they are not dependent on the deceased's estate for accommodation support. Although we recognise that use and occupation orders have the potential to delay estate administration and distribution and to increase costs of administration, we believe the court should nevertheless be able to make these orders in appropriate circumstances. The fact that orders will in most cases be transitional and temporary and may include a condition to pay occupation rent should lessen any impact on affected beneficiaries.
- 9.49 We heard from several submitters that surviving partners will often have accommodation needs after their partner's death. For many relationships, particularly those that occur between partners later in their lives, a surviving partner may not be entitled to claim ownership of the family home. That may be because the deceased did not gift the home to them in the will or because the surviving partner's relationship property interest does not enable them to receive the entire home. It can be difficult for surviving partners, particularly those with limited financial means, to rehome themselves, while those who are unable to do so may be reliant on government assistance for their accommodation needs.
- 9.50 Where the deceased has left any minor or dependent children, the court should consider their best interests as a primary consideration. This is in line with our recommendations in the PRA review and ensures consistency with this requirement in the UNCROC. We also consider it is consistent with the tikanga relating to whanaungatanga, manaakitanga and aroha that requires the needs of tamariki are met. For adult dependent children, their eligibility for an occupation order is justified on the basis of their immediate accommodation needs. If a child is dependent this will be the case no matter their age. The inclusion of adult dependent children also aligns with the availability of occupation orders when partners separate, which we affirmed in the PRA review.³⁰
- 9.51 We recommend restricting the category of eligible applicants to a surviving partner from a qualifying relationship, a principal caregiver of any minor child of the deceased or a dependent child of the deceased. A child of the deceased should include "accepted children" and whāngai, which we discuss further in Chapter 5. An accepted child is any child for whom the deceased assumed, in an enduring way, the responsibilities of a parent. A whāngai relationship between the deceased and the child is something that will need to be established pursuant to the tikanga of the relevant whānau. There may be other individuals, beyond those we recommend should be eligible to seek an order, who depended on the deceased for use or occupation of property and may therefore be in need of accommodation support upon the deceased's death, such as a surviving partner who, despite cohabiting with the deceased, was not in a qualifying relationship or an adult child who had not left home. However, we do not think such individuals should be entitled to use and occupation rights in the property following the deceased's death. It is difficult to see why, in the absence of formal occupation and use rights (such as a licence or a

³⁰ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R69 and [12.65].

lease), the deceased should owe legal obligations to such individuals, particularly as the deceased would have no legal obligation to provide for these individuals while alive. We also consider that, in most cases, personal representatives will be lenient towards these individuals as they transition to alternative accommodation. Such leniency may also be consistent with tikanga and reflect whānau wishes in particular circumstances.

- 9.52 We expect that a recipient of an order would normally have been resident in the property prior to the deceased's death. We do not, however, recommend making such co-residency with the deceased a condition on which the court should grant an order. Instead, we favour the court having broad powers to address the accommodation needs of the deceased's partner and children following death. We also note that the court's powers under the PRA are not restricted by co-residency requirements.
- 9.53 We consider the best approach for determining the duration of an order is to allow the court to have discretion, as it currently does, to make an order for such period as it sees fit, having regard to the circumstances of the case. There will frequently be a number of factors to balance, which we consider the court is best placed to weigh, including the tikanga of the whānau where relevant.
- 9.54 The court should have power to grant an order in respect of any property of the estate as well as:
- (a) any property the deceased owned as joint tenant that would accrue to the remaining joint tenant(s) by survivorship; and
 - (b) any property held on trust where the deceased or any minor or dependent child of the deceased are beneficiaries of the trust, including as a discretionary beneficiary.³¹
- 9.55 We consider that, if eligible recipients have immediate accommodation needs, these will exist irrespective of the nature of ownership in the property. We also consider it is appropriate to allow occupation of trust property on a temporary basis as long as the deceased's children have a beneficial interest in the property. Apart from the presumption in favour of granting an order in favour of any minor or dependent child of the deceased, the court should otherwise retain a broad discretion to make or withhold an order, having regard to the circumstances of the trust, including the interests of other beneficiaries.

Tenancy orders

- 9.56 We recommend that the new Act should provide the court with powers to grant a tenancy order to a surviving partner or a principal caregiver of any minor or dependent child of the deceased. When making furniture orders, the court should consider the best interests of the child as a primary consideration. Although tenancy orders are rare, we did not receive any call for them to be removed.
- 9.57 We consider that it is appropriate to retain tenancy orders alongside occupation and furniture orders. The objective of a tenancy order is the same as that of an occupation order, and both occupation and tenancy orders work in conjunction with furniture orders. This is also consistent with our recommendations in the PRA review.

³¹ The court's jurisdiction to grant occupation orders over homes held on trust when the deceased's children are beneficiaries is very broad. We expect, however, in most cases, the children would only seek an occupation order when they have been resident in the home prior to the deceased's death. We expect the court would decline an order when the children had not previously relied on the trust for accommodation.

Presumption in favour of minor or dependent children of the deceased

- 9.58 We recommend that, where the deceased left any minor or dependent child, there should be a presumption in favour of granting a temporary occupation or tenancy order to the principal caregiver of the child for the benefit of the child, with the proviso that a court should be able to decline to make an order if it is satisfied that an application is not in the child's best interests or would otherwise result in serious injustice. This is consistent with our recommendations in the PRA review.
- 9.59 In determining whether the order would be in the child's best interests, the court should have regard to:
- (a) the need to provide a home for the child;
 - (b) the potentially disruptive effects on the child of a move to other accommodation; and
 - (c) the child's views and preferences if they can be reasonably ascertained.
- 9.60 In considering whether the order would cause serious injustice, the court should consider the interests of beneficiaries and claimants against the estate and how they would be affected by the order. In making this assessment, the court's power to award occupation rent will be relevant.
- 9.61 We consider that this approach is consistent with Aotearoa New Zealand's obligations to take a child-centred approach under the UNCROC as well as a parent's duty to provide for their children. It reflects the tikanga relating to whanaungatanga, manaakitanga and aroha towards tamariki. It also recognises there may be cases where it would be inappropriate to award an occupation order and allows the court to decline to do so. Although some submitters felt the presumption would inappropriately fetter the discretion of the court, we are satisfied that the court's powers to depart from the presumption give the court sufficient flexibility.
- 9.62 Whether a child is "dependent" is a question of fact. We do not consider it necessary to define this term in the new Act. The term is already well established in case law, which suggests that adult children may be dependent on their parent for support if they are physically or intellectually disabled, but adult children who have not progressed to financial independence due to lack of desire or motivation are unlikely to be dependent.³² This is a different inquiry to the definition of disabled children eligible for family provision discussed in Chapter 5. As discussed further below, the family provision and use and occupation order jurisdiction are conceptually different and intended to achieve different objectives. We also consider that the factors set out above, which received support from submitters, will adequately limit orders to appropriate circumstances.

Furniture orders

- 9.63 A court should have the power to make furniture orders in favour of a surviving partner or a principal caregiver of any minor or dependent child of the deceased, either independently of or ancillary to any occupation or tenancy order. When making furniture orders, the court should consider the best interests of the child as a primary consideration.

³² See *B v B* (2009) 27 FRNZ 622 (HC) at [81].

- 9.64 The property available for a furniture order should extend to other types of property that would come under the new Act's definition of family chattels. This will ensure consistency with the recommendations made in the PRA review.

Occupation rent

- 9.65 We consider that, when the court makes an occupation order, it should have discretion to order the recipient of the order to pay occupation rent to the estate or trust.
- 9.66 Although we acknowledge the possibility that occupation rent could be chilling to applications for an occupation order, we consider that the benefits of having rent payable as a condition of any order outweigh this risk. Occupation rent compensates those beneficiaries or claimants who have had their entitlements under the will or intestacy deferred and is an effective means of achieving balance between the different interests at play.
- 9.67 We recommend that the new Act should expressly refer to the court's ability to award occupation rent when appropriate in the circumstances as a condition of any order, since, as identified in the PRA review, there is nothing in the wording of the provisions currently alerting a reader to this possibility.³³
- 9.68 As recommended in the PRA review, we do not recommend including guidance in the new Act for how a court should calculate occupation rent. We think the decision will depend on many factors, and the court should continue to have a broad discretion to take all relevant matters into account. We would expect that the factors outlined by Morris Legal in their submission (the market rent of the property, whether the recipient was paying any rent towards the property during the deceased's lifetime and the financial circumstances of the recipient, the deceased and the beneficiaries of the estate or trust) are factors the courts will take into account without needing to be specified.

³³ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [15.106].

CHAPTER 10

Contracting out and settlement agreements

IN THIS CHAPTER, WE CONSIDER:

- the law that governs whether someone, during their lifetime, can make an agreement with another that determines rights in respect of their estate when they die instead of having those rights determined by the relevant statutes (contracting out agreements); and
- the law that governs whether people can make agreements that settle any dispute regarding claims against an estate without the court having to make orders (settlement agreements).

CURRENT LAW

Contracting out of the PRA and settling claims

- 10.1 Part 6 of the Property (Relationships) Act 1976 (PRA) enables partners to reach their own agreement about the division of their property rather than following the provisions of the Act. There are different types of agreements. Section 21 allows partners in a relationship, or contemplating entering a relationship, to make a contracting out agreement with respect to the status, ownership and division of their property. Section 21A provides for partners to enter an agreement for the purposes of settling any differences that have arisen between them concerning property.
- 10.2 Section 21B allows agreements where one partner dies. This can be where proceedings are commenced while both partners are alive but then one partner dies or when one partner has died and the surviving partner or the deceased's personal representative intends to commence or has commenced proceedings. In either case, the surviving partner and the personal representative may make an agreement for the purpose of settling the claim.

- 10.3 Parties must observe the procedural safeguards in section 21F for an agreement to have effect.¹ These are:
- (a) the agreement must be in writing;
 - (b) each party to the agreement must have independent legal advice before signing the agreement;
 - (c) the signature of each party to the agreement must be witnessed by a lawyer; and
 - (d) the lawyer who witnesses the signature must certify that, before the party signed, the lawyer explained to that party the effect and implications of the agreement.
- 10.4 Section 21G provides that section 21F does not limit any other law that makes a contract void, voidable or unenforceable.
- 10.5 Under section 21J, a court can set aside an agreement if satisfied that giving effect to it would cause serious injustice, having regard to:
- (a) the provisions of the agreement;
 - (b) the length of time since the agreement was made;
 - (c) whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was made;
 - (d) whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made (whether or not those changes were foreseen by the parties);
 - (e) the fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering into the agreement; and
 - (f) any other matters that the court considers relevant.
- 10.6 The test to set aside an agreement is a high threshold. In 2001, Parliament changed the test from “unjust” to “serious injustice”. In addition, it inserted section 21J(4)(e), which requires the court to have regard to the fact that the parties wished to achieve certainty in their affairs. The amendments responded to the concern that the courts were setting aside contracting out agreements too readily.² Te Kōti Pīra | Court of Appeal has noted that serious injustice is most likely to be demonstrated by an unsatisfactory process resulting in an inequality rather than mere inequality of outcome itself.³
- 10.7 In addition, in deciding whether giving effect to an agreement made under section 21B would cause serious injustice, section 21J(5) provides that the court must also have regard

¹ If an agreement does not comply with the procedural safeguards in s 21F, a court may declare the agreement has effect, wholly or in part, if it is satisfied that the non-compliance has not materially prejudiced the interests of any party to the agreement: Property (Relationships) Act 1976, s 21H.

² In *Wood v Wood* [1998] 3 NZLR 234 (HC) at 235, the Court said:

My fear is that these contracting-out agreements are being set aside too readily. Those who criticise the Matrimonial Property Act for the readiness with which it captures property sourced from outside the marriage partnership (pre-marriage assets, third-party gifts and inheritances) are invariably met with the same answer: if people do not like the statutory regime they can contract out of it. One gathers that the same legislative approach is about to be taken with de facto marriage. But if effective contracting out were as difficult to achieve as these Family Court decisions suggest, the answer would be a hollow one. All would be consigned to the same Procrustean bed whether they liked it or not.

³ *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [112].

to whether the estate of the deceased spouse or partner has been wholly or partly distributed.

Contracting out of the FPA and settling claims

- 10.8 There is nothing in the Family Protection Act 1955 (FPA) that expressly prevents parties entering agreements during their lifetime regarding their rights under the FPA. However, the courts have held that the FPA is paramount as a matter of state policy and potential claimants cannot surrender their rights through agreements.⁴
- 10.9 The courts have held that agreements entered to settle FPA claims after the deceased has died do not prevent a person from pursuing a claim.⁵ Nevertheless, we understand parties often enter “deeds of family arrangement” to settle FPA claims.⁶

Contracting out of the TPA and settling claims

- 10.10 A claim under the Law Reform (Testamentary Promises) Act 1949 (TPA) is, by its nature, quasi-contractual. If the parties come to an agreement as to how a TPA claim would be determined, that would alter the promise upon which the claim is founded. Consequently, it would appear that parties can enter contracting out and settlement agreements to determine a claimant’s TPA claims both during the deceased’s lifetime and after their death.

Contracting out of the intestacy regime

- 10.11 There are no provisions in the Administration Act 1969 dealing with or prohibiting contracting out of the intestacy regime. This is understandable because the deceased could simply have made a will rather than contracting with another regarding their entitlements. There is some case law that has found that separating partners can contract out of intestacy entitlements.⁷
- 10.12 Under section 81 of the Administration Act, beneficiaries under the intestacy regime can disclaim their entitlements. However, a disclaimer has no effect if any valuable consideration is given for it.⁸

⁴ *Gardiner v Boag* [1923] NZLR 739 (SC) at 745–746. But see the recent case *Matthews v Phochai* [2020] NZHC 3455, in which the Court, while accepting the parties’ contracting out agreement was void or voidable insofar as it purported to exclude any claim under the Family Protection Act 1955, held that the agreement was relevant to the assessment of any award, as it recorded the parties’ joint intention to be financially independent and leave the relationship with only the assets they came in with plus anything more they had acquired themselves: at [61]–[64].

⁵ *Hooker v Guardian Trust & Executors Co of New Zealand* [1927] GLR 536 (SC).

⁶ Bill Patterson has argued that, if the issue came before the courts today, they would likely hold such deeds of family arrangements are enforceable: see Bill Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis, Wellington, 2021) at 112–113. Note too s 47(3) of the Administration Act 1969, which provides that claimants cannot bring an action against an administrator for distributing an estate when they have advised the administrator in writing or acknowledged in any document that they consent to the distribution or do not intend to make any application that would affect the distribution.

⁷ *Warrender v Warrender* [2013] NZHC 787, [2013] NZFLR 565 at [19].

⁸ Administration Act 1969, s 81(3)(c).

Mutual wills

- 10.13 A mutual wills arrangement is where two people make wills that dispose of certain property in a manner they have agreed upon accompanied by a mutual understanding that neither party will change or revoke the will or dispose of the property.⁹
- 10.14 For mutual wills made after 1 November 2007, section 30 of the Wills Act 2007 applies. It provides that, where two people have made mutual wills and the first of them to die (person A) keeps the promise but the second (person B) does not, a person who would have benefited from person B's will had person B kept their promise may claim from person B's estate.
- 10.15 For wills made before 1 November 2007, the common law doctrine of mutual wills continues to apply. If the surviving person does not keep their promise, when they die, their personal representative must hold the property on trust for the beneficiaries of the mutual wills agreement.¹⁰ This doctrine, rather than the Wills Act, also applies where the survivor acts inconsistently with the mutual wills agreement during their lifetime.

NGĀ TIKANGA

- 10.16 In this review, we recognise the importance of weaving tikanga into the law, and we sought feedback on where state law ought to recognise and respond to tikanga and any kawa necessary to enliven that tikanga. We have not received much feedback from Māori on tikanga relevant to contracting out and settlement agreements. It is possible, however, to make some general comments as to how tikanga might apply.
- 10.17 First, allowing people the freedom to enter agreements as to how an estate should be distributed recognises the mana of the parties to the agreement. It provides a means for Māori to arrange their property affairs in a manner of their own choosing.
- 10.18 Second, throughout this Report and, in particular, Chapter 13 on resolving disputes out of court, we stress the importance of tikanga processes through which Māori may settle disputes relating to succession. Māori dispute resolution is primarily concerned with maintaining a state of wellbeing and balance.¹¹ The application of tikanga to social relationships leads to conflict management processes that differ from prevalent Western ways of viewing and solving conflict.¹² Tikanga relating to mana, tapu and, especially, utu dictate the process and content of resolutions. These decision-making processes are not easily reduced into detailed rules.¹³ As we conclude in Chapter 13, allowing Māori to

⁹ *Wilson v Saunders* [2016] NZHC 1211, (2016) 17 NZCPR 404 at [8]–[9].

¹⁰ *Re Newey (Deceased)* [1994] 2 NZLR 590 (HC) at 593; and *Lewis v Cotton* [2001] 2 NZLR (CA) at [42].

¹¹ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 262 and 264–265.

¹² Carwyn Jones “Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes” in Morgan Brigg and Roland Bleiker (eds) *Mediating Across Difference: Oceanic and Asian Approaches to Conflict Resolution* (University of Hawai'i Press, Honolulu, 2011) 115 at 124.

¹³ Te Aka Matua o te Ture | Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase — An Advisory Report for Te Puni Kōkiri, the Office of Treaty Settlements and the Chief Judge of the Māori Land Court* (NZLC SP13, 2002) at 11.

resolve disputes through tikanga and tikanga processes, rather than through state law and institutions, also facilitates the exercise of tino rangatiratanga guaranteed in te Tiriti.

RECOMMENDATIONS IN THE PRA REVIEW

- 10.19 In the PRA review, we made recommendations in relation to contracting out and settlement agreements for the division of relationship property when partners separate. We concluded that the legislation should continue to enable partners to make their own agreement about how to divide their property during or in anticipation of entering into a relationship and in order to settle any differences that arise between them.¹⁴
- 10.20 We recommended that the existing procedural safeguards in section 21F of the PRA should be retained. We added that the legislation should permit lawyers to use audio-visual technology to witness a partner signing a contracting out or settlement agreement.¹⁵ If an agreement fails to conform to the procedural safeguards, we recommended that the court's power to give effect to the agreement should continue on the same basis but with the additional requirement that the court should have regard to the same matters that are relevant when deciding whether to set aside an agreement for serious injustice.¹⁶
- 10.21 We recommended that the court should continue to have power to set aside agreements that would cause serious injustice. We recommended, however, that the power should be enlarged to enable a court to vary the agreement instead of setting it aside.¹⁷ We also recommended that the court should have regard to the best interests of any minor or dependent children of the relationship when exercising its powers.¹⁸

ISSUES

Parties should be entitled to make comprehensive agreements regarding property on death

- 10.22 In our view, the law should respect the wishes of partners and people contemplating entering a relationship to have their rights and claims against each other's estates determined by agreement rather than the relevant statutes provided the parties have entered the agreement informed of their rights. The current law, which prevents parties from contracting out of the FPA, undermines parties' freedom to arrange their affairs in the manner they wish, promoting a certain and final outcome.

¹⁴ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R73.

¹⁵ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R74.

¹⁶ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R76.

¹⁷ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R77.

¹⁸ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R78.

State law governing agreements should recognise and respond to tikanga Māori

10.23 As noted above, contracting out and settlement agreements are likely to involve aspects of tikanga concerning the mana of the parties. They are connected to how parties might resolve disputes through tikanga processes. Responsible kāwanatanga requires that state law ought to recognise and respond to these matters.

The current law can lead to inconsistent outcomes

10.24 Several anomalies can potentially arise under the current law. First, a situation could arise where an FPA claim undermines a contracting out agreement under the PRA. For example, partners may make an agreement under section 21 of the PRA that certain property is to be separate property should one of the partners die. However, the surviving partner could, at least in theory, claim against the deceased's separate property under the FPA.

10.25 Second, the courts have held that they cannot interfere with contracts to make testamentary provision when determining FPA claims.¹⁹ A person could enforce a contract through which the deceased provided them certain benefits under their will. However, if a contract provided that a person agrees not to make an FPA claim against the estate, the court may not enforce it.

There are delays and costs to administration if matters cannot be settled out of court

10.26 It is unsatisfactory if claims cannot be settled without going to court. The parties will suffer from extra costs, delays and the adversarial nature of court proceedings. Scarce judicial resources may be unnecessarily spent.

It is unclear how claims against estates relate to mutual wills

10.27 It is unclear what effect a mutual wills arrangement has when a surviving partner elects option A under Part 8 of the PRA. It could be argued a mutual wills arrangement that does not meet the contracting out requirements under the PRA is void.²⁰ A surviving partner would therefore not be prevented from electing option A to divide relationship property despite the mutual wills. However, it is unclear whether the property the surviving partner receives from a relationship property division having chosen option A would be held on constructive trust or claimable under section 30 of the Wills Act.²¹

10.28 There is also a wider question about the requirements for finding a mutual wills arrangement. There have been cases where partners in a subsequent relationship have entered wills that made provision for the surviving partner to inherit the estate on the understanding they would then provide for the deceased partner's children in their will.²²

¹⁹ *Breuer v Wright* [1982] 2 NZLR 77 (CA).

²⁰ Property (Relationships) Act 1976, s 21F; and Nicola Peart "Effect of Option A" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Reuters, Wellington, 2004) 97 at 105–107.

²¹ The authors of *Relationship Property on Death* have argued that it should: see Nicola Peart "Effect of Option A" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Reuters, Wellington, 2004) 97 at 105–107.

²² See for example *Cleary v Cockcroft* [2020] NZHC 1452; and *McNeish v McArthur* [2019] NZHC 3281, [2020] 2 NZLR 287.

In these cases, after a partner died, the surviving partner changed their will to omit the deceased partner's children. The court held that a mutual wills arrangement was not present because there was no evidence that the parties had committed not to revoke their wills. A question arises as to whether the evidential threshold at which the courts should find a mutual wills relationship arrangement exists should be lowered.

Contracting out and settlement agreements may leave insufficient property to meet claims

10.29 It is possible that partners' contracting out and settlement agreements will provide a surviving partner with more property than they would otherwise be entitled to receive by claiming under the new Act while leaving insufficient property in the deceased's estate to meet claims. We consider this issue further when discussing awards, priorities and anti-avoidance in Chapter 8.

RESULTS OF CONSULTATION

- 10.30 Most submitters agreed with our identification of the issues in the Issues Paper. Several submitters who shared their views through the consultation website said there should be greater rights than the law currently provides for parties to enter agreements that comprehensively determine claims against estates. Most submitters, including Public Trust, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), the Family Law Committee of Auckland District Law Society (ADLS) and several law firms and lawyers, expressly agreed with our proposal that partners and people contemplating entering a relationship should be able to contract out of the new Act's provisions regarding relationship property entitlements and family provision claims. We qualified that proposal by adding that parties must follow procedural safeguards to ensure they appreciate their rights, namely, obtaining independent advice and having the lawyer witness the agreement and certify they explained the effect and implications of the agreement. We said also there should be no ability to contract out of family provision claims that might be brought by minor or dependent disabled children of the deceased. Submitters who addressed these points mainly agreed with the proposals.
- 10.31 Some submitters' views differed on the extent to which contracting out of the new Act should be permitted. McWilliam Rennie submitted there should be no ability to contract out of any family provision claim. They explained that the future a person may have expected when entering the contract may not eventuate, for example, because of illness or injury. Chris Kelly, in contrast, favoured the ability to contract out. He submitted that the procedural safeguards applying to contracting out agreements under the PRA should not be applied to contracting out agreements under the new Act because they impose financial barriers.
- 10.32 We proposed in the Issues Paper that it should not be possible to contract out of family provision claims of minor children and dependent disabled children. All submitters who addressed this point agreed, including NZLS and ADLS.
- 10.33 We proposed in the Issues Paper that a court should have power to give effect to an agreement that does not comply with the Act's procedural safeguards. Likewise, we proposed the court should have power to set aside or vary an agreement that would cause serious injustice. Again, submitters agreed with these proposals. NZLS disagreed, however, with the proposal that the best interests of children should be a matter on

which a court could set an agreement aside. NZLS reasoned that relationship property agreements concern matters between adult parties.

- 10.34 Several submitters supported our proposal that an agreement between former partners on their separation that purports to be a full and final settlement of relationship property matters should be presumed to be full and final settlement of all the surviving partner's entitlements and claims under the new Act.
- 10.35 We proposed that mutual wills agreements should be subject to the same procedural safeguards as contracting out agreements regarding claims against the other's estate. We explained this approach is consistent with the wider contracting out regime and could avoid contentious litigation about whether partners did in fact enter a mutual wills arrangement. Several submitters addressed this issue, including Public Trust, NZLS and ADLS. They all supported the proposal.
- 10.36 We presented two options regarding settlement agreements. The first option was that the new Act should allow parties to settle claims without prescribing any procedural safeguards as to how settlement agreements are made. The second option was to require parties to follow the same procedure applying to contracting out agreements. Most submitters favoured the first option, citing the burden and expense of each party obtaining independent legal advice. ADLS, on the other hand, favoured the second option. TGT Legal submitted that, where there are beneficiaries that are minors, unborn or unascertained or otherwise lack capacity, the agreement should be submitted to the court for approval on behalf of those parties.

CONCLUSIONS

Contracting out agreements

RECOMMENDATIONS

R68

Partners and people contemplating entering a relationship, who are informed of their rights, should be able to enter contracting out agreements that deal with relationship property entitlements and family provision claims under the new Act (contracting out agreements).

R69

A contracting out agreement under the new Act should be void unless it complies with the following procedural safeguards:

- a. The agreement must be in writing.
- b. Each party to the agreement must have independent legal advice before signing the agreement.
- c. The signature of each party to the agreement must be witnessed by a lawyer.
- d. The lawyer who witnesses the signature must certify that, before the party signed, the lawyer explained to that party the effect and implications of the agreement.

R70

If a contracting out agreement does not comply with the formalities in R69, a court should have power to give effect to the agreement if non-compliance has not caused material prejudice to the parties.

R71

Contracting out agreements should be subject to any other law that makes a contract void, voidable or unenforceable.

R72

A court should be able to set aside or vary a contracting out agreement if satisfied that giving effect to it would cause serious injustice. In deciding whether the agreement would cause serious injustice, the court should have regard to the matters currently set out in section 21J of the PRA, the best interests of any minor or dependent children of the deceased and the tikanga of the relevant whānau. For the purposes of determining whether to set aside or vary an agreement, a child of the deceased should include:

- a. an accepted child, being a child for whom the deceased had assumed, in an enduring way, the responsibilities of a parent; and
- b. a whāngai.

R73

Contracting out agreements should be subject to the new Act's anti-avoidance provisions recommended in R57-R62.

R74

There should be no ability to contract out of family provision claims with minor children or adult children who are deemed by law to lack capacity.

R75

An agreement between former partners on their separation that purports to be a full and final settlement of relationship property claims should be presumed to be a full and final settlement of the surviving partner's entitlements and claims under the new Act unless the agreement provides otherwise.

R76

Mutual wills agreements should be subject to the same procedural safeguards as contracting out agreements regarding claims against the other's estate.

Partners should be able to contract out of all entitlements and claims under the new Act

10.37 In previous chapters, we recommend that the new Act should provide for several claims that may be made against a deceased estate:

- (a) A surviving partner should be entitled to the relationship property interest they would otherwise receive had the relationship ended while the deceased was alive.
- (b) A surviving partner should be able to claim family provision from the estate where, taking into account the provision available under the deceased's will or in an intestacy, a surviving partner has insufficient resources to maintain a reasonable,

independent standard of living, having regard to the economic consequences of the relationship.

- (c) We presented two options for the Government to consider in respect of family provision awards to children of the deceased:
 - (i) Option One: All children or grandchildren of the deceased should be able to claim family provision when the deceased has unjustly failed to provide for them if they are in financial need or unjustly failed to recognise them.
 - (ii) Option Two: Children under 25 or disabled children of any age should be able to claim family provision when, the child does not have sufficient resources to enable them to be maintained.
- (d) When a deceased has promised to reward someone in their will who has provided them substantial work or services, the promisee should be able to claim against the estate (testamentary promise claims).

10.38 In addition, we recommend amendments to the intestacy regime in the Administration Act as to which family members should succeed to the intestate estate and in what shares (see Chapter 7).

10.39 In general, we favour an approach that enables adults to contract out of the entitlements and claims they may have in respect of someone's estate. We believe this approach is consistent with the principles underpinning contemporary state law in Aotearoa New Zealand that adult parties generally have autonomy to arrange their property matters with each other in the way they would like. It also addresses the unsatisfactory state of the current law, which allows people in relationships, or people contemplating entering relationships, to contract out of some claims against an estate but not others. Lastly, most submitters favoured a more comprehensive ability to contract out than the current law permits. As noted above, from a tikanga perspective, it recognises the mana of the parties entering the contract. It provides a means for Māori to arrange their property affairs in a manner of their own choosing, thereby facilitating tino rangatiratanga.

10.40 Accordingly, we recommend that partners or people contemplating entering a relationship, who are informed of their rights, should be able to enter contracting out agreements that deal with relationship property entitlements and family provision claims under the new Act.

10.41 Contracting out agreements under the new Act should be void unless they comply with the same procedural safeguards that currently apply to agreements entered under the PRA, namely:

- (a) the agreement must be in writing;
- (b) each party to the agreement must have independent legal advice before signing the agreement;
- (c) the signature of each party to the agreement must be witnessed by a lawyer; and
- (d) the lawyer who witnesses the signature must certify that, before the party signed, the lawyer explained to that party the effect and implications of the agreement.

10.42 These safeguards recognise that contracts regarding relationship property or family provision claims may be made between parties who do not approach one another as contracting parties at arm's length. Rather, they are in relationships of love, affection and

aroa. The parties may be of unequal bargaining power. The purpose of the safeguards is to ensure people do not sign away their rights without appreciating their entitlements under the new Act and the implications of the agreement.

- 10.43 If an agreement does not comply with the safeguards, a court should have powers to give effect to the agreement if non-compliance has not caused material prejudice to the parties.²³ A court should only give effect to the agreement to the extent it would not be caught by any anti-avoidance provisions that may be implemented in the new Act.
- 10.44 We recommend that these agreements should also continue to be subject to any other law that makes a contract void, voidable or unenforceable. A court should also be able to vary or set an agreement aside if satisfied that giving effect to it would cause serious injustice. This will enable the court to address agreements that have, for example, become unfair or unreasonable in light of any changes in circumstances since they were made. The court should have regard to the matters currently set out in section 21J of the PRA, and whether the estate has been wholly or partly distributed.²⁴ The factors should direct the court to have regard to the best interests of any minor or dependent children of the deceased, similar to the recommendation in the PRA review.²⁵ For the purposes of determining whether to set aside or vary an agreement, a child of the deceased should include an accepted child (being a child for whom the deceased had assumed, in an enduring way, the responsibilities of a parent) and a whāngai. Where applicable, the court should also have regard to the tikanga of the whānau to determine whether the agreement would cause serious injustice.
- 10.45 We recommend that contracting out agreements should be subject to the anti-avoidance provisions we recommend in Chapter 8. A court should have power to recover property when, based on the grounds within the recommended anti-avoidance provisions set out in Chapter 8, an agreement has the effect of defeating the entitlements and claims of others in relation to the estate.²⁶

No ability to contract out of some family provision claims

- 10.46 Irrespective of whether the Government adopts Option One or Option Two in relation to the family provision claims of children, we recommend that there should be no ability to contract out of claims that may be brought by minor children or adult children who are deemed by law to lack capacity. This approach differs from our proposal in the Issues Paper that there should be no ability to contract out of the family provision claims of

²³ The court's power to give effect to non-complying agreements may have particular significance because, in Chapter 7, we recommend that the court be empowered to give effect to informal relationship property settlements between partners who have separated but the surviving partner would otherwise be eligible in the deceased partner's intestacy.

²⁴ Property (Relationships) Act 1976, s 21J(5).

²⁵ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R78 and [13.96]–[13.98]. The court could also unwind an agreement if the deceased's children chose to challenge an agreement through anti-avoidance provisions, meaning there are potentially two routes through which the court could set aside or vary an agreement when it infringed on the best interests of minor or dependent children.

²⁶ Section 21K of the Property (Relationships) Act 1976 provides that agreements under ss 21-21B are deemed to have been made for valuable consideration. This provision should not apply in relation to the anti-avoidance provisions in the new Act. Rather whether a party to a contracting out agreement has provided valuable consideration so as to defend an application to recover property should be an issue to be determined on the facts of each case.

children under 25 and dependent disabled children. While submitters generally supported this approach, there may be good reasons to enable contracting out for children aged 18 or over and dependent disabled children who have capacity. For example, a parent may wish to provide financial support to help a child buy a house or complete education on the understanding it is an advance of their inheritance and no further provision would be available to that child when the parent dies. In our view, any prohibition on contracting out should apply in respect of claimants who are particularly vulnerable owing to their minority or lack of legal capacity.²⁷

Procedural safeguards are not needed for agreements with adult children concerning family provision and testamentary promise claims

- 10.47 We do not consider the new Act should make express provision in relation to adult children's family provision claims, irrespective of whether the Government adopts Option One or Option Two. Omitting express provision in the new Act for adult children to enter agreements will not preclude the parties from entering contracting out agreements and will instead enable the parties to enter arrangements that might not comply with the statutory formalities. As noted above, a person may provide their adult child with support during their life on the understanding it was an advance on their inheritance and no further provision would be available for that child when the deceased dies. The court should not be required to disregard this arrangement as void because it does not qualify as a contracting out agreement. Rather, in considering an adult child's application for family provision, the court should have regard to any agreement as part of its general inquiry as to whether the deceased has made insufficient provision for the child.²⁸
- 10.48 We are also mindful that an award to an adult child is more discretionary than a partner's relationship property entitlements. It would be difficult to apply the other provisions that apply to contracting out agreements in the PRA, such as when the court should validate a non-complying agreement or set an agreement aside for serious injustice.
- 10.49 We do not consider the parties should be required to follow the same procedural safeguards when making a contract that relates to a person's rights to bring a testamentary promise claim. It is preferable that parties can make agreements for work or services that might otherwise give rise to a claim without the potential barrier of having to go through the full contracting out procedure. In any event, parties entering a contracting out or settlement agreement to address other matters could, in addition, include terms relating to testamentary promise claims.

²⁷ Note, in contrast, s 21I of the Property (Relationships) Act 1976 which enables partners who are not yet 18 to enter contracting out and settlement agreements under the Act provided the Court approves the agreement.

²⁸ In Chapter 5 regarding family provision, we recommend that the court should have regard to various matters when considering a child's application for family provision. We anticipate the existence of an agreement with the deceased regarding the child's family provision claims would be highly relevant to matters the court should take into account, such as whether the deceased has given inadequate or no consideration to the strength and quality of the claimant's relationship with the deceased over their lifetime, the deceased's reasons for making their will and whether the will can be seen to be irrational or capricious.

Effect of a relationship property settlement when a partner dies

10.50 Under the current law, it is unclear whether a relationship property settlement between partners during their lifetimes precludes them from later making an FPA claim and/or precludes them from entitlements under the intestacy regime, when a partner dies. We recommend that an agreement between former partners on their separation that purports to be a full and final settlement of relationship property claims should be presumed to be a full and final settlement of the surviving partner's entitlements and claims under the new Act unless the agreement provides otherwise.²⁹

Mutual wills

10.51 We recommend that mutual wills agreements should be subject to the same procedural safeguards as contracting out agreements regarding claims against estates. That is, if the parties agree not to revoke their wills or deal with property inconsistently with them, that agreement should be recorded in writing, their signatures should be witnessed, and the lawyers advising each partner should certify the agreement. If these requirements were not met, the court could give effect to the agreement if neither partner suffered material prejudice.

10.52 Similarly, a court should be able to vary or set aside agreements that would cause serious injustice. Like other contracting out agreements, a mutual wills arrangement that defeats a person's claims under the new Act should be subject to the new Act's anti-avoidance provisions we recommend in Chapter 8. The court's remedial powers to set aside or vary mutual wills arrangements that would cause serious injustice should not be used as a substitute for the court's anti-avoidance powers.

10.53 We recommend that mutual wills should be made as contracting out agreements because:

- (a) it is consistent with the wider regime for contracting out;
- (b) it would avoid the contentious litigation often seen in the courts as to whether the partners did in fact enter a mutual wills arrangement;
- (c) the court would have residual powers to give effect to the agreement or to vary or set the agreement aside; and
- (d) it will help address instances where mutual wills ought or ought not to be enforced.

²⁹ We also consider that this presumption should apply equally to a non-complying agreement that a court has ordered should be given effect.

Settlement agreements

RECOMMENDATIONS

R77

The new Act and the Administration Act 1969 should clarify that parties may enter agreements to settle any difference arising between them in relation to relationship property entitlements, family provision claims, testamentary promise claims and intestacy entitlements under the new Act and the intestacy regime (settlement agreements). The legislation should impose no procedural safeguards for parties to observe when entering settlement agreements.

R78

Settlement agreements should be subject to any other law that makes a contract void, voidable or unenforceable.

R79

A court should be able to set aside or vary a settlement agreement if satisfied that giving effect to it would cause serious injustice. In deciding whether the agreement would cause serious injustice, the court should have regard to the matters currently set out in section 21J of the PRA, the best interests of any minor or dependent children of the deceased, and the tikanga of the relevant whānau.

R80

Settlement agreements should be subject to the new Act's anti-avoidance provisions recommended in R57-R62.

Parties should be able to settle disputes by agreement

10.54 We recommend that the new Act should contain provisions stating that parties can enter an agreement to settle any differences arising between them under the new Act. These types of agreements are likely to involve multiple parties who have an interest in or claim against the estate. They are different in nature to contracting out agreements. Identical provisions should be included in the Administration Act in respect of disputes arising in relation to the intestacy regimes.

10.55 The provisions in the new Act and Administration Act should not prescribe any procedural safeguards for those parties to observe when entering agreements except where the dispute involves parties who are unascertained, minors or deemed by law to lack capacity (see below). This approach would continue the existing practice of parties entering deeds of family arrangement. It would be a matter of judgement for the parties, particularly the personal representatives, as to how the agreement should be entered. For example, questions that might need to be considered include:

- (a) who would need to be party to the settlement agreement;
- (b) which parties would need to obtain independent legal advice; and
- (c) how parties who have chosen against actively participating in the settlement negotiations should be included in the agreement.

- 10.56 If, however, the dispute involves parties who are unascertained, minors or persons deemed by law to lack capacity, we recommend that the new Act should prescribe a process consistent with the alternative dispute resolution provisions of the Trusts Act 2019.³⁰ We discuss this process further in Chapter 13 on resolving disputes out of court. To summarise, the court should appoint representatives for these parties. The representative should be able to agree to participate in an out-of-court resolution process and agree to any settlement reached. The representative should act in the best interests of the parties they represent. We recommend that the court should be required to approve any settlement that involves unascertained parties, minors or persons who are deemed by law to lack capacity.
- 10.57 Apart from the requirements applying in respect of parties who are unascertained, minors or persons deemed by law to lack capacity, the main advantage of prescribing no other requirements is that it should be easier for the parties to conclude settlements than if more stringent procedural safeguards applied. Of the two options presented in the Issues Paper, most submitters favoured the less-stringent approach. They reasoned that requiring every party to obtain independent legal advice before a settlement agreement became binding would be too burdensome, adding cost and other barriers to parties settling their disputes.
- 10.58 A more flexible approach to concluding settlements, as this recommendation provides for, is likely to be more consistent with tikanga processes for resolving disputes. As we note in Chapter 13, the application of tikanga to social relationships may lead to conflict management processes that differ from prevalent Western ways of viewing and resolving conflict. Māori decision-making processes do not sit easily with detailed rules to govern the process. Suitable resolution methods are decided and acted upon according to various factors, including the relationships involved and the tikanga that were transgressed.³¹ The dispute resolution process is thus fluid and might incorporate several methods and principles in order to reach a solution.³² We anticipate that requiring parties to obtain independent legal advice and entering a formal settlement agreement in which each parties' lawyer certifies the agreement could unnecessarily undermine the tikanga of the resolution process.
- 10.59 We recognise the disadvantages of this option, including:
- (a) the possible uncertainty as to when and how it is permissible for the parties to enter a settlement agreement; and
 - (b) the potential that parties enter imprudent agreements they would not have entered had more stringent safeguards applied.
- 10.60 There are, however, ways in which inappropriate settlement agreements may be avoided. If a personal representative or other parties consider are not sure it would be appropriate to enter the settlement agreement, they could submit the proposed settlement to court for approval. An agreement must also comply with the requirements otherwise applying

³⁰ Trusts Act 2019, s 144.

³¹ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World — Māori Perspectives on Justice* (March 2001) at 83.

³² Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World — Māori Perspectives on Justice* (March 2001) at 89.

to contracts, including any other law that makes a contract void, voidable or unenforceable.

- 10.61 Further, there would be two potential methods to set aside settlement agreements. First, where an agreement would cause serious injustice, we recommend that the new Act should provide the court with power to vary or set aside the agreement. Second, based on the anti-avoidance mechanisms we recommend for the new Act in Chapter 8, a settlement agreement that prejudiced the entitlements or claims of a third party against the estate who has not properly been included in the settlement agreement could potentially be set aside and the property recovered if it had the effect of defeating claims.
- 10.62 Lastly, when considering whether a settlement agreement would cause serious injustice, we recommend that the court should have regard to the tikanga of the relevant whānau. This may include setting an agreement aside based solely on tikanga if needed.
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CHAPTER 11

Jurisdiction of the courts

IN THIS CHAPTER, WE CONSIDER:

- the jurisdiction of te Kōti Whānau | Family Court and te Kōti Matua | High Court to hear and determine entitlements to and claims against an estate; and
- the jurisdiction of te Kooti Whenua Māori | Māori Land Court to hear and determine claims relating to taonga.

CURRENT LAW**The PRA**

- 11.1 Every application under the Property (Relationships) Act 1976 (PRA) must be heard by te Kōti Whānau | Family Court (the Family Court).¹ The Family Court can transfer the proceedings to te Kōti Matua | High Court (the High Court) if the judge is satisfied that the High Court is the more appropriate venue, having regard to:²
- (a) the complexity of the proceedings or of any question in issue in the proceedings;
 - (b) any proceedings before the High Court that are between the same parties and that involve related issues; and
 - (c) any other matter that the judge considers relevant in the circumstances.
- 11.2 Parties to a proceeding or any other person prejudicially affected by a decision have an automatic right of appeal to the High Court.³ Appeals against decisions of the High Court are governed by the Senior Courts Act 2016.⁴

¹ Property (Relationships) Act 1976, s 22(1). Nothing in the PRA applies in respect of whenua Māori: Property (Relationships) Act 1976, s 6.

² Property (Relationships) Act 1976, s 38A.

³ Property (Relationships) Act 1976, s 39. The automatic right of appeal applies to a Family Court or District Court decision to make or refuse to make an order or to dismiss or otherwise finally determine the proceedings.

⁴ Property (Relationships) Act 1976, s 39B.

The FPA and the TPA

- 11.3 The Family Protection Act 1955 (FPA) and the Law Reform (Testamentary Promises) Act 1949 (TPA) have very similar jurisdictional rules. The High Court and the Family Court have concurrent jurisdiction with respect to proceedings under both Acts.⁵ However, if the claim relates only to Māori freehold land, it must be made in te Kooti Whenua Māori | Māori Land Court (the Māori Land Court).⁶ Te Ture Whenua Maori Act 1993 (TTWMA) provides that te Kooti Pīra Māori o Aotearoa | Māori Appellate Court (the Māori Appellate Court) has jurisdiction to hear and determine appeals from any final order of the Māori Land Court, whether made under TTWMA or otherwise.⁷
- 11.4 The Family Court does not have jurisdiction if proceedings related to the same matter have already been filed with the High Court.⁸ The Family Court may refer proceedings or any question in the proceedings to the High Court if it considers it appropriate.⁹ The High Court, upon application by any party, must order that the proceedings be removed to the High Court unless it is satisfied that the proceedings would be more appropriately dealt with in the Family Court.¹⁰
- 11.5 Parties to a proceeding, or any other person prejudicially affected by the proceedings, have an automatic right of appeal to the High Court.¹¹ Appeals against a High Court decision are governed by the Senior Courts Act.¹²

The intestacy regime

- 11.6 The Administration Act 1969 provides that the High Court has jurisdiction to determine proceedings relating to testamentary matters and matters relating to the estate of deceased persons.¹³ This general provision encompasses matters relating to intestate estates, although there are more specific rules in relation to certain matters:

⁵ Family Protection Act 1955, s 3A(1); and Law Reform (Testamentary Promises) Act 1949, s 5(1). However, s 106 of TTWMA prevents any order being made under the TPA or FPA from having the effect of alienating any beneficial interest in Māori freehold land outside of the preferred class of alienees.

⁶ Family Protection Act 1955, s 3A(2A); and Law Reform (Testamentary Promises) Act 1949, s 5(2A).

⁷ Section 59 of Te Ture Whenua Maori Act 1993 provides for appeals from a provisional or preliminary determination of the Māori Land Court. Further appeal to the Court of Appeal is permitted under s 58A and direct appeal to the Supreme Court in exceptional circumstances is permitted under s 58B. The High Court may state a case for the Māori Appellate Court where any question of fact relating to the interests or rights of Māori in any land or in any personal property arises in the High Court or any question of tikanga Māori arises in the High Court: s 61.

⁸ Family Protection Act 1955, s 3A(2); and Law Reform (Testamentary Promises) Act 1949, s 5(2). For the FPA, proceedings will relate to the same matter if a non-FPA proceeding might have the effect of enlarging or decreasing the estate, thus affecting the viability of an FPA claim: see *Hayes v Family Court* [2015] NZCA 470, (2015) 30 FRNZ 414.

⁹ Family Protection Act 1955, s 3A(3); and Law Reform (Testamentary Promises) Act 1949, s 5(3).

¹⁰ Family Protection Act 1955, s 3A(4); and Law Reform (Testamentary Promises) Act 1949, s 5(4).

¹¹ Family Protection Act 1955, s 15(1); and Law Reform (Testamentary Promises) Act 1949, s 5A(1). Similarly to the PRA, the right of appeal is against a decision of the Family Court or District Court to make or refuse to make an order, dismiss proceedings or otherwise finally determine proceedings: Family Protection Act 1955, s 15(1AA); and Law Reform (Testamentary Promises) Act 1949, s 5A(1AA).

¹² Decisions of the High Court are final unless the appellant obtains leave from the Court of Appeal: Senior Courts Act 2016, s 60(1).

¹³ Administration Act 1969, s 5.

- (a) The High Court has jurisdiction to grant letters of administration and to determine who should be appointed as administrator.¹⁴
 - (b) The High Court has jurisdiction to determine the validity of a will or its interpretation.¹⁵ The High Court's determination may lead to a total or partial intestacy.
 - (c) The Family Court may give approval for a person under 18 years to make, change, revoke or revive a will.¹⁶ The Family Court's determination may lead to a total or partial intestacy.
 - (d) The High Court may decide that a surviving de facto partner who was in a relationship of short duration should succeed on the deceased partner's intestacy.¹⁷
 - (e) A person can claim against an intestate estate under the PRA, FPA and TPA, in which case, the jurisdictional rules under those Acts will apply.¹⁸
 - (f) The administrators will hold an intestate estate on trust. Trustees may therefore apply to the High Court for directions,¹⁹ or beneficiaries may apply to the High Court to review a trustee's decision.²⁰
- 11.7 The Māori Land Court has jurisdiction in relation to intestacy over Māori freehold land.²¹ Beneficial interests pass to children in equal shares or, if there are no children, to siblings in equal shares.²² In all cases, if those children or siblings entitled to inherit die before the deceased, their children will inherit their share equally.²³

ISSUES

Which court is the most appropriate to deal with claims under the new Act?

- 11.8 In the Issues Paper, we considered which court was the most appropriate to deal with claims under the new Act – the Family Court or the High Court. We also considered the role of the Māori Land Court, which we discuss below.
- 11.9 We outlined factors in favour of the Family Court having first instance jurisdiction, with the power to transfer proceedings to the High Court and being subject to rights of appeal:
- (a) The specialist jurisdiction of the Family Court in matters concerning families, relationships and children's interests. The Family Court has held jurisdiction for PRA matters for 40 years, and FPA and TPA matters for 30 years.

¹⁴ Administration Act 1969, ss 5 and 6; and High Court Rules 2016, r 27.35.

¹⁵ Wills Act 2007, ss 14 and 32.

¹⁶ Wills Act 2007, s 9.

¹⁷ Administration Act 1969, s 77B.

¹⁸ Property (Relationships) Act 1976, s 61; Family Protection Act 1955, s 4; and Law Reform (Testamentary Promises) Act 1949, s 3.

¹⁹ Trusts Act 2019, s 133.

²⁰ Trusts Act 2019, s 95.

²¹ Te Ture Whenua Maori Act 1993, s 18.

²² Te Ture Whenua Maori Act 1993, s 109(1).

²³ Te Ture Whenua Maori Act 1993, s 109(1).

- (b) Proceedings in the Family Court are private as hearings are generally not open to the public.²⁴ Parties to a dispute may prefer privacy if the dispute centres on questions such as whether the deceased and the surviving partner were in a qualifying relationship.
 - (c) The Family Court is generally more accessible as Family Court judges are stationed in towns across Aotearoa New Zealand.
 - (d) Family Court proceedings must be conducted in such a way as to avoid unnecessary formality.²⁵
 - (e) Lawyers acting for parties in Family Court proceedings must, so far as possible, promote conciliation.²⁶
 - (f) The overall costs of Family Court proceedings are generally lower than High Court proceedings.²⁷
- 11.10 Factors in favour of the High Court having first instance jurisdiction are:
- (a) Giving the Family Court exclusive first instance jurisdiction could increase its already heavy workload and exacerbate delays.²⁸
 - (b) A claim against an estate can be brought alongside other claims for which the High Court has exclusive jurisdiction, such as challenging the validity of a will or the replacement of a personal representative, or a claim based on a constructive trust.
 - (c) The claims against estates recommended in this Report may be complex and may be more appropriate for the High Court's determination. For example, a claim based on a testamentary promise and anti-avoidance provisions could involve difficult questions of law and fact.

Rights of appeal against interlocutory matters are uncertain

- 11.11 Some High Court decisions have interpreted the right to appeal under the PRA as limited to orders that finally determine proceedings.²⁹ However, in *L v L*, the High Court held there is a right of appeal against interlocutory decisions under the PRA.³⁰
- 11.12 The courts have also been divided on rights of appeal under the FPA. In *Crick v McIlraith*, the High Court held there was no automatic right of appeal against an interlocutory decision given the terms of section 15(1AA) of the FPA.³¹ On the other hand, in *E v E*, the

²⁴ Family Court Act 1980, s 11A.

²⁵ Family Court Act 1980, s 10(1).

²⁶ Family Court Act 1980, s 9A.

²⁷ Although we have heard from some practitioners that proceedings may be resolved more efficiently and therefore more economically in the High Court.

²⁸ We discuss concerns about the delays in the Family Court in Chapter 12.

²⁹ *Dunsford v Shanly* [2012] NZHC 257 at [7]–[8], applying *E v E* [2005] NZFLR 806 (HC) and *Crick v McIlraith* HC Dunedin CIV-2004-412-37, 1 June 2004. See also *Smith v Smith* HC Whangarei CIV-2003-488-394, 12 March 2004.

³⁰ *L v L* [2017] NZHC 2529 at [22].

³¹ *Crick v McIlraith* HC Dunedin CIV-2004-412-37, 1 June 2004 at [3].

High Court refused to follow *Crick v McIlraith*, relying instead on the District Court Act 1947.³²

Jurisdictional limitations of the Family Court

- 11.13 There are questions regarding the Family Court's jurisdiction to address certain property issues that may arise under the PRA, such as whether a valid trust exists. Similar issues may arise in FPA and TPA proceedings where claimants try to impugn certain transactions. For example, property purportedly settled on a trust that the court declares invalid would revert to the deceased's estate and be available to satisfy a claim.
- 11.14 These issues have been partly addressed by section 141 of the Trusts Act 2019. That provision gives the Family Court the power to make any order or give any direction available under the Trusts Act in proceedings for which the Family Court has jurisdiction under section 11 of the Family Court Act 1980.
- 11.15 In the PRA review, we recommended that, in relationship property proceedings, the Family Court should have jurisdiction to hear and determine any related matter within the general civil and equitable jurisdiction of te Kōti-ā-Rohe | District Court (the District Court) pursuant to sections 74 and 76 of the District Court Act 2016.³³

The Māori Land Court

- 11.16 In the Issues Paper, we asked whether the Māori Land Court should have a broader role in resolving succession disputes over matters other than whenua Māori, noting the concerns we had heard about the challenges Māori face in resolving succession matters where whenua Māori and other property are involved. We briefly outlined the history of the Māori Land Court. We observed that its predecessor court at one time held concurrent jurisdiction with the High Court (then known as the Supreme Court) on matters of probate and administration and at another time held exclusive jurisdiction over these matters for Māori.³⁴ We also noted that the appropriate role of the Māori Land Court has been considered over many years with some suggesting its jurisdiction should be broadened.³⁵

RESULTS OF CONSULTATION

- 11.17 We received submissions on the jurisdiction of the courts from both submitters to the consultation website and submitters to the Issues Paper.

³² *E v E* [2005] NZFLR 806 (HC), relying on s 72 of the District Courts Act 1947, now s 124 of the District Court Act 2016. See also *R v N* [2014] NZHC 1295, in which the Court held it had jurisdiction to hear an appeal from an interlocutory direction in an FPA proceeding.

³³ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [17.41]. We also recommended the financial limit on the District Court's jurisdiction should not apply.

³⁴ Te Aka Matua o te Ture | Law Commission *Review of Succession Law: Rights to a person's property on death | He arotaki i te āheinga ki ngā rawa a te tangata ka mate ana* (NZLC IP46, 2021) at [15.14]–[15.15].

³⁵ Te Aka Matua o te Ture | Law Commission *Review of Succession Law: Rights to a person's property on death | He arotaki i te āheinga ki ngā rawa a te tangata ka mate ana* (NZLC IP46, 2021) at [15.21]–[15.29].

- 11.18 In the Issues Paper we proposed that the Family Court and the High Court should have concurrent first instance jurisdiction to hear claims under the new Act, subject to both Courts having the power to remove the proceedings to the High Court.
- 11.19 Most submitters to the Issues Paper agreed that the Family Court and High Court should have concurrent first instance jurisdiction. These submitters included Public Trust, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), the Family Law Committee of Auckland District Law Society (ADLS), MinterEllisonRuddWatts, Jan McCartney QC and Bill Patterson.³⁶ NZLS commented that there should be a provision in the new Act that the Family Court may order, either on application by a party or on its own motion, that the proceedings be removed to the High Court due to the complexity of the matter. However, some submitters disagreed with concurrent first instance jurisdiction. Professor Bill Atkin said that the Family Court should have sole first instance jurisdiction. He noted that complex matters can be transferred to the High Court and implementation of the recommendations in the *Te Korowai Ture ā-Whānau* report will help fix some of the cultural deficiencies in the Family Court.³⁷ Morris Legal also submitted that the Family Court should have first instance jurisdiction with claimants able to seek leave to file a claim in the High Court where:
- (a) only the High Court has jurisdiction to determine other claims being brought at the same time by the claimant; or
 - (b) the claim is particularly complex due to the legal issues and/or the value of the claim or estate.
- 11.20 Morris Legal submitted that the Family Court is the most appropriate forum for family disputes as it is less expensive, more informal, and private.
- 11.21 In the Issues Paper, we proposed that the High Court should continue to hold exclusive jurisdiction for issues concerning the administration and distribution of an intestate estate. Most submitters who commented on this agreed with the proposal. These submitters included Public Trust, NZLS, MinterEllisonRuddWatts and Patterson. A few submitters noted the high costs involved with the High Court in this regard.
- 11.22 In the Issues Paper, we also proposed that the new Act should permit appeals as of right against interlocutory decisions that can have a significant impact on the parties' rights and obligations, including:
- (a) occupation, tenancy and furniture orders;
 - (b) transfers of the proceeding to the Family Court or the High Court; and
 - (c) orders for the disclosure of information.
- 11.23 We noted that these proposals were consistent with our recommendations in the PRA review.³⁸

³⁶ Although ADLS agreed with concurrent first instance jurisdiction, it did not consider the Family Court accessible. ADLS noted that claims take longer in the Family Court than the High Court, and estate claims are often prioritised behind the other work the Family Court does.

³⁷ See Rosslyn Noonan, La-Verne King and Chris Dellabarca *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Tāhū o te Ture | Ministry of Justice, May 2019) at 7. See also other submissions discussed in Chapter 12 regarding resolving disputes in court.

³⁸ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R119 and [17.53].

- 11.24 Most submitters who commented on this agreed that the new Act should permit appeals as of right against interlocutory decisions that can have a significant impact on the parties' rights and obligations. These submitters included Public Trust, MinterEllisonRuddWatts, Morris Legal and Patterson. However, Morris Legal disagreed with the proposal that orders for disclosure of information may be appealed as of right because an asset-holding party may use the consequent increased cost and delay to their advantage. NZLS thought the distinction between those interlocutory matters that have a significant impact on the parties' rights and obligations and other interlocutory matters was unnecessary.
- 11.25 Lastly, we proposed that the Family Court should have jurisdiction to hear and determine any matter within the general civil and equitable jurisdiction of the District Court pursuant to sections 74 and 76 of the District Court Act 2016. We noted that this accords with our recommendations regarding Family Court jurisdiction in the PRA review. The submitters who responded to this point (Public Trust, MinterEllisonRuddWatts and Patterson) agreed with our proposals.
- 11.26 In the Issues Paper, we also asked whether the Māori Land Court should have a broader role in resolving succession disputes over matters other than whenua Māori. The submitters who commented on this question supported a broader role, including Te Hunga Rōia Māori o Aotearoa (THRMOA), ADLS, Professor Jacinta Ruru, Chapman Tripp, Te Kani Williams and MinterEllisonRuddWatts. THRMOA said that the jurisdiction of the Māori Land Court should be extended to matters of probate and administration regarding estates already before the Court in relation to whenua Māori. THRMOA felt that the benefits to Māori outweigh the risks of this approach. It did not support the alternative approach we proposed, of the Māori Land Court taking on an active liaison role with the High Court, as it thought this would increase the administrative burden on the Māori Land Court.
- 11.27 THRMOA supported the Māori Land Court having jurisdiction over matters relating to taonga, noting that this would reduce some uncertainty and the potentially increased administration for successors at a difficult time. It noted the jurisdiction the Māori Land Court already holds regarding taonga tūturu under the Protected Objects Act 1975. THRMOA also submitted that the Māori Land Court is more accessible to Māori in terms of cost, approach and expertise. Chapman Tripp supported THRMOA's submission. Ruru supported the Māori Land Court having a broader role in relation to succession as it is a court Māori deal with in a regular manner. MinterEllisonRuddWatts also supported this, subject to concerns about capacity constraints. ADLS supported the Māori Land Court having a broader role in relation to the status and ownership of taonga.

CONCLUSIONS

RECOMMENDATIONS

R81

Te Kōti Whānau | Family Court and te Kōti Matua | High Court should have concurrent first instance jurisdiction to hear and determine claims under the new Act, subject to both Courts having the power to remove the proceedings to te Kōti Matua | High Court.

R82

Te Kōti Whānau | Family Court and te Kōti Matua | High Court should have concurrent jurisdiction to hear and determine questions concerning the eligibility of individuals to succeed in an intestacy. Te Kōti Matua | High Court should continue to hold jurisdiction for other issues concerning the administration and distribution of an intestate estate.

R83

The new Act should permit appeals as of right against interlocutory decisions that can have a significant impact on the parties' rights and obligations, namely:

- a. occupation, tenancy and furniture orders;
- b. transfers of the proceedings to te Kōti Matua | High Court;
- c. orders for disclosure of information; and
- d. applications regarding the removal of a notice of claim.

R84

Te Kōti Whānau | Family Court should have jurisdiction to hear and determine any matter within the general civil and equitable jurisdiction of te Kōti-ā-Rohe | District Court pursuant to sections 74 and 76 of the District Court Act 2016. Claims heard and determined in te Kōti Whānau | Family Court should not be subject to the financial limit imposed on te Kōti-ā-Rohe | District Court.

R85

Te Kooti Whenua Māori | Māori Land Court, te Kōti Whānau | Family Court and te Kōti Matua | High Court should have concurrent jurisdiction to hear and determine succession matters involving taonga.

R86

Te Kōti Whānau | Family Court and te Kōti Matua | High Court should have the power to transfer proceedings or a question in proceedings to te Kooti Whenua Māori | Māori Land Court.

R87

The Government should consider further the appropriate rights of appeal for matters relating to taonga.

R88

The Government should consider whether the te Kooti Whenua Māori | Māori Land Court should have jurisdiction to grant applications for probate and letters of administration regarding estates for which te Kooti Whenua Māori | Māori Land Court has jurisdiction in relation to succession to Māori freehold land where the applications for probate or letters of administration are uncontested.

R89

The Government should consider the jurisdiction of te Kooti Whenua Māori | Māori Land Court to hear and determine family provision and testamentary promise claims in the new Act.

The Family Court and the High Court should have concurrent first instance jurisdiction in the new Act

- 11.28 We recommend that the Family Court and the High Court should have concurrent first instance jurisdiction to hear and determine all matters relating to entitlements and claims under the new Act.³⁹ We make recommendations on the role of the Māori Land Court later in the chapter.
- 11.29 Most submitters agreed with our proposal for concurrent first instance jurisdiction. We acknowledge the views of some submitters who felt that the Family Court should have first instance jurisdiction as it is the most appropriate court to deal with family matters and that complex matters can be transferred to the High Court. However, we prefer concurrent first instance jurisdiction for the following reasons:
- (a) We generally favour the Family Court retaining first instance jurisdiction because of the “family” nature of the claims under the new Act, the relative accessibility of the Family Court and the proven expertise of the Family Court. However, there may be instances where it is appropriate for the High Court to have jurisdiction, such as when the proceedings involve questions affecting the estate that are in the exclusive jurisdiction of the High Court or where the issues are particularly complex.⁴⁰
 - (b) The High Court and the Family Court have had concurrent first instance jurisdiction with respect to proceedings under the FPA and TPA for many years and we have heard little criticism of that approach.
 - (c) We received feedback that the High Court procedures and case management system enables cases to be heard more efficiently in the High Court. In Chapter 12, we make recommendations to improve procedures in the Family Court.
 - (d) There is less risk in succession matters that a party will file in the High Court for tactical advantage than in the context of relationship property division on separation.⁴¹
- 11.30 We recommend that, if proceedings have been commenced in the High Court and the Family Court that relate to the same matter, the High Court should hear the claim. It is procedurally more efficient that all matters be considered by the same court at the same time.
- 11.31 We recommend that both Courts should have the power to transfer proceedings to the High Court. This may be done by application to either Court, or the Family Court may decide to transfer proceedings to the High Court on its own motion. We recommend that the new Act should contain directions on when proceedings already filed in the Family Court, or a question in those proceedings, ought to be removed to the High Court. The Court should have regard to:⁴²

³⁹ We make recommendations on the role of the Māori Land Court later in this chapter.

⁴⁰ We note the extended jurisdiction of the Family Court to deal with trust matters under s 141 of the Trusts Act 2019. However, there are still other matters that are outside the scope of this review, such as the jurisdiction of the High Court to validate wills under s 14 of the Wills Act 2007 (although we briefly discuss the validation of wills under s 14 of the Wills Act 2007 in Chapter 16, regarding other reform matters).

⁴¹ See discussion in Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [17.37(e)].

⁴² These are the same factors as in s 38A of the Property (Relationships) Act 1976.

- (a) the complexity of the proceedings or any question in issue in the proceedings;
 - (b) any proceedings before the Family Court or the High Court that relate to the same matters; and
 - (c) any other matter the judge considers relevant in the circumstances.
- 11.32 We do not recommend providing for the High Court to transfer proceedings to the Family Court. We are cautious about creating an additional procedural matter that could be argued over and used to delay the resolution of substantive matters. We also note that the FPA and TPA do not include a power for the High Court to transfer a matter to the Family Court, and we have encountered little criticism of this approach. No submitter called for a power to transfer proceedings to the Family Court.

Jurisdiction for issues concerning the administration and distribution of an intestate estate

- 11.33 In Chapter 7 we make several recommendations about who should be eligible to succeed in an intestacy. We note that the determination of those eligible to succeed may not be straightforward, and disputes may arise in some cases. For example, difficult questions may arise as to whether the deceased was in a qualifying relationship with a surviving partner or whether a whāngai relationship should give rise to succession rights. We recommend that the Family Court and the High Court have concurrent jurisdiction to hear and determine matters relating to eligibility in intestacies. The Family Court has specialist jurisdiction regarding family relationships and may be more accessible than the High Court. The High Court has jurisdiction to consider other issues in relation to the administration of intestate estates, meaning it may be more efficient to have the High Court deal with all matters if multiple issues arise.
- 11.34 In relation to questions arising in connection with the tikanga concerning whāngai relationships, we consider the Family Court and the High Court should be capable of resolving these issues. We discuss the courts' ability to deal with matters of tikanga further below when considering the role of the Māori Land Court.
- 11.35 We recommend that the High Court should continue to hold exclusive jurisdiction for all other issues concerning the administration and distribution of an intestate estate. Most submitters who commented on this point agreed. We anticipate that matters relating to an intestacy are most likely to come before the court because personal representatives apply for directions, such as on the validity of a will. The High Court currently holds jurisdiction for such applications.

The new Act should permit appeals as of right against interlocutory decisions that can have a significant impact on the parties' rights and obligations

- 11.36 We recommend that the new Act should permit appeals as of right against interlocutory decisions that can have a significant impact on the parties' rights and obligations.⁴³ Most

⁴³ Interlocutory decision is not defined in the Property (Relationships) Act 1976. Rule 8(1) of the Family Court Rules 2002 defines an "interlocutory application" to mean:

... an application in proceedings or intended proceedings for an order or a direction relating to a matter of procedure or for some relief ancillary to the orders or declarations sought in the proceedings or intended proceedings ...

submitters agreed with this proposal. The interlocutory decisions for which parties should have an automatic right of appeal should be:

- (a) occupation, tenancy and furniture orders;
- (b) transfers of the proceedings to the High Court;
- (c) orders for disclosure of information; and
- (d) applications regarding the removal of a notice of claim.

- 11.37 For all other interlocutory decisions, claimants should obtain leave to appeal from the Family Court or the High Court. This recognises that, in exceptional cases, an interlocutory decision of a procedural nature may also affect parties' substantive rights and liabilities while also minimising risks that parties unduly protract proceedings with appeals.
- 11.38 The effect of these recommendations would be to displace the general right of appeal under section 124 of the District Court Act where the appeal is from a decision of the Family Court.⁴⁴
- 11.39 We acknowledge the submission by NZLS that all appeals should lie as of right and the distinction between interlocutory matters that have a significant impact on parties' rights and those that do not is unnecessary. We consider, however, that to allow all interlocutory matters to be appealed as of right may delay proceedings significantly and is contrary to the objective of efficient estate administration. We also acknowledge the concerns of Morris Legal that allowing parties to appeal as of right an order for disclosure of information may result in an asset-holding party using the increased cost and delay to their advantage. However, we consider the same concern applies if we were to recommend appeals for these matters had to be made by way of an application for leave to appeal. We think it is better that these matters have the benefit of a full hearing when they arise.
- 11.40 We have added applications regarding the removal of a notice of claim to the list we presented in the Issues Paper. An application to remove a notice of claim has the potential to affect title to land⁴⁵ and can have a significant impact on the parties' rights and obligations.
- 11.41 We expect that applications to recover property outside an estate made in accordance with our anti-avoidance recommendations in Chapter 8 would be heard as part of an application for an award under the new Act. We do not consider them to be "an order or a direction relating to a matter of procedure or for some relief ancillary to the orders or declarations sought in the proceedings or intended proceedings".⁴⁶ Rather, they are decisions that have a direct impact on the rights and obligations of the parties involved in proceedings.

In *Waterhouse v Contractors Bonding Ltd [Interlocutory decision]* [2013] NZCA 151, [2013] 3 NZLR 361 at [16], the Court of Appeal held that an interlocutory decision (of the High Court) is ordinarily understood to be a decision made in the course of a proceeding leading to or facilitating the hearing of the claim and its ultimate disposition following the hearing.

⁴⁴ Section 124 of the District Court Act 2016 does not apply to a decision of a kind in respect of which another enactment "expressly confers a right of appeal".

⁴⁵ See Land Transfer Act 2017, ss 141–143; and Property (Relationships) Act 1976, s 42.

⁴⁶ See Family Court Rules 2002, r 8(1).

The jurisdictional limitations of the Family Court

- 11.42 We recommend that the Family Court should have jurisdiction to hear and determine any related matter within the general civil and equitable jurisdiction of the District Court pursuant to sections 74 and 76 of the District Court Act in the new Act. This should include jurisdiction to grant any remedy pursuant to section 84 of the District Court Act. This accords with our recommendations regarding Family Court jurisdiction in the PRA review and reflects the plain meaning of the relevant provisions of the Family Court Act.⁴⁷ Three submitters responded to this point, and they all agreed with our proposals.
- 11.43 To ensure consistency across the new Act, our recommendations in the PRA review and the approach taken in the Trusts Act, the new Act should clarify that claims made under the new Act and heard and determined in the Family Court are not subject to the financial limit imposed on the District Court.⁴⁸
- 11.44 Clarifying the equitable jurisdiction of the Family Court in this way will not detract from the statutes that require the High Court to exercise jurisdiction for certain succession matters, like the Administration Act and the Wills Act 2007.

The role of the Māori Land Court in contemporary Aotearoa New Zealand

- 11.45 A prominent theme during our consultation has been the desire for the Māori Land Court to be a place where Māori may go to resolve legal disputes beyond whenua Māori.
- 11.46 We acknowledge the varied roles the Māori Land Court has played in the past, particularly in a succession context.⁴⁹ In the Issues Paper, we referred to several reports on the role of the Māori Land Court.⁵⁰ We have also heard feedback on the role of the Court during our consultation and throughout this review generally. Essentially, what we have heard is that there continues to be a desire for the Court's jurisdiction to be expanded to deal with Māori issues generally.⁵¹ More thought and consultation is required to fully consider the place of such a court in contemporary Aotearoa New Zealand. This involves consideration

⁴⁷ See discussion in Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [17.5]–[17.20].

⁴⁸ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [17.42]. Section 141(5) of the Trusts Act 2019 provides:

To avoid doubt, an exercise by the Family Court of jurisdiction under this section is not subject to financial limits in relation to the value of any property or interest.

⁴⁹ See Te Aka Matua o te Ture | Law Commission *Review of Succession Law: Rights to a person's property on death* | *He arotaki i te āheinga ki ngā rawa a te tangata ka mate ana* (NZLC IP46, 2021) at [15.13]–[15.20] for a summary of the jurisdictional history of the Court.

⁵⁰ Te Aka Matua o te Ture | Law Commission *Review of Succession Law: Rights to a person's property on death* | *He arotaki i te āheinga ki ngā rawa a te tangata ka mate ana* (NZLC IP46, 2021) at [15.21]–[15.32]. The literature we reviewed included “The Maori Land Courts: Report of the Royal Commission of Inquiry” [1980] IV AJHR H3; Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004); Te Aka Matua o te Ture | Law Commission *Striking the Balance: Your Opportunity to Have Your Say on the New Zealand Court System* (NZLC PP51, 2002); Te Aka Matua o te Ture | Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002); Te Aka Matua o te Ture | Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase — An Advisory Report for Te Puni Kōkiri, the Office of Treaty Settlements and the Chief Judge of the Māori Land Court* (NZLC SP13, 2002); and Te Kooti Whenua Māori | Māori Land Court and Tāhū o te Ture | Ministry of Justice *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero: 150 Years of the Māori Land Court* (2015).

⁵¹ See also Te Aka Matua o te Ture | Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002) at 191, which discussed a “Māori Lands and their Communities Court”.

of where the Māori Land Court sits within the wider framework of the court system, which is outside the scope of this review.

- 11.47 Despite the limitations of this review, it is necessary and important to consider the role of the Māori Land Court under the new Act.

The role of the Māori Land Court under the new Act

- 11.48 In our view, it is important that the Māori Land Court's knowledge, experience and understanding of te ao Māori, tikanga Māori and te reo Māori is available, where appropriate, under the new Act. This may include disputes about whether an item is a taonga and disputes regarding taonga more generally. We explain in Chapter 3 that, although we anticipate most such disputes will be resolved without state law involvement, the state may still play a role in facilitating the resolution of disputes over taonga, both in and out of court. We discuss the resolution of disputes out of court in Chapter 13.

Taonga

- 11.49 There are several advantages the Māori Land Court has over the general courts that favour the Māori Land Court having exclusive jurisdiction over matters involving taonga for succession matters generally:
- (a) The Court is required to conduct proceedings in such a way as will best avoid unnecessary formality and may also apply such rules of marae kawa as the judge thinks appropriate and make rulings on the use of te reo Māori during a hearing.⁵²
 - (b) Judges of the Māori Land Court are generally understood to be versed in te reo Māori and tikanga Māori.⁵³
 - (c) Māori Land Court fees are lower than in both the Family Court and the High Court.⁵⁴
 - (d) The Court has powers to refer disputes to mediation.⁵⁵ These mediations may be conducted in a way more aligned with tikanga processes than courtroom processes.
 - (e) We have heard that the Māori Land Court judges facilitate whānau hui or mediation and that taonga are sometimes at issue. This indicates that some disputes around taonga are already being resolved through the Māori Land Court.
 - (f) The Māori Land Court already has jurisdiction over taonga tūturu under the Protected Objects Act 1975 and has exercised that jurisdiction several times.⁵⁶
- 11.50 Despite these advantages, we recommend that the Family Court, the High Court and the Māori Land Court should have concurrent jurisdiction for succession matters involving taonga because:

⁵² Te Ture Whenua Maori Act 1993, s 66.

⁵³ A person must not be appointed a judge unless the person is suitable, having regard to the person's knowledge and experience of te reo Māori, tikanga Māori and the Treaty of Waitangi: Te Ture Whenua Maori Act, s 7(2A).

⁵⁴ See Māori Land Court Fees Regulations 2013; Family Courts Fees Regulations 2009; and High Court Fees Regulations 2013.

⁵⁵ Te Ture Whenua Maori Act 1993, pt 3A. Part 3A came into force on 6 February 2021.

⁵⁶ See for example *Acting Chief Executive of the Ministry for Culture and Heritage – Taonga Tūturu found at Kerikeri* (2015) 106 Taitokerau MB 210 (106 TTK 210); *Chief Executive of the Ministry for Culture and Heritage – Taonga Tūturu found at Cook's Cove, Tolaga Bay* (2017) 71 Tairāwhiti MB 267 (71 TRW 267); and *Chief Executive, Ministry for Culture and Heritage – Tāonga Tūturu found at Plimmerton* (2012) 283 Aotea MB 166 (283 AOT 166).

- (a) Succession proceedings are often complex and involve multiple issues. If the Māori Land Court has exclusive first instance jurisdiction over issues involving taonga, multiple proceedings involving claims against the same estate involving the same parties may be spread across different courts. We have heard similar concerns regarding the separation of jurisdiction for whenua Māori from other succession matters.
 - (b) Parties may provide pūkenga (experts) in tikanga Māori to inform the Family Court or the High Court on issues of tikanga that come before them. We also recommend in Chapter 12 that the Family Court and the High Court be able to appoint a person to inquire into or advise on matters of tikanga Māori.
 - (c) We expect decisions from the Māori Land Court and the Māori Appellate Court concerning taonga to carry considerable weight when it comes to the discussion of tikanga or its application.
 - (d) If issues of taonga are heard exclusively in the Māori Land Court, an opportunity is lost for systemic improvement in relation to the understanding of tikanga Māori in the courts. We note the work currently being done to improve this understanding.⁵⁷
 - (e) The Māori Land Court is already a busy institution, working to resolve whenua issues for Māori. Expanding its workload may detract from these Important functions.
 - (f) The advantages the Māori Land Court has over the Family Court and the High Court can still be available if claimants choose to file their proceedings in the Māori Land Court. We would expect most claimants to file with the Māori Land Court where the dispute only concerns taonga. We would also expect the Family Court and the High Court to transfer proceedings or a question in the proceedings to the Māori Land Court where it is appropriate.
- 11.51 This recommendation is supported by our recommendations in Chapter 12 that, where needed, Family Court and High Court judges should receive education on tikanga Māori and that the courts be able to appoint a person to inquire into and advise on matters of tikanga Māori.
- 11.52 Consistent with our recommendations regarding transfers of proceedings, the Family Court should have the power to order that proceedings or a question in proceedings concerning taonga be transferred to the High Court. We also recommend that both the Family Court and the High Court be able to transfer proceedings or a question in the proceedings to the Māori Land Court. This recognises the appropriateness of hearing issues relating to taonga in the Māori Land Court.
- 11.53 As mentioned above, the Māori Appellate Court has jurisdiction to hear appeals from the Māori Land Court, with appeals from the Māori Appellate Court to be made to te Kōti Pira | Court of Appeal (the Court of Appeal) or te Kōti Mana Nui | Supreme Court in exceptional

⁵⁷ See for example Rosslyn Noonan, La-Verne King and Chris Dellabarca *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Tāhū o te Ture | Ministry of Justice, May 2019); Helen Winkelmann “Renovating the House of the Law” (keynote speech to Hui-a-Tau 2019, Te Hūnga Rōia Māori o Aotearoa | The Māori Law Society Annual Conference, Wellington, 29 August 2019); and Te Kura Kaiwhakawā | Institute of Judicial Studies *Prospectus 2021*. We were also made aware during our consultation of some Family Court and High Court judges undergoing training in te reo Māori and tikanga Māori.

circumstances.⁵⁸ A question arises as to which court any appeal from a decision of the Māori Land Court in respect of claims relating to taonga should be made. It may be undesirable to have two different lines of appeal, one through the Māori Appellate Court (from the Māori Land Court) and another through the High Court (from the Family Court) for matters concerning taonga (although we note that appeals from both the High Court and the Māori Appellate Court are to the Court of Appeal). It is also desirable that appeals on all matters arising (including those relating to taonga) can be heard in the same court at the same time. While these factors might be seen to favour appeal from the Māori Land Court to the High Court, it is also important to recognise the value of appeals concerning taonga being heard in the Māori Appellate Court, given its significant expertise in tikanga Māori and its current jurisdiction under TTWMA.

- 11.54 Any changes from the current appeal rules in TTWMA would require amendment to TTWMA. We therefore recommend the Government considers further how to provide for appeals in relation to matters concerning taonga.

Probate and administration

- 11.55 We have received feedback supporting an extended role for the Māori Land Court in relation to granting probate and letters of administration. A key concern expressed is that, where an estate comprises whenua Māori and other property, people often are required to have probate or letters of administration granted in the High Court in addition to having their succession to whenua Māori processed in the Māori Land Court. This creates additional barriers in the succession process that non-Māori do not experience.
- 11.56 We described in the Issues Paper the long history of the Māori Land Court's involvement in succession beyond whenua Māori. We also noted that there is a risk of unintended consequences in extending the jurisdiction of the Māori Land Court in this way given the specialised nature of probate and administration matters in the High Court. For example, the High Court holds significant other powers such as jurisdiction to determine matters of testamentary capacity and the power to validate a document as a will under section 14 of the Wills Act.
- 11.57 We therefore recommend that the Government consider whether the Māori Land Court should have jurisdiction to grant probate and letters of administration regarding matters already before the Māori Land Court only where the applications are uncontested. We anticipate that these powers might work in the following way. An applicant would file for probate or letters of administration, or could be directed to do so, alongside their succession application for Māori freehold land. Where the Māori Land Court is satisfied that the application for probate or letters of administration is uncontested, it might make orders granting probate or letters of administration alongside the succession orders. Where the Māori Land Court is not satisfied that the matter is uncontested, it would refer the matter to the High Court. Claimants would still be able to apply directly to the High Court where it is appropriate to do so, including where there is an issue clearly requiring a decision by the High Court. We accept THRMoa's submission that the alternative of the Māori Land Court having an active liaison role with the High Court in this regard is likely to

⁵⁸ Although, the FPA and TPA require claims that relate only to Māori freehold land to be made exclusively to the Māori Land Court, and any appeal from a decision from that Court must be made to the High Court: Family Protection Act 1955, s 3A; and Law Reform (Testamentary Promises) Act 1949, s 5.

cause further delays rather than make the process simpler and do not recommend that the Government considers this option.

Family provision and testamentary promises

11.58 As we noted in Chapters 5 and 6, it seems strange that, in light of the emphasis in TTWMA on Māori freehold land being a taonga tuku iho, a court can order the redistribution of that land under the FPA and TPA. In those chapters, we suggest that the Government should consider further whether and, if so, how family provision awards and testamentary promise awards under the new Act should apply to succession to Māori freehold land. The Government should also consider the jurisdiction of the Māori Land Court to hear and determine family provision and testamentary promise claims under the new Act, should Māori freehold land continue to be subject to these claims.

CHAPTER 12

Resolving disputes in court

IN THIS CHAPTER, WE CONSIDER:

- limitation periods for making claims;
- disclosure of information;
- evidence;
- representation of minors or people deemed by law to lack capacity;
- costs;
- delays in te Kōti Whānau | Family Court; and
- tikanga Māori and dispute resolution in court.

INTRODUCTION

12.1 In Chapter 2 of this Report, we discuss the criteria that we think will lead to good succession law, including the promotion of efficient estate administration and dispute resolution. In this chapter, we discuss several important procedural matters aimed at the just and efficient resolution of claims under the new Act when those disputes reach court, consistent with that goal and with the objectives of the court rules.¹ We also consider actions that can be taken to improve the recognition of tikanga within te Kōti Whānau | Family Court (the Family Court) and in te Kōti Matua | High Court (the High Court).

LIMITATION PERIODS**Current law**

12.2 Generally, proceedings under the Property (Relationships) Act 1976 (PRA), the Family Protection Act 1955 (FPA) and the Law Reform (Testamentary Promises) Act 1949 (TPA)

¹ See High Court Rules 2016, r 1.2; and Family Court Rules 2002, r 3.

must be commenced within 12 months from the grant of administration.² A two-year period applies if the application is made under the FPA by a personal representative on behalf of a person who is not of full age or mental capacity.³

- 12.3 The court may extend the time limits in some circumstances, although an application for an extension cannot be made after the final distribution of the estate. The TPA and PRA do not define what is meant by final distribution. However, case law has established that, in proceedings under these Acts, it means the point where the personal representative has completed administration of the estate and becomes the trustee for the beneficiaries of those assets, even if those assets have not actually been distributed.⁴ A different approach is taken under the FPA, where section 2(4) clarifies that, for the purpose of that Act, distribution will not be deemed to have occurred simply because the administrator has finished their administrative duties in respect of that property and they or another trustee are holding the property on trust.⁵ Final distribution requires that the assets are transferred to those beneficially entitled.⁶
- 12.4 A surviving partner has six months from the grant of administration in Aotearoa New Zealand in which to make an election under the PRA whether to seek division under the Act (option A) or accept whatever provision is made for them under the deceased partner's will or on their intestacy (option B).⁷ A surviving partner must have chosen option A to commence proceedings under the PRA.⁸ The court may extend the time for making the choice.⁹ If a surviving partner makes no election within the relevant timeframe,

² Property (Relationships) Act 1976, s 90; Family Protection Act 1955, s 9; and Law Reform (Testamentary Promises) Act 1949, s 6. Note the TPA does not refer to the grant of administration being made in Aotearoa New Zealand and it is therefore possible that time may commence from the date of a grant first obtained outside of Aotearoa New Zealand. Patterson submits, however, that because the TPA is considered a matter of administration rather than succession, at least in respect of immovables situated in Aotearoa New Zealand and probably movables, time will not commence until a grant is made (or resealed) in Aotearoa New Zealand: see Bill Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis, Wellington, 2021) at 315.

³ Family Protection Act 1955, s 9(2)(a).

⁴ See *Lilley v Public Trustee* [1981] 1 NZLR 41 (PC) and *Sullivan v Brett* [1981] 2 NZLR 202 (CA) in respect of final distribution under the TPA. The concept of assent has evolved as the means by which the personal representative might indicate that they do not require particular property in the estate for the purposes of administration and the estate assets may pass to the beneficiaries. However, it is rare in Aotearoa New Zealand for personal representatives to formally give assent: *Sullivan v Brett* [1981] 2 NZLR 202 (CA) at 207. The stricter approach has been applied by te Kōti Pira | Court of Appeal to proceedings under the PRA's predecessor the Matrimonial Property Act 1963 (see *Re Magson* [1983] NZLR 592 (CA)) and it appears likely that the same approach would be consistently taken to proceedings under the PRA: see Bill Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis, Wellington, 2021) at 271; *R v D [Relationship property]* [2009] NZFLR 607 (FC); and *McConkey v Clarke* [2019] NZHC 924, [2019] NZFLR 170 at [74].

⁵ Administrative duties will include proving the will, burying the deceased, getting in the assets and paying debts, funeral and testamentary expenses.

⁶ John Caldwell *Family Law Service (NZ)* (online looseleaf ed, LexisNexis) at [7.908.01]. Multiple cases have considered whether final distribution has occurred in respect of proceedings under the FPA: see for example *Re Hill (dec'd)*; *Hill v Hill* [1999] NZFLR 268 (HC) at 275; *Re Kahn (dec'd)*; *Kahn v Kahn* [2008] NZFLR 782 (HC) at [18]; *Gudgeon v Public Trustee* [1960] NZLR 233 (SC); *Fowler v New Zealand Insurance Co Ltd* [1962] NZLR 947 (SC); and *Bennett v Percy* [2020] NZFC 770.

⁷ Property (Relationships) Act 1976, s 62(1)(b). Different rules apply if the estate is a "small estate": s 62(1)(a).

⁸ However, the partner can apply under the FPA for further provision from the estate irrespective of which option they elect: Property (Relationships) Act 1976, s 57.

⁹ Property (Relationships) Act 1976, s 62(2). However, the application for extension must be made before the final distribution of the estate: s 62(4).

- including any extended timeframe, they are deemed to have chosen option B.¹⁰ A court may set aside a surviving partner’s chosen option in some circumstances.¹¹
- 12.5 Section 47 of the Administration Act 1969 sets out the circumstances in which personal representatives may distribute an estate without facing liability to potential claimants.¹² As a general rule, they may make distributions six months from the grant of administration provided they have not received notice of a potential claim.¹³ Where a person of full legal capacity has consented to the distribution, that person also loses the right to bring an action against the personal representative.¹⁴
- 12.6 A personal representative will be protected when they make early distributions for the maintenance, support or education of any person partially or totally dependent on the deceased immediately before the deceased’s death. Such distributions may be made even if the personal representative has notice of an intended claim, and any distribution made for this purpose, if properly made, cannot be later disturbed.¹⁵
- 12.7 In certain circumstances, claimants may have the ability to “follow” the estate property into the hands of a beneficiary after distributions have been made.¹⁶ This process is set out in sections 49–52 of the Administration Act. The court has considerable discretion as to the form and extent of the orders it may make.¹⁷ It may require the transfer or payment of any interest in any assets distributed or the payment of a sum not exceeding the net value of the assets at the date of distribution (with interest if the court thinks equitable). A following order may be made against the recipient of the distributed assets who received those assets otherwise than in good faith and for full valuable consideration. The court may make the following order on terms and conditions that it thinks fit and may make any further orders to give effect to the following order.
- 12.8 A following order requires a separate court application to the substantive application under the TPA and FPA, but this must also be made within the same time limits for making claims.¹⁸ The court does not have the general power to grant an extension of time for the making of a following order,¹⁹ but if an applicant was not aware of the distribution at the time of filing a substantive application, they may still make an application for a following order if they do so within six months of first becoming aware of the distribution.²⁰ Failure

¹⁰ Property (Relationships) Act 1976, s 68.

¹¹ Property (Relationships) Act 1976, s 69(2).

¹² See also s 71(2) of the Property (Relationships) Act 1976. Distribution is defined in s 46 of the Administration Act 1969.

¹³ Administration Act 1969, s 47(4).

¹⁴ Administration Act 1969, s 47(3).

¹⁵ Administration Act 1969, s 47(2). See s 47(1) for the relevant claims, which include the FPA, TPA and PRA.

¹⁶ The court may only make an order if there is nothing in any Act that prevents the distribution from being disturbed: see for example s 9(1) of the Family Protection Act 1955; s 6 of the Law Reform (Testamentary Promises) Act 1949; and s 47(2) of the Administration Act 1969.

¹⁷ These are set out in s 49(1) of the Administration Act 1969.

¹⁸ Administration Act 1969, s 49(3). Note that s 49(3)(a) specifies that time period commences from the date of the grant of administration in Aotearoa New Zealand.

¹⁹ Compare the provisos in s 9 of the Family Protection Act 1955; and s 6 of the Law Reform (Testamentary Promises) Act 1949. See also *Lapwood v Teirney* [2012] NZHC 1803 at [10] and [21].

²⁰ Administration Act 1969, s 49(4).

to comply with that six-month time limit, however, is an absolute bar to following the assets.²¹

Issues with time limits under the PRA, FPA and TPA

- 12.9 There appears to be broad satisfaction with the 12-month time limit for commencing proceedings under the Acts. We have heard that the two-year timeframe for FPA claims on behalf of minors and those deemed by law to lack capacity can cause problems because estates are often wound up in this timeframe.
- 12.10 In Chapter 4, we discuss the issues with the six-month time limit for electing option A or option B under the PRA.
- 12.11 Several issues may arise in respect of final distribution. Restricting a court's power to extend time limits or make other orders²² up to the point an estate has been finally distributed provides certainty and protection for personal representatives and beneficiaries. However, it can unfairly impact on claimants with legitimate claims. Claimants may be forced to bring claims against personal representatives personally.²³ It is also confusing that what constitutes final distribution differs depending on the statute and is not clearly defined in legislation.²⁴ It is not always obvious to interested parties when final distribution has occurred.

Issues with distribution

- 12.12 Our preliminary engagement revealed mixed views about whether six months from the grant of administration in Aotearoa New Zealand is a suitable period to wait for an estate to be distributed. The six-month period may be justified because it allows claimants time to find out about the estate and consider their options while not excessively delaying distribution. However, issues can arise because of the difference between a six-month hold for distribution and the general 12-month time limit for making claims. There may also be occasions where a personal representative wishes to distribute earlier than the six-month period. At present, a personal representative would make this decision after assessing the risk of claims and obtaining indemnities from beneficiaries or other potential claimants.²⁵
- 12.13 There is little case law available on section 47(2) of the Administration Act regarding the protection of distributions made to provide for maintenance, support and education, and we are unaware how frequently personal representatives rely on it. Personal

²¹ *Re Nicoll* HC Tauranga M44/92, 13 August 1993. However, in *Hodgkinson v Holmes* [2012] NZHC 2972 at [27], the Court suggested that an application made outside the six-month period would not be barred if "final distribution" had not occurred. This was criticised by Patterson in Bill Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis, Wellington, 2021) at 307.

²² For example, under s 77 of the Property (Relationships) Act 1976, a court may permit a surviving partner to take under the will or on intestacy in addition to their division under option A provided that the application to do so is made before the final distribution of the estate.

²³ See *B v T* [2015] NZHC 3174 as an example of a claim brought against personal representatives in their personal capacity. Note, however, the personal representative will be protected from such claims where they have made distributions in accordance with s 47 of the Administration Act 1969.

²⁴ Noting that s 2(4) of the Family Protection Act 1955 goes part way to explaining the definition under that Act.

²⁵ See s 47(3) of the Administration Act 1969.

representatives could potentially distribute property using the section 47(2) power with the effect of leaving insufficient property to meet other claims against the estate.²⁶ However, our preliminary engagement indicated that this had not been an issue in practice.

- 12.14 Sections 49–52 of the Administration Act, which deal with the following of assets, are difficult to understand and may cause confusion.

Results of consultation

- 12.15 Submitters to the Issues Paper, including Public Trust, Perpetual Guardian, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), the Family Law Committee of Auckland District Law Society (ADLS), Morris Legal and Bill Patterson, were broadly satisfied with our proposals in the Issues Paper relating to the limitation periods.
- 12.16 ADLS commented that few problems occur under the current time limits and it is open to personal representatives to obtain indemnities from potential claimants if distribution is considered appropriate. Public Trust also agreed that the protections in section 47 of the Administration Act should be retained because they provide certainty to personal representatives who wish to distribute an estate without facing liability to potential claimants. Community Law Centres o Aotearoa (Community Law) submitted that many of their clients are unaware of the 12-month deadline. Community Law said that there is need for clear and consistent information to be widely available.
- 12.17 Both Public Trust and ADLS agreed with our proposal not to have a longer two-year period available for minors or other claimants who are deemed by law to lack capacity as this can cause unnecessary delays in finalisation of an estate.
- 12.18 Public Trust, Morris Legal and Patterson expressed their support for a consistent definition of final distribution across the respective claims. Patterson agreed that the definition used in the FPA is preferable. Conversely, Morris Legal submitted that the definition should align with the definition that has developed in case law under the TPA and PRA, meaning that final distribution has occurred when the personal representative has completed administration of the estate and become trustee for the beneficiaries of those assets, even if those assets have not actually been distributed. Morris Legal submitted that this is a pragmatic limit that would increase certainty for all parties.
- 12.19 Patterson submitted that sections 45–51 of the Administration Act need rewriting as they lack clarity.

Conclusions

RECOMMENDATIONS

R90

Applications for relationship property awards, family provision awards and testamentary promise awards under the new Act should be made within 12 months from the grant of administration in Aotearoa New Zealand.

²⁶ Provided that the distribution is made in accordance with any trust, power or authority that is subsisting: see s 48(2) of the Administration Act 1969.

R91

Where an estate can be lawfully distributed without a grant of administration, applications for relationship property awards, family provision awards and testamentary promise awards should be made within the later of:

- a. 12 months from the date of the deceased's death; or
- b. 12 months from the grant of administration in Aotearoa New Zealand (if the grant is made within six months of the deceased's death).

R92

A court should have discretion to grant an extension to bring a claim under the new Act provided the application for extension is made before the final distribution of the estate.

R93

The new Act should provide that final distribution of an estate will occur when all estate assets are transferred to those beneficially entitled rather than when the personal representative has finished their administrative duties and is holding the property on trust.

R94

Personal representatives should be protected against personal liability from claimants under the new Act where they distribute any part of the estate in the circumstances prescribed in section 47 of the Administration Act 1969.

- 12.20 Any time limit for claims under the new Act must balance the need to avoid undue delay in the administration and distribution of an estate with the need to ensure that those with a genuine claim have sufficient time to make it. The limitation periods should work cohesively together to the extent that is practicable.
- 12.21 A personal representative should continue to be protected against personal liability to claimants under the new Act where the personal representative distributes any part of the estate in the circumstances prescribed in section 47 of the Administration Act. While we note the potential problems with a personal representative's power to distribute to the deceased's dependants for their maintenance, support or education, we think limits on this power, or its repeal, are not desirable reforms. We are reassured that no concerns about this provision were raised with us in consultation.
- 12.22 Proceedings for claims under the new Act should be commenced within 12 months from the grant of administration in Aotearoa New Zealand.
- 12.23 For decades, this has been the time period for FPA and TPA claims, and it appears relatively uncontroversial. We anticipate that 12 months would generally be sufficient time for potential claimants under the new Act to determine their eligibility and evaluate their prospect of success. We note that 12 months is at the upper end of the limitation periods for family provision-type claims in comparable jurisdictions.²⁷

²⁷ For example, in Victoria, Western Australia, South Australia and the Australian Capital Territory, claimants have six months from the grant of administration: Administration and Probate Act 1958 (Vic), s 99; Family Provision Act 1972

- 12.24 Claims relating to estates that can be lawfully distributed without a grant of administration should be made within the later of:
- (a) 12 months from the date of the deceased's death; or
 - (b) 12 months from the grant of administration in Aotearoa New Zealand (if the grant is made within six months of the deceased's death).
- 12.25 There should not be an extended limitation period for claims made on behalf of minors or persons deemed by law to lack capacity. Because estates may be distributed after six months, our view is that there is no significant benefit in permitting a two-year limit.
- 12.26 We recommend that courts should retain their discretion to allow claims to be made beyond the express time limits provided that the application is made before final distribution of the estate. This will ensure that the courts can continue to consider some claims outside of time where justified.²⁸
- 12.27 We also recommend that final distribution should be defined in the new Act. For the purposes of the new Act, final distribution will have occurred when all estate assets are transferred to those beneficially entitled rather than when the personal representative has finished their administrative duties and is holding the property on trust. We think that this interpretation of final distribution accords more closely with people's expectations. The current law regarding the following of assets and the restrictions on disturbing distributions would continue to apply.²⁹
- 12.28 However, as we discuss in Chapter 7, there are many sections of the Administration Act that are difficult to understand and should be rewritten in accordance with modern drafting standards. We agree with Patterson that the sections that deal with the following of assets and the protections of personal representatives and persons acting on administration are good examples of these inaccessible provisions.

DISCLOSURE OF INFORMATION

Current law

- 12.29 Section 11A of the FPA provides that personal representatives have a duty to place before the court all relevant information in their possession concerning the financial affairs of the estate and the deceased's reasons for making the dispositions made by the will or for not making any further provision, as the case may be. This duty to provide the court with relevant information about the deceased's reasons will override any claim to legal

(WA), s 7(2); Inheritance (Family Provision) Act 1972 (SA), s 8; and Family Provision Act 1969 (ACT), s 9. In Tasmania, it is only three months, and in Northern Territory, it is 12 months: Testator's Family Maintenance Act 1912 (Tas), s 11; and Family Provision Act 1970 (NT), s 9. In Queensland and New South Wales the limitation periods commence from the date of death and are nine and 12 months respectively: Succession Act 1981 (Qld), s 41(8); and Succession Act 2006 (NSW), s 58(2).

²⁸ See *Re Magson* [1983] NZLR 592 (CA) at 598 for matters relevant to the court's discretion to grant extensions of time.

²⁹ This means that there will continue to be restrictions on following assets distributed prior to final distribution in some circumstances: see ss 49–52 of the Administration Act 1969. Sections 71–74 of the Property (Relationships) Act 1976 regarding distribution of estates would also continue to apply without the references to the formal option A and option B election process if the Government implements our recommendation to remove this process.

privilege in the context of a solicitor-client relationship.³⁰ There is no equivalent provision in the TPA. However, the same principle is treated as applying to TPA proceedings.³¹

- 12.30 In Chapter 4, we discuss several specific rules relating to the classification of relationship property, including the presumption that all property owned by the deceased partner or acquired by the estate is relationship property.³² Those rules place an onus on the personal representatives to disclose information if they want to resist a finding that the property of the estate is relationship property. No corresponding rule applies to the property of the surviving partner.
- 12.31 Under both the Family Court Rules and the High Court Rules, discovery is available to any party who has filed a pleading in respect of any of the Acts.³³ Pre-action discovery orders may also be available for intending claimants provided they have a strong foundation for the order.³⁴

Recommendations in the PRA review

- 12.32 In the PRA review, we observed that situations may arise where one partner has greater knowledge of the couple's relationship property affairs but refuses to make adequate disclosure, thereby putting the other partner at a disadvantage.³⁵
- 12.33 We made several recommendations aimed at encouraging a culture of compliance with disclosure obligations when resolving relationship property matters in and out of court.³⁶ These included recommending that:³⁷
- (a) the new Relationship Property Act include an express duty of disclosure on partners;
 - (b) new pre-action procedures include a prescribed process for complying with the duty of disclosure prior to making an application to the Family Court; and
 - (c) new procedural rules include the procedure for initial and subsequent disclosure in relationship property proceedings.

Issues

- 12.34 We have heard from lawyers that it can be difficult for potential claimants to obtain relevant information needed to assess the viability of the claim or to resolve that claim outside of court. We discuss this issue in Chapter 13.
- 12.35 Obtaining relevant information once a claim had been filed seems to be more straightforward. However, issues arise about the disclosure of irrelevant information,

³⁰ *Carmichael v Goddard* [1979] 2 NZLR 586 (SC); and *Re Cross* [1981] 2 NZLR 673 (HC).

³¹ *Powell v Public Trustee* [2003] 1 NZLR 381 (CA) at [27].

³² Property (Relationships) Act 1976, ss 81–82.

³³ Family Court Rules 2002, r 141; and High Court Rules 2016, rr 8.4–8.5.

³⁴ Family Court Rules 2002, r 140; and High Court Rules 2016, r 8.20. See also *Moon v Lafferty* [2020] NZHC 1652 at [27].

³⁵ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [16.121].

³⁶ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [16.141].

³⁷ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R110–R111 and [16.142]–[16.146].

particularly when affidavits and annexures total tens or hundreds of pages or denigrate the character and motives of another family member.³⁸

Results of consultation

- 12.36 In the Issues Paper, we proposed that the new Act includes an express duty on the personal representative to assist the court, similar to that in section 11A of the FPA. We received limited submissions about this proposal. ADLS submitted that generally a personal representative's affidavit will address the relevant matters, and when it does not, this is often linked with a personal representative not understanding their requirement to take a neutral position in proceedings (we discuss the role of the personal representative in Chapter 14). Public Trust and Perpetual Guardian submitted that they agreed with the proposed express duty.
- 12.37 Public Trust and ADLS agreed with our proposal that, in respect of relationship property claims, the surviving partner and the personal representative should have a duty to disclose each partner's assets and liabilities. Public Trust submitted that it may enable parties to assess the merits of claims and potentially encourage settlements. ADLS also agreed that the quality and clarity of the information disclosed may be improved by updated affidavit forms.

Conclusions

RECOMMENDATIONS

R95

The new Act should include an express duty on personal representatives to assist the court, similar to that in section 11A of the Family Protection Act 1955. As part of that duty, on any application under the new Act, personal representatives should have an obligation to place before the court all relevant information in their possession or knowledge concerning details of:

- a. members of the deceased's family;
- b. the financial affairs of the estate;
- c. any transaction or joint tenancy between the deceased and a third party in respect of which an application has been made to recover property from the third party to meet a claim;
- d. persons who may be claimants under the Act; and
- e. the deceased's reasons for making the testamentary dispositions and for not making provision or further provision for any person.

R96

In proceedings for the division of relationship property, the surviving partner and the personal representative should have a duty to disclose each partner's assets and liabilities, and this should be expressed in the new Act.

³⁸ See *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [71]; and *Kirby v Sims* HC Wellington CIV-2010-485-1019, 22 August 2011 at [65].

R97

Affidavit forms should be created for the applications under the new Act to ensure appropriate information is made available.

- 12.38 We recommend that the new Act should include an express duty on the personal representative to assist the court, similar to that in section 11A of the FPA. This would provide that a personal representative who had received notice of an application for an award under that Act would have an obligation to place before the court all relevant information in the personal representative's possession or knowledge concerning details of:
- (a) members of the deceased's family;
 - (b) the financial affairs of the estate;
 - (c) any transaction or joint tenancy between the deceased and a third party in respect of which an application has been made to recover property from the third party to meet a claim (see R57 in Chapter 8);
 - (d) persons who may be claimants under the Act; and
 - (e) the deceased's reasons for making the testamentary dispositions and for not making provision or further provision for any person.
- 12.39 This would not require the personal representative to make enquiries beyond their ordinary duties when administering and distributing an estate but rather to make available to the court the information they already hold.
- 12.40 When an application is made to recover property from a third party, that party should be joined as a party to the proceeding and discovery could be sought.
- 12.41 We also recommend that, in respect of relationship property claims, the surviving partner and the personal representative should have a duty to disclose each partner's assets and liabilities, and this should be expressed in the new Act.
- 12.42 We consider that the quality and clarity of the information disclosed may also be improved by updated affidavit forms. A form similar to PR (1) Affidavit of Assets and Liabilities should be created for personal representatives and surviving partners to complete in relationship property proceedings.³⁹ A similar form should also be created for the personal representative to complete when a family provision claim or testamentary promise claim is made. This would detail the estate's assets and liabilities as well as details about property the deceased owned in joint tenancy at the time of death. A form for an affidavit in support for each of the claims under the new Act should also be created with accompanying guidance on relevant and non-relevant information.

³⁹ Family Court Rules 2002, r 398.

EVIDENCE

Current law

- 12.43 In FPA and PRA proceedings, evidence is usually given by affidavit regardless of whether they are in the Family Court or the High Court.⁴⁰ In TPA proceedings, affidavit evidence is preferred in the Family Court, whereas the presumption in the High Court is that evidence will be given orally unless the judge directs otherwise.⁴¹ A commonly cited reason for receiving evidence by way of affidavit in FPA claims is that the deceased's evidence cannot be led or tested.⁴²
- 12.44 Under the FPA and PRA, cross-examination is allowed in exceptional circumstances where allegations are specific and serious.⁴³ It is discouraged, particularly where it is sought by family members as a means of disparaging each other's character.⁴⁴ Affidavits in reply may also be made but must not introduce new matters.⁴⁵
- 12.45 Section 11 of the FPA provides that the court can hear reasons for dispositions or for leaving someone out of the will, whether that evidence would be otherwise admissible in court or not.

Issues

- 12.46 It is unclear why, for TPA proceedings, affidavit evidence would be suitable in the Family Court but not suitable in the High Court.⁴⁶

Results of consultation

- 12.47 Public Trust, NZLS and ADLS agreed that affidavit evidence should be consistently preferred across the claims. Jan McCartney QC commented that, to reduce the number of affidavits, a single brief of evidence should be required.

Conclusions

RECOMMENDATION

R98

Unless a judge directs otherwise, affidavit evidence should be preferred for all claims under the new Act irrespective of the court in which the proceeding is commenced.

⁴⁰ Family Court Rules 2002, r 48; and High Court Rules 2016, r 18.15(1).

⁴¹ High Court Rules 2016, r 18.15(2)(a). In the first edition of *Law of Family Protection and Testamentary Promises*, Bill Patterson explains that this is a historical anomaly due to TPA claims originally being brought by way of writ: see WM Patterson *Family Protection and Testamentary Promises in New Zealand* (Butterworths, Wellington, 1985) at 237–238.

⁴² John Caldwell *Family Law Service (NZ)* (online looseleaf ed, LexisNexis) at [7.913], citing *Re Munro (dec'd)* DC Waitakere 760/99, 19 October 2000 at 11; and *Re Darby (dec'd)* FC Christchurch FP 1427/98, 8 August 2000 at 16.

⁴³ See for example *Willis v Fredson* [2013] NZFC 4742.

⁴⁴ *Re Meier (deceased)* [1976] 1 NZLR 257 (SC).

⁴⁵ Family Court Rules 2002, r 158; and High Court Rules 2016, r 9.76.

⁴⁶ See Bill Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis, Wellington, 2021) at 320.

12.48 We recommend that, unless a judge directs otherwise, affidavit evidence should be preferred for all claims under the new Act irrespective of which court the proceeding is commenced in.⁴⁷ In our view, this will facilitate a consistent and efficient approach to giving evidence and minimise the time and expense spent on oral evidence. This approach would also be consistent with the recommendation by the judicial subcommittee on access to justice for evidence at trial in the High Court to be given by way of affidavit and viva voce evidence in chief to be given only on areas of significant factual contest.⁴⁸

REPRESENTATION OF MINORS AND PERSONS DEEMED BY LAW TO LACK CAPACITY

Current law

- 12.49 Section 4(4) of the FPA states that an administrator of the estate may apply for further provision from the estate on behalf of a person who is not of full age or mental capacity. They may also apply to the court for advice or directions as to whether they ought to apply for such further provision.
- 12.50 Section 37A of the PRA allows the court to appoint a lawyer to represent any minor or dependent child of the relationship if there are special circumstances that make the appointment necessary or desirable.
- 12.51 In proceedings under the FPA or the TPA, both the Family Court and the High Court may also make representation orders for minors or people who lack capacity.⁴⁹ The appointed party may be the personal representative, counsel, a litigation guardian or Public Trust.
- 12.52 When a claimant files for directions as to service, they also apply for orders of representation that might be required. In the case of minor children, it is customary for the claimant to obtain and file the consent of counsel where the claimant is requesting the court to appoint that counsel to represent such children.⁵⁰ This generally means that the claimant is expected to find a lawyer to represent the minor child with the hope that the lawyer will get paid from the estate.
- 12.53 Article 12 of the United Nations Convention on the Rights of the Child provides that children are given the right to freely express their views in all matters that affect them and to have their views given due weight in accordance with their age and maturity. This includes their right to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.
- 12.54 Article 12 of the United Nations Convention on the Rights of Persons with Disabilities reaffirms that persons with disabilities have the right to equal recognition before the law.

⁴⁷ See Family Court Rules 2002, r 48; and High Court Rules 2016, r 18.15(1).

⁴⁸ Te Komiti mō ngā Tikanga Kooti | The Rules Committee *Interim Report from Access to Civil Justice Judicial Subcommittee* (C 2 of 2021, 15 March 2021) at [53(c)].

⁴⁹ Family Court Rules 2002, r 382; and High Court Rules 2016, r 4.27. In the Family Court, these orders can be made without the appointment of a litigation guardian or next friend for the minor or incapacitated person, which are governed by rr 90B, 90C, 90D and 90F: Family Court Rules 2002, r 382(2). In the High Court, these orders can occur at the request of a party or intending party, or on the court's own initiative: High Court Rules 2016, r 4.27; and see also rr 4.35 and 18.8.

⁵⁰ See for example *Family Court Caseflow Management Practice Note* (March 2011) at [9.6].

This includes disabled people's right to have the state take appropriate measures to provide access to support needed to exercise their legal capacity and to enable them to control their own financial affairs.⁵¹

Issues

- 12.55 When FPA claims are made on behalf of minor children, these are generally brought by the child's guardian, and it appears to be uncommon for minor children to take an active role in proceedings that directly or indirectly affect them. Similarly, in the Commission's review of the PRA, we observed that "it is unusual for children to participate in relationship property proceedings or for a lawyer for child to be appointed."⁵²
- 12.56 Personal representatives are not under a general duty to initiate FPA applications. However, the Kōti Pira | Court of Appeal stated in *Re Magson* that, in a clear case, a duty would apply.⁵³ Although section 4(4) of the FPA states that a personal representative may apply on behalf of any person not of full age or mental capacity, it fails to provide any guidance about when personal representatives should make such an application.

Recommendations in the PRA review

- 12.57 The Commission made several recommendations in the PRA review aimed at giving greater priority to children's best interests in respect of relationship property matters following parental separation, which we considered should be a primary consideration in the new Relationship Property Act.⁵⁴ This included the recommendation that the Government considers ways to strengthen child participation in relationship property proceedings in any work undertaken in response to the recommendations of the Independent Panel appointed to examine the 2014 family justice reforms.⁵⁵

Results of consultation

- 12.58 In the Issues Paper, we expressed the preliminary view that the primary responsibility to bring a family provision claim on behalf of a minor child should lie with the child's parent or guardian. We suggested that a welfare guardian might take this primary responsibility for an adult lacking capacity.
- 12.59 We proposed that section 4(4) of the FPA be repealed, and in its place, a personal representative would have a statutory duty to notify potential relationship property and family provision claimants of relevant information related to their rights under the new Act. Additionally, we proposed that, when any minor child, person lacking capacity or unascertained party wishes to claim or may be affected by a claim under the new Act, the court must appoint a representative for that party.

⁵¹ United Nations Convention on the Rights of Persons with Disabilities, 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), arts 12(3) and 12(5).

⁵² Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [12.23].

⁵³ *Re Magson* [1983] NZLR 592 (CA) at 599.

⁵⁴ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R67–R72.

⁵⁵ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R71.

- 12.60 Public Trust submitted that, in some cases, welfare guardians, property managers and/or attorneys may be well placed to advocate for incapacitated claimants because they have statutory duties under the Protection of Personal and Property Rights Act 1998.
- 12.61 ADLS agreed that the primary responsibility should lie with a minor child's parent or guardian and the welfare guardian of a person lacking capacity. ADLS said that, in some circumstances, the personal representative should have the responsibility to organise a court-approved lawyer to represent the interests of a minor child and to seek a direction from the court that the reasonable costs of the child's lawyer be paid by the estate.
- 12.62 Morris Legal submitted that personal representatives should be able to apply for further provision from the estate on behalf of a person who is not of full age or mental capacity under the new Act, as they are currently able to under section 4(4) of the FPA, but there should be clear guidance in the new Act about when a personal representative is required to make an application on behalf of a vulnerable potential claimant. Morris Legal submitted that this is preferable to requiring the person's parent or guardian to apply as they are more likely to be in a position of conflict.

Conclusions

RECOMMENDATION

R99

When any minor child or adult deemed by law to lack capacity wishes to claim or may be affected by a claim under the new Act, the court should appoint a representative for that party. The court must similarly appoint a representative for any unascertained party who may be affected by a claim under the new Act. These representation orders should be made at the time of giving directions for service.

- 12.63 We consider that the primary responsibility to bring a family provision claim on behalf of a minor child should lie with the child's parent or guardian rather than resting on a personal representative. A welfare guardian, property manager or person holding a power of attorney might take this primary responsibility for an adult deemed by law to lack capacity. We suggest that lacking capacity is defined consistently with the definition in section 9 of the Trusts Act 2019 so that an adult lacks capacity when they are not competent to manage their own affairs for any reason, including when they are subject to an order appointing a manager or trustee corporation to manage their property under sections 31–33 of the Protection of Personal and Property Rights Act.⁵⁶
- 12.64 We therefore recommend that section 4(4) of the FPA should be repealed. In its place, personal representatives should have a statutory duty to notify surviving partners of their rights under the new Act and to provide them with information about the claims, relevant time limits and obtaining independent legal advice. If the Government decides to implement Option Two of our family provision recommendations for children, a personal

⁵⁶ Te Aka Matua o te Ture | Law Commission is undertaking a review of the law relating to adult decision-making capacity: Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke* | Review of Adult Decision-making Capacity Law: Terms of Reference (October 2021).

representative should also have a statutory duty to notify any child of the deceased potentially eligible under that option. We further discuss the duty to give notice and make related recommendations in Chapter 14.

- 12.65 In respect of out-of-court dispute resolution processes, we consider that, when any minor child or person deemed by law to lack capacity wishes to claim or may be affected by a claim under the new Act, the court must appoint a representative for that party.⁵⁷ The court must similarly appoint a representative for any unascertained party who may be affected by a claim under the new Act. We discuss this process further in Chapter 13.
- 12.66 We recommend that the same requirement should apply to court proceedings. These representation orders should be made at the time of giving directions of service. It appears that both the Family Court and the High Court's existing powers would be sufficient to enable these representation orders to be made.
- 12.67 Tāhū o te Ture | Ministry of Justice has an ongoing programme of work focused on enhancing children's participation in Family Court proceedings.⁵⁸ Our view is that this work programme should include participation in proceedings under the new Act.

COSTS

Current law

- 12.68 Costs are at the discretion of the court.⁵⁹ Historically, it was common in FPA proceedings for the court to order that costs be paid from the estate.⁶⁰ We understand that it is now usual in claims against an estate for costs to follow the event (that is, to be awarded in favour of the successful party).⁶¹ However, the court may consider the family context of proceedings and be reluctant to exacerbate family rifts by personal costs orders.⁶²
- 12.69 Reprehensible conduct in the course of proceedings that causes delay and expense may be reflected in costs.⁶³
- 12.70 A personal representative's full costs will generally be paid by the estate unless the personal representative has acted unreasonably.⁶⁴

⁵⁷ This is the process for matters relating to a trust that has beneficiaries who are unascertained or lack capacity: Trusts Act 2019, s 144.

⁵⁸ See for example Tāhū o te Ture | Ministry of Justice *Regulatory Impact Assessment: Strengthening the Family Court – First stage initiatives to enhance child and whānau wellbeing* (14 May 2020).

⁵⁹ Family Court Rules 2002, r 207(1); and High Court Rules 2016, r 14.1(1). In exercising its discretion as to costs, the Family Court may apply rr 14.2–14.12 of the District Court Rules 2014 so far as applicable and with all necessary modifications. These rules are largely the same as the High Court Rules 2016. Where costs are ordered by the court, these are allocated according to the civil scale of costs in schs 4–5 of the District Court Rules 2014 and schs 2–3 of the High Court Rules 2016.

⁶⁰ *Keelan v Peach [Costs]* [2003] NZFLR 727 (CA) at [7]; and *Fry v Fry* [2015] NZHC 2716, [2016] NZFLR 713 at [12].

⁶¹ *Fry v Fry* [2015] NZHC 2716, [2016] NZFLR 713 at [17].

⁶² *Ware v Reid* [2019] NZHC 1706 at [53]; and *Keelan v Peach [Costs]* [2003] NZFLR 727 (CA) at [7].

⁶³ See for example *Powell v Public Trustee* [2003] 1 NZLR 381 (CA). See also District Court Rules 2014, rr 14.6–14.7; and High Court Rules 2016, rr 14.6–14.7.

⁶⁴ *Fry v Fry* [2015] NZHC 2716, [2016] NZFLR 713 at [17].

Recommendations in the PRA review

- 12.71 In the PRA review, we concluded that it is appropriate, as a general principle, that costs in PRA proceedings lie where they fall because of the distinctive characteristics of such proceedings.⁶⁵ It would reflect the semi-inquisitorial approach taken by the Family Court in relationship property proceedings and recognise that the nature of those disputes means that each partner will have “successes” and both partners will benefit from resolution.
- 12.72 A common feature we noted in disputes about relationship property on separation was intentional tactics to delay or disrupt proceedings. We recommended:⁶⁶
- (a) a new Relationship Property Act should make express provision for the Family Court to impose costs and other consequences for non-compliance with procedural requirements;
 - (b) new procedural rules and guidance should be issued addressing the imposition of costs and other consequences of non-compliance with procedural requirements as well as the exercise of the Court’s discretion to make costs orders that are not for the purpose of penalising non-compliance; and
 - (c) the establishment of a separate scale of costs for relationship property proceedings because of their distinctive characteristics.

Issues

- 12.73 Commentators do not identify any significant problems with the current costs regime in relation to proceedings dealing with claims against estates. The previously common approach of ordering costs to be paid from the estate has been criticised for potentially encouraging unmeritorious claims and at times exhausting smaller estates.⁶⁷ There appears to be broad satisfaction now with the courts’ flexible approach and the move towards general cost principles under the court rules.

Results of consultation

- 12.74 The small number of submitters who commented on costs gave differing views about the approach that courts should take. Public Trust and ADLS agreed that the courts’ current flexible approach to costs was working and the courts should continue to have discretion as to costs. Chris Kelly and one other submitter considered that costs should generally be borne by the estate. In Kelly’s experience, imposing costs on a losing party does not encourage settlement or early resolution between parties in estate disputes, as it would in most forms of civil litigation. The risk of costs being awarded is frequently ignored or misunderstood by grieving family members who want a chance to vindicate their position in court. Kelly suggested that, where it is necessary to do justice between the parties, the

⁶⁵ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [16.111]. The distinctive characteristics of relationship property proceedings are discussed in that Report at [16.70].

⁶⁶ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R105–R107 and [16.110]–[16.111].

⁶⁷ See *Fry v Fry* [2015] NZHC 2716, [2016] NZFLR 713 at [13]; Nicola Peart (ed) *Family Property* (online looseleaf ed, Thomson Reuters) at [FP5.02]; and Greg Kelly “An Inheritance Code for New Zealand” (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 2010) at 20.

court should have discretion to increase, decrease or waive scale costs or to direct that any or all parties should meet their own costs.

- 12.75 Several submitters, including Public Trust, NZLS and ADLS, said that there should be a separate scale of costs for claims under the new Act. NZLS submitted that a scale developed for relationship property proceedings would be sufficient for this purpose.
- 12.76 Public Trust also expressed support for the establishment of guidance regarding costs for non-compliance with procedural requirements, noting that there are many different circumstances that warrant the court's discretion regarding costs, including parties' conduct, or a failure to comply with procedural requirements after a claim has commenced.

Conclusions

RECOMMENDATIONS

R100

The new Act should contain a provision expressly referring to the court's power to make cost orders as it thinks fit.

R101

The new Act should make express provision for the court to impose costs for non-compliance with procedural requirements.

R102

A separate scale of costs should be established for proceedings under the new Act (which may be the scale of costs recommended in R107 of the PRA review).

- 12.77 We recommend no change to the general rule that a court has discretion to order costs against parties as it sees fit.
- 12.78 The new Act should contain a provision expressly referring to the court's power to make cost orders as it thinks fit.⁶⁸ Just as we recommended in the PRA review, the new Act should also expressly refer to the court's ability to impose costs for non-compliance with procedural requirements.⁶⁹ This would signal to parties what is expected of them, although our understanding is that non-compliance is less of an issue for claims against estates than it is for relationship property claims on separation. General guidance about the obligation on parties to comply with procedural requirements and the potential repercussions for failing to do so could also be included in updated affidavit forms.
- 12.79 The feedback we received from the Practitioner Survey and consultation was mostly positive towards the courts' move away from the general presumption that costs are borne by the estate. This was because of concerns that such a presumption may encourage unmeritorious claims and discourage parties from reaching settlement. Additionally, costs borne by the estate may deplete small estates or unfairly impact on one beneficiary.

⁶⁸ Compare s 40 of the Property (Relationships) Act 1976.

⁶⁹ See also Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | Te Arotake i te Property (Relationships) Act 1976 (NZLC R143, 2019) at R105.

- 12.80 Our view is that, in relationship property proceedings on death, it will often be appropriate for costs to lie where they fall for the same reasons that the Commission gave for proceedings for relationship property division on separation. Frequently, these proceedings will be about the classification of relationship property and there will not be “successes” as in other civil proceedings. For family provision and testamentary promise claims, it may be more common for costs to be paid by the unsuccessful party following the proceeding. Flexibility will be particularly important in proceedings that consider multiple different claims. We acknowledge that there are unique emotional elements to succession disputes where parties are grieving and at times this may factor into the cost awards that are made, but we do not agree that it should always result in a presumption that costs will be borne by the estate.
- 12.81 We recommend that a separate scale of costs should be established for proceedings under the new Act. This could be the same scale developed for proceedings under the Commission’s proposed new Relationship Property Act or it may be a separate scale.⁷⁰ Many of the distinctive characteristics of relationship property proceedings on separation are shared with the claims under the new Act and therefore may better suit a scale developed for that purpose than a scale applicable to all civil claims. Where claims are also made that sit outside of the new Act, meaning that the proceeding must be heard in the High Court, the High Court should apply its usual approach to costs, although it may take account of the proposed new scale.⁷¹ It will be appropriate for the relevant Rules Committees to consider these matters further.

DELAYS IN THE FAMILY COURT

- 12.82 The Independent Panel examining the 2014 family justice reforms reported that delay in the Family Court impacted on almost every other issue in family justice services.⁷² In the PRA review, we identified that a key issue with the procedure governing proceedings under the PRA was the delays experienced in the Family Court.⁷³ We observed that, in 2015, half of the cases that proceeded to a hearing took more than two years from filing to disposal.⁷⁴

⁷⁰ See Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R107.

⁷¹ See the judicial comment advocating for a separate schedule of costs commensurate with and applicable to the Family Court in *Bond v Alloway* [2016] NZFC 1868 at [11]. See also similar comments made in *H v B* [2012] NZHC 674 at [17].

⁷² Rosslyn Noonan, La-Verne King and Chris Dellabarca *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Tāhū o te Ture | Ministry of Justice, May 2019) at 7.

⁷³ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [16.69]–[16.70].

⁷⁴ Based on data provided by email from Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission (16 September 2016): see discussion in Te Aka Matua o te Ture | Law Commission *Dividing relationship property — time for change? | Te mātatoha rawa tokorau — Kua eke te wā?* (NZLC IP41, 2017) at [25.24].

12.83 On average, TPA and FPA cases take more than 60 weeks from filing to disposal in the Family Court,⁷⁵ significantly longer than the intended 26 weeks.⁷⁶

The PRA review

12.84 In the PRA review, we explained that the delays in relationship property proceedings were attributable to multiple factors. These included the complex legal and factual issues that arise about property, the emotional component of separating partners and the lack of a structured case management process with prescribed timeframes.⁷⁷

12.85 We recommended that a Family Court Rules Committee should be established for the purpose of developing new procedural rules for relationship property matters to be included as a sub-part of the Family Court Rules 2002 and issuing guidance on the rules as required. We made several other recommendations, including:⁷⁸

- (a) the new procedural rules should include case management procedures tailored to the needs of relationship property proceedings;
- (b) the Family Court should have broad powers to appoint a person to make an inquiry into any matter that would assist the Court to deal effectively with the matters before it; and
- (c) the Government should collect data on the progress and resolution of relationship property proceedings in the Family Court in order to monitor whether the Family Court is adequately resourced to deal appropriately with relationship property proceedings.

Issues

12.86 In our early engagement, several lawyers raised general concerns about delays in the Family Court, but we did not receive concerns specific to the claims in question, nor did we hear that tactics are used to delay proceedings. It was suggested by some that delay may be useful in some estate disputes as it allows the deceased's family and friends time to grieve and heightened emotions to settle.

12.87 However, a year or more to resolve a dispute may be a long time for families. Delays can have significant consequences for beneficiaries who cannot access some or all of the estate property during that time, especially those who had relied on the deceased for support during their lifetime.

12.88 We did not make any specific proposals for reform in the Issues Paper in response to delays in the Family Court in disposing of claims against estates.

⁷⁵ The average age of the TPA and FPA cases disposed of by te Kōti Whānau | Family Court between 2009 and 2019 was 450 days (64.3 weeks) and 440 days (62.9 weeks) respectively: email from Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding annual court data (13 February 2020).

⁷⁶ The Family Court's *Caseflow Management Practice Note*, last updated in 2011, states that FPA, TPA and PRA cases should be disposed of within 26 weeks of filing: *Family Court Caseflow Management Practice Note* (March 2011) at [9.1].

⁷⁷ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [16.70]–[16.71].

⁷⁸ For a full list of these recommendations, see Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R102–R109 and [16.99]–[16.113]. We discuss several of the recommendations in the section above on costs.

Results of consultation

- 12.89 Several submitters, including NZLS, ADLS and Jan McCartney QC, commented on the delays experienced in the Family Court.
- 12.90 ADLS submitted that the delays were mostly attributable to resource constraints and a lack of institutional knowledge by court staff because of high staff turnover. ADLS also submitted that delays can be beneficial by allowing the parties time to grieve and to force grieving parties to quickly resolve the dispute would not achieve justice.
- 12.91 Submitters expressed different views about whether new procedural rules should be developed specific to claims under the new Act. NZLS supported this in principle, noting that any Rules Committee established should have its own terms of reference in respect of its role and what rules might be needed for a new Act. While agreeing that procedural changes were needed to improve Family Court processes, McCartney did not agree that a Family Court Rules Committee should be established and instead said the High Court Rules Committee should control the Family Court Rules. ADLS submitted that new procedural rules would not be desirable as the delays are related to inadequate staffing and resourcing of registries and an absence of judge time. ADLS also submitted that delays are permitted to occur because of a reluctance of the judiciary to make cost awards against parties who do not comply with directions. In ADLS's view, there should be a rule that all estate cases proceed to a judicial settlement conference (JSC) before a hearing date is allocated and that no JSC can be allocated until the estate's assets and liabilities have been ascertained and the value of each asset and liability is known. ADLS submitted that personal representatives should hold responsibility for ascertaining estates' assets and liabilities and any party that has a different view of the values should provide independent documentation establishing this view at least seven days prior to the JSC.
- 12.92 McCartney also said that succession law is the perfect area to benefit from inquisitorial decision-making, and this should be a reform considered by the Commission.

Conclusions

RECOMMENDATION

R103

Any Rules Committee established, as recommended by the Commission in the PRA review in R102, should consider whether to develop rules in respect of claims under the new Act.

- 12.93 We remain of the view that there are no significant issues specific to estate disputes under the FPA, TPA or PRA that are attributable to delays in the Family Court. We understand that the Ministry of Justice is to coordinate a review and rewrite of the Family

Court Rules 2002.⁷⁹ However, any Rules Committee established, as recommended in the PRA review, should consider whether to develop rules in respect of claims under the new Act.⁸⁰

- 12.94 We do not recommend a separate inquisitorial dispute resolution process for claims under the new Act. Parties to an estate dispute already have mediation and other alternative dispute resolution processes available to them, along with the semi-inquisitorial nature of the Family Court.

TIKANGA MĀORI AND DISPUTE RESOLUTION IN COURT

- 12.95 In Chapter 11, we discuss the jurisdiction of the Family Court, the High Court and te Kooti Whenua Māori | Māori Land Court (the Māori Land Court).
- 12.96 For many Māori, the Māori Land Court is a more attractive forum for resolving disputes than the general courts. The filing fees are much lower than those of the High Court, and the expertise of both judges and staff of the Māori Land Court in tikanga and te reo Māori can make the Court a supportive and positive place to go for dispute resolution.⁸¹ The Court is required to conduct proceedings as will best avoid unnecessary formality and may also apply rules of marae kawa as the judge thinks appropriate and make rulings on the use of te reo Māori during a hearing.⁸² There are additional powers allowing the Court to take a flexible approach to obtaining and receiving evidence as may assist the Court to deal effectively with the matters before it.⁸³ The Court may appoint counsel to assist the Court or represent a person or class of people.⁸⁴
- 12.97 Māori may, however, choose to resolve a succession dispute in the Family Court and the High Court.

Issues

- 12.98 Concerns have long been expressed about Māori experience with the courts and justice system and the need for the justice system to better take account of te ao Māori.⁸⁵ The

⁷⁹ In accordance with recommendation 65 of the final report of the Independent Panel examining the 2014 family justice reforms: see Rosslyn Noonan, La-Verne King and Chris Dellabarca *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Tāhū o te Ture | Ministry of Justice, May 2019) at 105.

⁸⁰ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R102.

⁸¹ See the submission of Te Hunga Rōia Māori o Aotearoa that describes the Māori Land Court as being “more accessible to Māori in terms of costs, approach and expedience”, sentiments that were endorsed by Ngā Rangahautira and Chapman Tripp in their submissions.

⁸² Te Ture Whenua Maori Act 1993, s 66.

⁸³ Te Ture Whenua Maori Act 1993, s 69.

⁸⁴ Te Ture Whenua Maori Act 1993, s 70. See the discussion in Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 240.

⁸⁵ See for example *Puao-Te-Ata-Tu (day break): The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (September 1988); Moana Jackson *The Maori and the Criminal Justice System: A New Perspective | He Whaipanga Hou* (Policy and Research Division, Department of Justice, Study Series 18, 1987–1988); *Turuki! Turuki! Move Together! Transforming our criminal justice system: The second report of Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group* (December 2019); Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004); Te Aka Matua o te Ture | Law Commission *Justice: The Experiences of Māori Women | Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori*

Independent Panel examining the 2014 family justice reforms reported in 2019 that the family justice system is largely monocultural and does not operate in a way that recognises tikanga Māori or Māori views on whānau.⁸⁶

Recent steps to incorporate tikanga into the administration of justice by the courts

- 12.99 Some steps have been taken in recent decades to incorporate tikanga into contemporary dispute resolution processes, including in the administration of justice by the courts.⁸⁷ Te Kura Kaiwhakawā | Institute of Judicial Studies (the Institute of Judicial Studies) provides education programmes and resources to the judiciary, including te reo and tikanga wānanga.⁸⁸
- 12.100 Recent recommendations have been made for reform in relation to the Family Court. The Independent Panel examining the 2014 family justice reforms recommended the development of a joined-up family justice service to be called Te Korowai Ture-ā-Whānau.⁸⁹ The Panel recommended that the Ministry of Justice work with iwi and other Māori, the Family Court and other professionals to develop, resource and implement a strategic framework to improve family justice services for Māori.⁹⁰ The Panel also observed that the emphasis on relationships in Māori culture contrasts with family justice services, which prioritise individual rights of parties.⁹¹ The Panel made several recommendations directed to increasing the number of Māori Family Court judges and, pending that, to appoint some Māori Land Court judges to sit in the Family Court, require Family Court judges to observe proceedings in the Māori Land Court and involve Family Court judges in the tikanga Māori programme delivered by the Institute of Judicial Studies.⁹²

e pa ana ki tēnei (NZLC R53, 1999); and Rosslyn Noonan, La-Verne King and Chris Dellabarca *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Tāhū o te Ture | Ministry of Justice, May 2019).

⁸⁶ Rosslyn Noonan, La-Verne King and Chris Dellabarca *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Tāhū o te Ture | Ministry of Justice, May 2019) at 37.

⁸⁷ See discussion in Helen Winkelmann “Renovating the House of the Law” (keynote speech to Hui-a-Tau 2019, Te Hūnga Rōia Māori o Aotearoa | The Māori Law Society Annual Conference, Wellington, 29 August 2019). This has been particularly the case in the criminal justice sphere: Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 275–281. See also the discussion of the Te Ao Mārama model for the District Court: Heemi Taumaunu “Norris Ward McKinnon Annual Lecture 2020: Mai te pō ki te ao mārama | The transition from night to the enlightened world — Calls for transformative change and the District Court response” (11 November 2020).

⁸⁸ See Te Kura Kaiwhakawā | Institute of Judicial Studies *Prospectus 2021*.

⁸⁹ Rosslyn Noonan, La-Verne King and Chris Dellabarca *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Tāhū o te Ture | Ministry of Justice, May 2019) at 29.

⁹⁰ This would include appointing specialist advisors to assist the Family Court on tikanga Māori, supporting kaupapa Māori services and whānau-centred approaches and developing a tikanga-based pilot for the Family Court. Rosslyn Noonan, La-Verne King and Chris Dellabarca *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Tāhū o te Ture | Ministry of Justice, May 2019) at 38.

⁹¹ Rosslyn Noonan, La-Verne King and Chris Dellabarca *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Tāhū o te Ture | Ministry of Justice, May 2019) at 40.

⁹² Rosslyn Noonan, La-Verne King and Chris Dellabarca *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Tāhū o te Ture | Ministry of Justice, May 2019) at 37–39.

- 12.101 Courts may access expertise on matters of fact such as tikanga in various ways. Perhaps most commonly, the parties to a case will each provide evidence from an expert. The court may require the experts to conference and prepare a joint witness statement identifying the matters on which they agree and disagree.⁹³ In *Ellis v R*,⁹⁴ counsel agreed on a process involving a wānanga of tikanga experts who met with each other and with all counsel and produced an agreed statement of tikanga. However, such a process is expensive and uncommon.
- 12.102 The appointment of a court expert or pūkenga is another way to assist the court.⁹⁵ The Māori Appellate Court may also provide an opinion on a question of tikanga in an appropriate case.⁹⁶

Recommendations in the PRA review

- 12.103 In the PRA review, we made several recommendations about the resolution of relationship property matters that involve questions of tikanga Māori:⁹⁷
- (a) The Family Court should be able to appoint a person to make an inquiry into matters of tikanga Māori and report to the Court.
 - (b) Family Court judges should receive education on tikanga Māori.
 - (c) The Government should give further consideration to warranting Māori Land Court judges to sit alongside judges in the Family Court where there is a difficult matter of tikanga Māori at issue.

Results of consultation

- 12.104 All submitters who responded to these matters discussed in the Issues Paper agreed it was important to make the general courts more accessible and attractive for Māori. This included Te Hunga Rōia Māori o Aotearoa (THRMOA), Ngā Rangahautira, Public Trust, NZLS, ADLS, Community Law, Professor Jacinta Ruru, Chapman Tripp and Te Kani Williams.
- 12.105 Several submitters noted there was a lack of Māori judges in the general courts and questioned the cultural competency of the judiciary to make decisions as to tikanga.
- 12.106 THRMOA submitted that upskilling non-Māori judges and staff in the general courts regarding knowledge and understanding of tikanga and ensuring more well-trained Māori become general court judges is required to address this gap. This was endorsed by Ngā Rangahautira and Chapman Tripp. THRMOA acknowledged that, in the interim, other

⁹³ High Court Rules 2016, r 9.44; and District Court Rules 2014, r 9.35. See for example *Ngāti Whātua Ōrākei Trust v Attorney-General* [2020] NZHC 3120 at [41].

⁹⁴ *Ellis v R* [2020] NZSC 89. At the time of publication, the Supreme Court had not delivered its final judgment in this case.

⁹⁵ See subpt 5 of pt 9 of the High Court Rules 2016 and the inherent jurisdiction of the court: *Ngāti Whātua Ōrākei Trust v Attorney-General* [2020] NZHC 3120 at [36]. Section 99 of the Marine and Coastal Area (Takutai Moana) Act 2011 provides for the High Court to refer a question of tikanga to a court expert (pūkenga).

⁹⁶ Te Ture Whenua Maori Act 1993, s 61. See also *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [95]; and the discussion in Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 242–250.

⁹⁷ See Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R83–R85 and [14.59]–[14.62].

approaches such as having a mechanism for a Māori Land Court judge to sit on the High Court bench could be useful when questions of tikanga arise.

- 12.107 NZLS submitted that te Tiriti should be included in all family law reform, and from that, it would follow that key concepts such as tikanga must be considered. NZLS cited the recent report into whānau experiences of care and protection in the Family Court in which the authors state that one option for achieving transformational change is to change the behaviour of the judiciary and professionals working in the justice system – an option that does not require legislative change:⁹⁸

Every court date is an opportunity to engage with whānau, hapu and iwi to support change. Whānau, hapu and iwi must be respected at all points of engagement, and culturally appropriate models of engagement must be understood and enacted by the judiciary. It must be agreed that the attainment of a sound knowledge of tikanga and te reo Māori is non-negotiable for professionals working in the Family Court. Furthermore, respecting mana, whakapapa and whanaungatanga, together with acts of kindness and inclusion towards whānau, are behaviours that should be a common standard for all that work in the Family Court.

- 12.108 Although no specific question was asked on the consultation website, one submitter suggested extending the use of cultural impact assessment reports⁹⁹ into succession matters, with the idea that as proficiency in tikanga improved, these could be used less and less. The submitter suggested other alternatives including tikanga-ā-rohe assessors, specialist tikanga courts or specialist tikanga advisers appointed to every court.

Conclusions

RECOMMENDATIONS

R104

Education on tikanga Māori, including on tikanga Māori specific to whānau, should be an important aspect of education for Family Court and High Court judges who are not already knowledgeable in these areas.

R105

The courts should be able to appoint a person to inquire into such matters the court considers may assist it to deal effectively with the matters before it, including matters of tikanga Māori, and this power should be specified in the new Act.

- 12.109 Ensuring diversity amongst the judiciary and the judiciary's appreciation of te ao Māori is important for all courts. The Chief Justice, Dame Helen Winkelmann, has publicly expressed her focus on diversity in judicial appointment, with the "ideal ... that each judge has the required knowledge to judge in a diverse society".¹⁰⁰ Over time, greater diversity

⁹⁸ Amohia Boulton and others *Te Taniwha | Te Ao Ture-ā-Whānau: Whānau Experience Of Care And Protection In The Family Court* (Te Kōpū Education and Research, July 2020) at 20.

⁹⁹ For example, as currently provided for in s 27 of the Sentencing Act 2002.

¹⁰⁰ Dame Silvia Cartwright Address, Auckland, 17 October 2019, published as Helen Winkelmann "What Right Do We Have? Securing Judicial Legitimacy in Changing Times" [2020] NZ L Rev 175 at 183. See also the address given by the Chief

in judicial appointment will make a difference, but as the Chief Justice observes, judicial education is critical.¹⁰¹ It remains the case for many (although of course not all) judges that they have insufficient understanding of te ao Māori. For this reason, we are supportive of the education that the Institute of Judicial Studies is delivering to the judiciary on te reo Māori and tikanga.¹⁰² We recommend that this education includes tikanga Māori specific to whānau. This will better equip judges without this expertise with the skills and knowledge to determine circumstances where an inquiry into matters of tikanga Māori is warranted and to recognise and apply the principles of tikanga Māori more generally through the adjudication process.¹⁰³

- 12.110 Consistent with the recommendation in the PRA review, we recommend that a provision should be incorporated into the new Act enabling the court to appoint a person to make an inquiry into and report on matters of tikanga Māori relevant to any application under the new Act. We do not see this provision as replacing the practice of parties bringing their own expert evidence, nor do we consider that it should be mandatory for the court to make such inquiries. Although the existing powers under the court rules enable a court to appoint its own expert, inclusion in the statute of this specific provision would give prominence to this power.¹⁰⁴
- 12.111 While we see this power as being a significant tool for inquiries into matters of tikanga, the courts should have the power to appoint a person to inquire into any matters that the court considers may assist it to deal effectively with the matters before it. This may, for example, include matters of valuation relevant to a relationship property division. Consistent with the Commission’s recommendations in the PRA review, the provision and related court rules should clarify the powers of a person appointed to carry out the inquiry.¹⁰⁵
- 12.112 We do not recommend changes in respect of who pays the cost of the inquiry. The court should retain discretion to direct either or both of the parties to make such payments into the court as it considers appropriate, taking into account the reasons for the inquiry and the circumstances of the case.¹⁰⁶

Justice on the 40th anniversary of the establishment of the Family Court, Helen Winkelmann “Securing the vision of its founders 40 years on” (speech given to Family Court Judges’ Triennial Conference, 12 May 2021) at 8.

¹⁰¹ Helen Winkelmann “What Right Do We Have? Securing Judicial Legitimacy in Changing Times” [2020] NZ L Rev 175 at 184.

¹⁰² Considerable work is also being undertaken to establish a bijural, bicultural and bilingual undergraduate legal education in Aotearoa New Zealand: see Jacinta Ruru and others *Inspiring National Indigenous Legal Education for Aotearoa New Zealand’s Bachelor of Laws Degree: Phase One – Strengthening the Ability for Māori Law to Become a Firm Foundational Component of a Legal Education in Aotearoa New Zealand* (Ngā Pae o te Māramatanga, supported by the Michael and Suzanne Borrin Foundation, August 2020).

¹⁰³ The Commission made this recommendation in respect of Family Court Judges in the PRA review: see Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R84 and [14.60].

¹⁰⁴ High Court Rules 2016, r 9.36; and District Court Rules 2014, r 9.27. The court also has the ability to order an account or inquiry: High Court Rules 2016, r 16.2 and District Court Rules 2014, r 16.2.

¹⁰⁵ See Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R83 and [14.59]; and see R104 and [16.108].

¹⁰⁶ See Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [16.109].

CHAPTER 13

Resolving disputes out of court

IN THIS CHAPTER, WE CONSIDER:

- ways in which parties can resolve a dispute without a court hearing;
- the law that applies to resolving disputes out of court; and
- tikanga Māori and dispute resolution out of court.

CURRENT LAW

- 13.1 A significant proportion of claims against estates are resolved out of court. There are good reasons to promote the resolution of matters outside of court. It is generally quicker and less expensive. It can result in better outcomes for families because resolution processes can focus on reaching agreement rather than adversarial court proceedings.
- 13.2 The most common ways of resolving disputed claims against estates out of court are:
- (a) party or lawyer-led negotiation;
 - (b) mediation;
 - (c) arbitration; and
 - (d) judicial settlement conferences.
- 13.3 We understand that resolutions reached by negotiation or mediation are often concluded by the parties entering a deed of family arrangement. In judicial settlement conferences, the presiding judge may make consent orders confirming the resolution reached.¹ A consent order made at a settlement conference has the same effect as if it were made with the consent of the parties in proceedings in a court.² Arbitrations are concluded by

¹ Family Court Rules 2002, r 179(1).

² Family Court Rules 2002, r 179(3)(a).

- the arbitrator’s decision. However, the parties must first have entered an arbitration agreement through which they agree to be bound by the decision.
- 13.4 The Trusts Act 2019 allows for alternative dispute resolution procedures.³ The Act provides that the trustees or the court may refer a matter to an “ADR process”, even if there is no provision in the terms of the trust that would allow for an alternative dispute resolution process.⁴ The matter may include legal proceedings or a dispute that may give rise to legal proceedings.⁵
- 13.5 If a matter is “internal”, meaning it is a matter to which the only parties are the trustees or beneficiaries, the matter can be referred to ADR even if there are beneficiaries who are unascertained or are deemed by law to lack capacity. The court must appoint a representative who must act in the best interests of those beneficiaries.⁶ The representative may agree to an ADR settlement or agree to be bound by an arbitration agreement and any arbitral award under that agreement, on behalf of those beneficiaries.⁷ Except in relation to arbitral awards, the court must approve an ADR settlement in order for it to take effect.⁸
- 13.6 Part 3A of Te Ture Whenua Maori Act 1993 (TTWMA) provides for a statutory mediation process to assist parties to a dispute to quickly and effectively resolve any disputed issues “between themselves; and in accordance with the law; and as far as possible, in accordance with the relevant tikanga of the whanau or hapu with whom they are affiliated, for both the process and the substance of the resolution.”⁹ A judge hearing the proceedings may refer any issue arising from the matter to a mediator at the judge’s initiative or at the request of any party.¹⁰ If there are no proceedings, any party to a dispute may apply to the Registrar to have the issue referred to a mediator.¹¹ The process is flexible, with the mediator able to follow any procedures the mediator thinks appropriate to promptly and effectively resolve the issues and receive any information they think fit, whether or not it would be admissible in court proceedings.¹²

³ The Trusts Act 2019 applies to all express trusts governed by New Zealand law, such as trusts created by wills and statutory trusts under the intestacy regime: Trusts Act 2019, s 5. It also applies to the duties incidental to the office of administrator under the Administration Act 1969: Trusts Act 2019, sch 4 pt 1.

⁴ Trusts Act 2019, s 143.

⁵ Trusts Act 2019, s 142.

⁶ Trusts Act 2019, s 144(2)(a).

⁷ Trusts Act 2019, s 144(1)(b).

⁸ Trusts Act 2019, s 144(1)(c).

⁹ Te Ture Whenua Maori Act 1993, s 98I. The mediation process only applies to matters over which the Māori Land Court has jurisdiction: s 98H.

¹⁰ Te Ture Whenua Maori Act 1993, s 98L(1).

¹¹ Te Ture Whenua Maori Act 1993, s 98L(2).

¹² Te Ture Whenua Maori Act 1993, s 98O(3).

RECOMMENDATIONS IN THE PRA REVIEW

- 13.7 In the PRA review, we recommended measures to support out-of-court resolution. We said parties should have adequate information about the property sharing regime and options for resolving relationship property matters and have access to affordable legal advice.¹³ Such an approach would promote the resolution of PRA matters as inexpensively, speedily and simply as is consistent with justice. We recommended too that voluntary out-of-court dispute resolution for relationship property matters should be promoted by:¹⁴
- (a) including in the recommended new Relationship Property Act a statutory endorsement of voluntary out-of-court dispute resolution to resolve relationship property matters;
 - (b) introducing new pre-action procedures in the Family Court Rules 2002 that will provide a clear process for partners to follow when attempting to resolve relationship property matters out of court; and
 - (c) requiring applicants to acknowledge in court application forms that they have received information about the pre-action procedures and the availability of dispute resolution services.

NGĀ TIKANGA

- 13.8 Tikanga Māori promotes wellbeing and balance between all aspects of the human, natural and spiritual worlds.¹⁵ Māori dispute resolution is primarily concerned with maintaining a state of wellbeing and balance.¹⁶
- 13.9 The application of tikanga to social relationships leads to conflict management processes that differ from prevalent Western ways of viewing and solving conflict.¹⁷ However, Māori decision-making processes are not easily reduced into an exhaustive set of detailed rules.¹⁸ Māori decision-making is guided by tikanga both in terms of process and the final decision. The tikanga will depend on the nature of the issues at stake and the relationships involved.

¹³ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R96–R99 and [16.7]–[16.32].

¹⁴ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R100.

¹⁵ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 262; and Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 35.

¹⁶ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 262 and 264–265.

¹⁷ Carwyn Jones “Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes” in Morgan Brigg and Roland Bleiker (eds) *Mediating Across Difference: Oceanic and Asian Approaches to Conflict Resolution* (University of Hawai‘i Press, Honolulu, 2011) 115 at 124.

¹⁸ Te Aka Matua o te Ture | Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase – An Advisory Report for Te Puni Kōkiri, the Office of Treaty Settlements and the Chief Judge of the Māori Land Court* (NZLC SP13, 2002) at 11.

- 13.10 The tikanga that apply to Māori dispute resolution are based on mana and tapu. These dictate the cause and consequences of disputes within te ao Māori.¹⁹ Utu is the primary mechanism by which breaches of mana or tapu are rectified. Resolution might be achieved through kōrero and hui, the perpetrator assuming whakamā (personal accountability) for the action or omission, rāhui (prohibition), and many other methods besides.²⁰ We also discuss in Chapter 6 the take-utu-ea framework for assessing breaches of tikanga.
- 13.11 Suitable resolution methods are decided and acted upon according to various factors, including the relationships involved and the tikanga that were transgressed.²¹ The dispute resolution process is fluid and might incorporate several methods and principles in order to reach a solution.²² This might be contrasted with Western methods where, for example, the parties may contractually bind themselves to a particular process before a dispute has even arisen.²³
- 13.12 The importance of rangatira (chiefs or leaders) for the resolution of disputes has been widely discussed.²⁴ Rangatira are widely regarded as carrying the mana of their people and are expected to demonstrate this through actions and words that strengthen the cohesiveness of the group. Three principles are employed to achieve this: aroha, the emotional response stirred by empathy and kindness; atawhai, the obligation to serve others and protect their wellbeing; and manaaki, the ability to look after those under one's care.²⁵ Associate Professor Khylee Quince observes that a traditional dispute process might involve rangatira leading discussions, exploring options and leading their people to accept one solution over another in the event that consensus is not achieved by mediation.²⁶ Kuia and kaumātua also play a significant role in addressing transgressions

¹⁹ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 264.

²⁰ Traditionally, the practices of muru (taking of personal property as compensation) and marriage alliances were also used: see Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 75–79, 83, 86 and 200. Withdrawal from disputed territory was another practice: see Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 265.

²¹ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 83.

²² Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 89.

²³ For example, parties that agree to submit future disputes to arbitration are bound to arbitrate those disputes by the provisions of the Arbitration Act 1996.

²⁴ See for example Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 265–268; Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 89–92; Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected Writings of Rev Māori Marsden* (Estate of Rev Māori Marsden, Masterton, 2003) at 35; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 30–32.

²⁵ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 265–268.

²⁶ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 270.

and restoring relationships.²⁷ The ultimate measure of success for Māori dispute resolution was the degree of social harmony achieved within the group and between the group and others.²⁸

- 13.13 The arrival of the British settlers introduced to Aotearoa New Zealand institutions that differentiated between the political and the legal, while for Māori, political and legal were subsumed under the rules and practices of mana and tapu associated with whakapapa and whanaungatanga.²⁹ With the emphasis on individual identity and diminution of group obligation, the role of the rangatira and their authority as spokesperson and guardian of group rights diminished.³⁰
- 13.14 Dr Carwyn Jones has discussed three key differences between Māori and dominant Western methods of addressing conflict: relationships with other people, attitudes towards time and attitudes towards the environment.³¹ Māori tend to resolve disputes with reference to the maintenance of relationships rather than with the application of universal standards.³² Collective responsibility also means that the whole community is responsible for maintaining and sustaining the values of that community.³³ Māori regard the length of time it takes to resolve a dispute as subordinate to the overall goal of achieving balance in the relationships involved. The close connections with the past and the future mean that the focus is shifted away from the present and creates accountability for the current generation to both the past and future generations.³⁴ Because tikanga that underpin Māori dispute resolution are all closely connected to or derived from the natural world, parties within a dispute are not isolated actors from their environment.³⁵

²⁷ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 83 and 89–91.

²⁸ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 269.

²⁹ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 271.

³⁰ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 271.

³¹ Carwyn Jones “Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes” in Morgan Brigg and Roland Bleiker (eds) *Mediating Across Difference: Oceanic and Asian Approaches to Conflict Resolution* (University of Hawai‘i Press, Honolulu, 2011) 115 at 124.

³² Carwyn Jones “Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes” in Morgan Brigg and Roland Bleiker (eds) *Mediating Across Difference: Oceanic and Asian Approaches to Conflict Resolution* (University of Hawai‘i Press, Honolulu, 2011) 115 at 125.

³³ See Harry Dansey “A View of Death” in Michael King (ed) *Te Ao Hurihuri: Aspects of Maoritanga* (Reed Publishing, Auckland, 1992) 105 at 109; and Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 90. This Report uses case studies to demonstrate various tikanga and kawa around dispute resolution. In one example, the whānau of two kuia who were having a minor dispute came to the marae to be involved in the process. In this way, they supported their whanaunga but also ensured their own mana was protected as it was affected by the mana of the individual.

³⁴ Carwyn Jones “Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes” in Morgan Brigg and Roland Bleiker (eds) *Mediating Across Difference: Oceanic and Asian Approaches to Conflict Resolution* (University of Hawai‘i Press, Honolulu, 2011) 115 at 127, where Jones emphasises that the present and future generations are seen as living faces of the ancestors.

³⁵ Carwyn Jones “Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes” in Morgan Brigg and Roland Bleiker (eds) *Mediating Across Difference: Oceanic and Asian Approaches to Conflict Resolution* (University of Hawai‘i Press, Honolulu, 2011) 115 at 128. Jones explains how whanaungatanga includes the

- 13.15 Quince favours a modern system of dispute resolution that incorporates fundamental aspects of tikanga and establishes practical processes that reflect the reality of present-day Māori.³⁶ In her view, simply placing Māori in positions of power within the current systems is inadequate; a truly representative system would be predicated on tikanga as well as Māori people.³⁷
- 13.16 The marae remains at the centre of Māori life and continues to play a crucial role in Māori dispute resolution.³⁸ Dame Joan Metge has explained that:³⁹
- Māori collectively see the marae as the appropriate venue for debating issues of all kinds, especially at family and community level. Discussion is an integral part of every gathering held on a marae, whether the community is meeting on its own or entertaining visitors, and whatever the publicly announced reason for coming together. When Māori meet for discussion in other places, they transform them into the likeness of a marae by their use of space and application of marae rules of debate.
- 13.17 However, it is well recognised that the impacts of colonisation have left many Māori without access to any marae as a forum for dispute resolution and without access to wider whānau and hapū as support networks.⁴⁰

ISSUES

How should tikanga Māori dispute resolution be facilitated in the new Act?

- 13.18 There is an important question about the best way to enable dispute resolution processes based in tikanga Māori to be facilitated in the new Act. As we mention in Chapter 2 the Crown has an obligation under te Tiriti to exercise its kāwanatanga (the right to govern) responsibly and to facilitate the exercise of tino rangatiratanga. This includes an obligation to facilitate the resolution of disputes according to tikanga Māori. Many of our recommendations in this report are an attempt to weave tikanga into a state law framework to create better law for all. We have stressed, though, that Māori who wish to resolve disputes by tikanga should have the option to do so. And the Crown, through its

interconnectedness between people and the environment and that the concepts of utu, tapu/noa and kaitiakitanga are all closely connected with the natural world.

³⁶ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 280–281.

³⁷ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 292.

³⁸ See Joan Metge *Kōrero Tahi: Talking Together* (Auckland University Press with Te Mātāhauariki Institute, Auckland, 2001) at 8–10; Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 269; and Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 24.

³⁹ Joan Metge *Kōrero Tahi: Talking Together* (Auckland University Press with Te Mātāhauariki Institute, Auckland, 2001) at 8, cited in Te Aka Matua o te Ture | Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase – An Advisory Report for Te Puni Kōkiri, the Office of Treaty Settlements and the Chief Judge of the Māori Land Court* (NZLC SP13, 2002) at 11–12.

⁴⁰ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 271–273.

obligation to exercise kāwanatanga responsibly, should facilitate this expression of tino rangatiratanga.

The legality of some out-of-court settlements is unclear

13.19 In Chapter 10, we discuss the legality of agreements that purport to settle claims against an estate. To summarise:

- (a) A surviving partner may enter an agreement under Part 6 of the PRA with the personal representative of the estate to resolve relationship property matters.⁴¹
- (b) The courts have held that agreements through which parties purport to settle Family Protection Act 1955 (FPA) claims are not binding on grounds of public policy.⁴² It is unclear whether the courts would continue to uphold this rule if the issue arose in proceedings.⁴³ We understand that parties will frequently settle claims by entering deeds of family arrangement.
- (c) It appears that parties can settle Law Reform (Testamentary Promises) Act 1949 (TPA) claims by agreement.
- (d) The Arbitration Act 1996 provides generally that “any dispute” can be arbitrated unless the arbitration agreement is “contrary to public policy” or “under any other law, such a dispute is not capable of determination by arbitration”.⁴⁴ We have found no case that has considered a relationship property arbitration award in Aotearoa New Zealand, although some commentators have argued the agreement would be binding if it conformed to the contracting out requirements under Part 6 of the PRA.⁴⁵

13.20 As a result of this law, it is unclear whether parties are able to comprehensively settle claims against an estate without going to court.

Out-of-court resolution and parties who are unascertained, minors or persons who are deemed by law to lack capacity

13.21 A key question concerning out-of-court resolution is whether court involvement is needed when the parties involved are unascertained (such as beneficiaries yet to be born), minors or persons who are deemed by law to lack capacity. These parties may be beneficiaries of the estate and/or claimants under the new Act. If out-of-court resolution is to continue to be available under the new Act, there is a question as to how the interests of such parties should be protected. As noted, the Trusts Act sets out procedures for ADR processes concerning internal matters when beneficiaries are involved who are unascertained, are minors or are deemed by law to lack capacity.

⁴¹ Property (Relationships) Act 1976, s 21B.

⁴² *Hooker v Guardian Trust & Executors Co of New Zealand* [1927] GLR 536 (SC).

⁴³ Bill Patterson has argued that if the issue came before the courts today, they would likely hold such deeds of family arrangements are enforceable: see Bill Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis, Wellington, 2021) at 112–113. Note too s 47(3) of the Administration Act 1969, which provides that claimants cannot bring an action against an administrator for distributing an estate when they have, in writing, consented to the distribution or acknowledged they do not intend to make an application that would affect the distribution.

⁴⁴ Arbitration Act 1996, s 10(1).

⁴⁵ See Robert Fisher “Relationship property arbitration” (2014) 8 NZFLJ 15 at 16; and Regan Nathan “Another tool in the kete? — relationship property arbitration in New Zealand” (2020) 10 NZFLJ 47 at 47–48.

Should pre-action procedures be contemplated for claims against estates?

- 13.22 Potential claimants sometimes experience difficulties obtaining the relevant information needed to assess the viability of a claim or to resolve that claim. Those who are not already beneficiaries under the will often have the most difficulty. We have heard that accessing the will itself can be complicated, often only being provided once probate is granted and the will becomes a public record.
- 13.23 In the PRA review, we recommended the introduction of new “pre-action procedures” for relationship property matters.⁴⁶ Parties would need to comply with the pre-action procedures, unless there are good reasons not to, to equip them for out-of-court resolution and help avoid procedural issues like inadequate disclosure of information. We recommended pre-action procedures should cover:
- (a) giving notice to the other party of an intention to engage in out-of-court dispute resolution to resolve a relationship property dispute, which would provide an opportunity to put the parties on notice of their disclosure obligations and of other matters such as the prohibition on disposing of family chattels without the other partner’s consent;
 - (b) the process for disclosure; and
 - (c) participation in out-of-court dispute resolution, such as negotiation, counselling, mediation, arbitration and other recognised dispute resolution methods.
- 13.24 Given our recommendation in the PRA review to introduce pre-action procedures to relationship property matters, a question arises as to whether they should be introduced for claims against an estate.

RESULTS OF CONSULTATION

Confirmation and endorsement of the ability of parties to resolve disputes out of court

- 13.25 In the Issues Paper, we proposed that the new Act should expressly confirm and endorse the ability of parties to resolve disputes out of court. We proposed this to clarify that court involvement will not be required to vary the distribution of an estate under the terms of a will or intestacy provided that the parties comply with any procedural requirements for entering settlement agreements.
- 13.26 Most submitters agreed with our proposals, including Public Trust, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), the Family Law Committee of Auckland District Law Society (ADLS), Morris Legal, Chapman Tripp, Jan McCartney QC and Bill Patterson.
- 13.27 NZLS did not think that a provision similar to section 143 of the Trusts Act was necessary.⁴⁷ ADLS did not think arbitration was an appropriate out-of-court resolution process for determining family issues such as succession. It also submitted that attendance at a judicial settlement conference should be compulsory before a fixture is allocated for a

⁴⁶ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [16.54]–[16.55].

⁴⁷ Section 143 of the Trusts Act 2019 gives a trustee power to refer matters to an ADR process with the agreement of each party to the matter.

hearing. It noted an extremely high number of cases settle at judicial settlement conferences. Succeed Legal supported more statutory guidance on resolving disputes out of court.

Tikanga relevant to dispute resolution

13.28 In the Issues Paper, we asked whether we had accurately described the tikanga relevant to dispute resolution.⁴⁸ All submitters who responded agreed with our description of the relevant tikanga. This included Te Hunga Rōia Māori o Aotearoa (THRMOA), Ngā Rangahautira, Chapman Tripp and MinterEllisonRuddWatts. Tamati Cairns (in an interview with Tai Ahu) said that the larger history and background to a dispute and the parties involved is always relevant to resolving disputes according to tikanga.

Tikanga-based dispute resolution

13.29 In the Issues Paper, we asked whether mediation or arbitration are useful ways to resolve succession disputes for Māori and whether tikanga-based mediation should be included in state law as an option for Māori. We also asked how else whānau might resolve succession disputes.

13.30 THRMOA supported the use of alternative dispute resolution. It considered all forms of alternative dispute resolution should be available for Māori to ensure Māori can choose whether to utilise a tikanga-based process or not. However, THRMOA considered that, where taonga are concerned, the process should be tikanga-based. THRMOA said that tikanga-based dispute resolution must have an independent pūkenga and someone who understands the relevant tikanga. THRMOA and MinterEllisonRuddWatts noted that high-level, outcome-focused dispute resolution processes are preferable over prescriptive processes as they allow the parties to determine what a tikanga process looks like for them. THRMOA gave the new dispute resolution provisions in TTWMA as an example of a tikanga-based mediation process that is outcome based, although noted the limited information available to date about its success.⁴⁹ Both Ngā Rangahautira and Chapman Tripp supported THRMOA's submission. Professor Jacinta Ruru submitted that tikanga-based mediation should be available to Māori at any point in their interaction with the law.

13.31 Submitters made various suggestions for appropriate ways to facilitate tikanga-based resolution, including:

- (a) the establishment of a Māori Issues Court or Māori dispute resolution body with members who have a strong grasp of tikanga and state law;
- (b) a system similar to that used in the Rangatahi Courts, where whānau can get together to manage and facilitate disputes and enhance the mana of those attending; and
- (c) a dispute resolution process similar to judicial settlement conferences for whānau succession disputes but with a specific tikanga foundation for tangata whenua and supervised by mediators and/or experts that are well versed in tikanga and te reo Māori.

⁴⁸ We set out our discussion of the relevant tikanga above.

⁴⁹ The dispute resolution provisions are found in pt 3A of Te Ture Whenua Maori Act 1993 and came into force on 6 February 2021.

13.32 We did not specifically ask about tikanga-based dispute resolution on the consultation website, but some website submitters discussed tikanga-based dispute resolution in response to other questions. One said that tikanga processes can be less adversarial than state law processes and encourage dialogue among parties. Some noted that tikanga processes can vary between groups, and the law should accommodate these differences. Another submitter said that tikanga-based processes are inclusive and consensus building, with a focus on rebuilding relationships. They said that tikanga is concerned with the maintenance of balance within the bonds of relationships and those relationships are mediated through kanohi-ki-te-kanohi (face-to-face) negotiation, compromise and agreement between whānau and hapū.

Out-of-court dispute resolution that involves parties who are unascertained, minors or persons who are deemed by law to lack capacity

13.33 In the Issues Paper, we proposed that the new Act should prescribe a process for out-of-court dispute resolution involving parties who are unascertained (such as beneficiaries yet to be born), minors or persons who are deemed by law to lack capacity that is consistent with the alternative dispute resolution provisions in the Trusts Act. It would require a representative for parties who are unascertained, minors or persons who are deemed by law to lack capacity, who would be able to agree to participate in an out-of-court resolution process and agree to any settlement reached.

13.34 We proposed that the court should be required to approve any settlement that involves unascertained parties, minors or persons who are deemed by law to lack capacity.

13.35 We expressed a preliminary view that, for arbitration, the same process should apply. However, court scrutiny of the arbitral award should not be required.

13.36 Most submitters agreed with our proposals, including Public Trust, Succeed Legal, Morris Legal and Patterson. NZLS submitted that the new Act should clarify the legality of out-of-court settlements and that a similar provision to section 144 of the Trusts Act could be adopted in the new Act. Chapman Tripp did not see the need for a court to approve a settlement that involved unascertained parties, minors or persons who lack capacity as the involvement of a representative is sufficient protection. ADLS did not think that an out-of-court resolution process should have to consider unascertained parties as out-of-court dispute resolution requires certainty. ADLS also submitted that court approval of a settlement should be required when one or more of the parties is a self-represented litigant, is a minor or does not have capacity to look after their own affairs.

Pre-action procedures

13.37 In the Issues Paper, we proposed that parties in disputes should be required to follow pre-action procedures. The procedures would cover:

- (a) giving notice to other parties of an intention to engage in out-of-court dispute resolution;
- (b) the requirement to make arrangements for the representation of parties who are unascertained, minors or persons deemed by law to lack capacity;
- (c) the process for disclosure of information, including initial disclosure obligations; and
- (d) information about participation in out-of-court dispute resolution, such as negotiation, counselling, mediation, arbitration and other recognised dispute resolution services.

- 13.38 We proposed that the procedures could be set by a Family Court Rules Committee or the High Court Rules Committee.⁵⁰
- 13.39 Most submitters agreed with our proposals, including Public Trust, Succeed Legal, Morris Legal and Patterson. Chapman Tripp submitted that pre-action procedures can be beneficial, but with agreement, families should be able to opt out of them where there are no unascertained parties, minors or persons deemed by law to lack capacity involved. NZLS did not support the imposition of an obligation upon the parties to follow pre-action procedures.⁵¹

CONCLUSIONS

The new Act should endorse and facilitate out-of-court dispute resolution and tikanga-based dispute resolution

RECOMMENDATION

R106

The new Act should expressly endorse out-of-court dispute resolution and tikanga-based dispute resolution.

- 13.40 In Chapter 10, we recommend that the new Act and the Administration Act 1969 should contain provisions stating that parties can enter an agreement to settle any differences arising between them under the new Act or the intestacy provisions in the Administration Act. The new Act should prescribe no procedural requirements for those parties to observe when entering settlement agreements (except for matters involving any parties who are unascertained, minors or persons who are deemed by law to lack capacity). However, a settlement agreement could be set aside if it would cause serious injustice, or where the agreement prejudiced the entitlements or claims of a third party who has not properly been included in the settlement agreement.
- 13.41 In the Issues Paper, we proposed that there should be a statutory endorsement of out-of-court resolution within the new Act. We recognised that out-of-court resolution may be particularly beneficial for the types of family disputes that would arise under the new Act. A process that allows the parties to arrive at an agreed settlement may be more helpful at diffusing family hostilities than an adversarial court process. Out-of-court resolution processes may also allow other family matters to be addressed that may not be strictly relevant to the legal issues before the court. Most submitters expressly agreed

⁵⁰ We recommended the establishment of a Family Court Rules Committee in the PRA review: see Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R102 and [16.56].

⁵¹ NZLS also referred to its submission in the PRA review, where it supported pre-action procedures proposed in that context in relation to matters of disclosure.

with our proposals. We therefore recommend that the new Act contain a statutory endorsement of out-of-court dispute resolution.⁵²

- 13.42 We recommend that the new Act should separately endorse the availability of tikanga-based dispute resolution. In our view, tikanga-based processes should not be defined by reference to the courts as an “out-of-court” resolution process, nor as an “alternative” form of dispute resolution. A statutory endorsement of tikanga-based dispute resolution, separate from a general endorsement, gives mana to agreements reached through these processes as well as going some way to facilitate tino rangatiratanga and recognise tikanga Māori as an equal source of rights and obligations to state law. This would also expressly allow space for the development of new Māori models of dispute resolution.
- 13.43 We observe that the mediation process set out in Part 3A of TTWMA is available for nearly any matter over which te Kooti Whenua Māori | Māori Land Court (the Māori Land Court) has jurisdiction, including FPA and TPA disputes for which the Māori Land Court currently has jurisdiction.⁵³ If the Government adopts our recommendation in Chapter 11 that the Māori Land Court have jurisdiction for matters concerning taonga, parties to a dispute involving taonga would also have access to the mediation process in Part 3A. In our view, this is appropriate.
- 13.44 There is a broader question about the availability of the Part 3A mediation process to claims more generally under the new Act. Our recommendations about settlement agreements in Chapter 10 mean that parties could engage in an out-of-court or tikanga-based dispute resolution process of their own accord, without court involvement, and come to a resolution.
- 13.45 However, we consider that the Crown has a positive obligation to facilitate the exercise of tino rangatiratanga by Māori, including through the facilitation of tikanga-based dispute resolution to resolve disputes. It may be that a process that is statutory, flexible and relatively inexpensive like the Part 3A mediation process, is one that might have broader application. For example, disputes concerning the eligibility to succeed in an intestacy in connection with a whāngai relationship may be an issue that is well suited to such a mediation process.

⁵² Similar statutory endorsements are found in comparable jurisdictions. See for example s 4 of the British Columbia Family Law Act SBC 2011 c 25, which emphasises that out-of-court dispute resolution is preferred, including encouraging resolution through agreements and appropriate family dispute resolution processes before making an application to a court; and s 3 of the Ontario Family Law Act RSO 1990 c F.3, which endorses voluntary mediation as a process for resolving any matter that the court specifies.

⁵³ See Te Ture Whenua Maori Act 1993, s 98H.

The new Act should prescribe a process for out-of-court resolution involving parties who are unascertained, minors or persons deemed by law to lack capacity

RECOMMENDATIONS

R107

The new Act should prescribe a process for out-of-court resolution involving parties who are unascertained, minors or persons deemed by law to lack capacity. The court should appoint representatives for parties who are unascertained (such as beneficiaries yet to be born), minors or persons deemed by law to lack capacity when:

- a. a person makes a claim against an estate under the new Act that may affect the interests of any parties who are unascertained, minors or persons who are deemed by law to lack capacity; or
- b. any minor or person who is deemed by law to lack capacity wishes to bring a claim under the new Act.

R108

A representative for parties who are unascertained, minors or persons who are deemed by law to lack capacity should be able to agree to participate in an out-of-court resolution process and agree to any settlement reached. The representative should act in the best interests of the parties they represent.

R109

The court should be required to approve any settlement that involves unascertained parties, minors or persons deemed by law to lack capacity. It should also be able to vary or set aside any agreement that would cause serious injustice.

R110

The same process set out at R107–R108 for appointing representatives should apply for arbitrations involving parties who are unascertained, minors or persons deemed by law to lack capacity. However, outcomes reached by arbitration should not require approval by the court.

13.46 Most submitters agreed with our proposals in the Issues Paper regarding out-of-court resolution involving parties who are unascertained, minors or persons deemed by law to lack capacity. We acknowledge the few submitters who argued the processes would be unnecessary. However, we think consistency with the processes for out-of-court resolution involving parties who are unascertained, minors or persons who are deemed by law to lack capacity in the Trusts Act is important. Given the interrelationship between trusts and estates, it would be unhelpful if a different process applied to disputes under the new Act.

13.47 When a dispute involves parties who are unascertained (such as beneficiaries yet to be born), minors or persons deemed by law to lack capacity, we recommend that the new Act should prescribe a process that is consistent with the alternative dispute resolution

provisions of the Trusts Act.⁵⁴ The process will require the court to appoint representatives for those parties to look after their best interests. The representative would be able to agree on their behalf to participate in an out-of-court resolution process and agree to any settlement reached. For the present time, the definitions relating to capacity under the new Act for the purposes of out-of-court resolution should be consistent with the Trusts Act to align the process with the Trusts Act.⁵⁵

13.48 The process of appointing representatives would apply when:

- (a) a person makes a claim against an estate under the new Act that may affect the interests of any parties who are unascertained, minors or persons who are deemed by law to lack capacity; or
- (b) any minor or person who is deemed by law to lack capacity wishes to bring a claim under the new Act.⁵⁶

13.49 As with the Trusts Act, the new Act should provide the further safeguard of requiring a court to approve the settlement reached unless the settlement is an arbitral award. Additionally, the agreement should be subject to the court's power to vary or set aside any agreement that would cause serious injustice (as recommended in Chapter 10).

13.50 We recognise that the Trusts Act is still new legislation. It is yet to be seen how its provisions governing dispute resolution will work in practice. If Parliament determines the Trust Act provisions require reform, it may be desirable for the rules in the new Act to be amended to align as closely as possible with any changes.

The new Act should not prescribe pre-action procedural rules for parties to follow

13.51 We have concluded that the new Act should not prescribe pre-action procedural rules for parties in disputes because:

- (a) the associated costs may be too high, particularly for small estates;
- (b) by introducing compulsory procedures for parties to follow, we risk giving parties with frivolous or unmeritorious claims a procedural tool to use to prolong a dispute; and
- (c) pre-action procedural rules are less appropriate for succession disputes than relationship property disputes. When people separate, the possibility of uncooperative behaviour is higher than when one party has died and their personal representatives stand in their place.

⁵⁴ See Trusts Act 2019, s 144.

⁵⁵ As noted in Chapter 1, Te Aka Matua o te Ture | Law Commission has commenced its review of the law relating to adult decision-making capacity, Ngā Huarahi Whakatau, and we expect that recommendations from that review will address whether capacity should be understood in a more nuanced way than is presently set out in law.

⁵⁶ We do not consider unascertained parties would be able to bring a claim under the new Act. In Chapter 5 we recommend that the only unborn children eligible to claim a family provision award should be unborn children in utero at the time of the deceased's death. Children who may be born in the future, but were not in utero prior to the deceased's death, would not be eligible.

13.52 In deciding not to recommend pre-action procedural rules, we have balanced the needs of potential claimants to have access to information and representation in the early stages of a dispute against the costs of providing these. We have concluded that the potential costs outweigh the potential benefits and that the existing practices for resolving disputes out of court and the well-established procedures for bringing a claim in court are sufficient.

CHAPTER 14

Role of personal representatives

IN THIS CHAPTER, WE CONSIDER:

- personal representatives' duties when claims are brought, or may be brought, against an estate.

CURRENT LAW

14.1 When a deceased person leaves a will, the person appointed under the will to carry out the terms of the will is called an executor. When a deceased person dies intestate, a person who is granted letters of administration is called an administrator. An administrator's role is to distribute the estate in accordance with the intestacy regime in the Administration Act 1969. We use the term "personal representatives" to refer to both executors and administrators.

Duty to give notice to potential claimants

14.2 Personal representatives have a duty to be even-handed between all beneficiaries of the estate. The courts have held that the duty of even-handedness extends to claimants against an estate where personal representatives are aware that they wish to make a claim.¹ Personal representatives must not actively or dishonestly conceal relevant material about the estate from potential claimants who seek information.²

14.3 Te Kōti Pira | Court of Appeal (the Court of Appeal) has confirmed there is no general duty to advise all potential claimants of the death of a deceased nor a general duty to advertise for claimants.³ The Court left open the question of whether a duty of even-handedness and a duty to notify potential claimants should extend to the claims of which

¹ *Irvine v Public Trustee* [1989] 1 NZLR 67 (CA) at 70.

² *Mackenzie v Mackenzie* (1998) 16 FRNZ 487 (HC) at 495.

³ *Sadler v Public Trust* [2009] NZCA 364, [2009] NZFLR 937 at [39].

the executor ought to be aware. However, in *B v T*, te Kōti Matua | High Court (the High Court) held that the personal representatives ought to have given notice to the deceased's estranged daughter.⁴ The Court reasoned it should have been “abundantly plain” that the daughter would have been entitled to claim.

The role of personal representatives in court proceedings

- 14.4 Personal representatives will be the named defendants in Family Protection Act 1955 (FPA), Law Reform (Testamentary Promises) Act 1949 (TPA) and Property (Relationships) Act 1976 (PRA) proceedings, but the role they should take to actively defend the claims differs based on the nature of the claims and the extent to which the claims are opposed by other parties.
- 14.5 In FPA proceedings, the representatives can be described as “nominal defendants” because they are generally expected to take a neutral role in proceedings, submitting to the judgment of the court without taking sides.⁵ Section 11A of the FPA imposes a duty on personal representatives to place before the court all relevant information about the estate finances and the deceased's reasons for making dispositions.
- 14.6 In contrast, personal representatives are expected to take an active role in defending claims under the TPA.⁶ The beneficiaries under the will may not be able to shed any light on the alleged claim or contest the detail. The personal representatives' role is therefore to ensure the claim is properly tested and proved. However, where other parties wish to take full part in the proceedings, it is usual for personal representatives to take a neutral role.⁷
- 14.7 The same active role is expected of personal representatives in PRA proceedings.⁸
- 14.8 In any of these proceedings, the court may require personal representatives to represent infants, unborn persons, absentees or those not already represented.⁹

Managing conflicts of interest

- 14.9 When a claim is made against an estate, sometimes personal representatives will have a conflict of interest. A personal representative may be:¹⁰

⁴ *B v T* [2015] NZHC 3174 at [111].

⁵ John Earles and others *Wills and Succession (NZ)* (online looseleaf ed, LexisNexis) at [13.11]; and Bill Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis, Wellington, 2021) at 115.

⁶ Bill Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis, Wellington, 2021) at 116.

⁷ Bill Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis, Wellington, 2021) at 116, giving *Re Barker* (1997) 15 FRNZ 618 (HC) as an example.

⁸ Bill Atkin and Bill Patterson *Laws of New Zealand Family Protection and other Family Property Arrangements* (online ed) at [52].

⁹ See Family Court Rules 2002, rr 380 and 382, regarding applications for representation; High Court Rules 2016, r 4.27; and discussion in Bill Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis, Wellington, 2021) at 330–331. Section 4(4) of the Family Protection Act 1955 also provides that personal representatives may apply on behalf of any person who is not of “full age or mental capacity”.

¹⁰ This list is taken from Stephen McCarthy “Will Challenges — what is the executor to do?” (paper presented to Trusts & Estates Conference 2016, Auckland, 18 August 2016) at 10–11. See also *Bennett v Percy* [2020] NZFC 3223; and John Caldwell *Family Law Service (NZ)* (online looseleaf ed, LexisNexis) at [7.909], referring to instances where a personal representative retains their role while defending the claim in their capacity as beneficiary.

- (a) a claimant against the estate;¹¹
 - (b) a beneficiary who intends to defend a claim as a beneficiary;
 - (c) a family member on one side of a dispute between family members; or
 - (d) the family solicitor who has previously acted for a number of family members.
- 14.10 In these instances, it may be appropriate for the personal representative to renounce or retire from their role because of the conflict.
- 14.11 Personal representatives may, with the consent of the High Court and if not expressly prohibited, appoint Public Trust as sole executor or as a co-executor.¹²
- 14.12 If the conflicted individual does not step down as personal representative, the High Court has power to remove them under section 21 of the Administration Act. The Court of Appeal has held that “the conflict must actually prejudice the beneficiaries’ welfare or undermine the executor’s ability to perform his or her duties as administrator.”¹³

ISSUES

Criticism of personal representatives’ duty to notify potential claimants

- 14.13 In the Issues Paper, we noted the case law that suggests personal representatives have a duty to notify potential claimants of whose claims they ought to be aware. There has been criticism that this requires the personal representatives to speculate as to who may or may not wish to bring a claim, to judge the strength of the claim and to advise the potential claimant accordingly.¹⁴ These are matters critics say are inconsistent with personal representatives’ duties.
- 14.14 We have heard through the course of this review that the current law is unsatisfactory. Some individuals stressed to us that a personal representative’s primary duty is to administer the estate and distribute it according to the deceased’s will or the intestacy regime. On the other hand, others we have heard from favoured imposing obligations on the personal representatives to take reasonable steps to notify potential claimants.

The role personal representatives should take in proceedings may be unclear

- 14.15 The role personal representatives should take in defending claims against an estate is set out in case law. It is also highly dependent on the nature of the claim and how other parties choose to participate. In the Issues Paper, we described how, during our preliminary engagement, several people emphasised that the role of personal representatives in proceedings should be clear and their duties as straightforward as possible.

¹¹ Note that partners who elect option A under s 61 of the Property (Relationships) Act 1976 are ineligible to apply for letters of administration in their partner’s intestacy: High Court Rules 2016, r 27.35. However, a partner electing option A may still be appointed an executor. If a surviving partner is the sole personal representative of the deceased partner’s estate, they must submit any agreement settling relationship property matters to the court for approval: Property (Relationships) Act 1976, s 21B(3).

¹² Public Trust Act 2001, s 76.

¹³ *Tod v Tod* [2015] NZCA 501, [2017] 2 NZLR 145 at [27], citing *Hunter v Hunter* [1938] NZLR 520 (CA) at 530–531.

¹⁴ Shane Campbell “Executors and trustees of estates: an obligation to invite adverse claims against an estate?” [2018] NZLJ 75 at 76.

Applications to replace personal representatives should be made and dealt with efficiently

- 14.16 As noted, there may be some cases where a personal representative has a conflict of interest but continues to act as representative. When a personal representative must stand aside because of the conflict but they refuse to do so, it will be necessary for affected claimants or beneficiaries to apply to the High Court for their removal. We emphasised in the Issues Paper that it is important for removal applications to be made and dealt with as efficiently as possible.

RESULTS OF CONSULTATION

Issues

- 14.17 In response to our question in the Issues Paper on the identification of the issues, submitters generally agreed with our analysis.

Duty to give notice

- 14.18 In the Issues Paper, we proposed that the new Act should require personal representatives to give notice in a prescribed form to the deceased's surviving partner and the deceased's children who are eligible for a family provision award. The notice should include information about the option of choosing relationship property rights, rights to claim family provision under the new Act, relevant time limits and obtaining independent legal advice.
- 14.19 Most submitters who commented on this proposal were supportive. They included Public Trust, the Family Law Committee of Auckland District Law Society (ADLS), Chapman Tripp and Succeed Legal. Submitters considered that a statutory requirement would help clarify the law regarding duties to notify, avoid claims being made out of time and impose obligations on those personal representatives who might otherwise hold personal reasons for not notifying some potential claimants.
- 14.20 Several submitters, including those that supported the proposal, emphasised the difficulties personal representatives might face when determining who would need to receive notice and locating those individuals. Submitters made several suggestions for how the notice procedure could be made as easy and workable as possible:
- (a) It should be clear on who should receive notice. ADLS submitted, for example, only the deceased's biological children should receive notice. Personal representatives should not have to notify individuals who may be the deceased's "accepted children".¹⁵
 - (b) The notice should be in a set template with the prescribed information that must be included.
 - (c) There should be a set timeframe within which personal representatives should give notice.

¹⁵ See Chapter 5 for further discussion of "accepted children".

- (d) The notice requirement should be subject to a proviso that the personal representatives' duties are satisfied when they have been unable to locate individuals but have taken reasonable steps.
- 14.21 Some submitters saw the practical obstacles as too great and did not support a duty to notify. Morris Legal stressed that personal representatives' duties are to administer estates in accordance with wills or intestacy provisions. They added that family members usually have no concerns about what they are to receive from an estate, and it may be unpalatable if they are given notice about rights to claim. They said the wording of any notice needs careful consideration. Bill Patterson suggested, as an alternative, following orders could be implemented to enable assets to be followed after final distribution of an estate if a claimant with a meritorious claim was unaware of the position.
- 14.22 Some submitters repeated their views that there should be wider categories of claimants eligible for family provision (see Chapter 5). They favoured requiring personal representatives to give notice to all of these individuals.

The role of personal representatives in court proceedings

- 14.23 We proposed in the Issues Paper that the new Act should not prescribe the role personal representatives are to take in proceedings, except to provide a duty to place before the court information concerning the estate and deceased's family in the personal representative's knowledge or possession. Most submitters agreed with the proposal, some explaining how the proposal to provide information would facilitate efficient case management. ADLS, on the other hand, disagreed with the requirement to provide information. It said the duty could be onerous and therefore costly to the estate and could be contrary to the duty to remain neutral.

Managing conflicts of interest

- 14.24 In the Issues Paper, we expressed a preliminary view that no provision should be made in the new Act for how personal representatives are to manage conflicts of interest, instead leaving the general law on personal representatives' duties to apply. We added, however, that the new Act should contain a power for both the High Court and te Kōti Whānau | Family Court (the Family Court) to remove or replace personal representatives where expedient.
- 14.25 Few submitters addressed this proposal, but those that did were in favour. Submitters were particularly supportive of the proposal to include an avenue within the new Act to apply to remove or replace personal representatives to save a separate application under the Administration Act.

CONCLUSIONS

Personal representatives' duty to notify potential claimants should be clarified

RECOMMENDATIONS

R111

The new Act should require personal representatives to give notice within three months of a grant of administration to:

- a. the deceased's surviving partner; and/or
- b. any person who the personal representatives reasonably apprehend was in an intimate relationship with the deceased at the time of death.

The notice should be in a prescribed form and contain information about:

- a. relationship property entitlements;
- b. family provision claims;
- c. relevant time limits; and
- d. obtaining independent legal advice.

R112

If the Government decides to implement Option One from R25 so that all children and grandchildren of the deceased are eligible claimants for family provision, personal representatives should not be required to give notice to the children and grandchildren.

R113

If the Government decides to implement Option Two from R25 so that the deceased's children who are under 25 or who are disabled are eligible claimants for family provision, personal representatives should be required to give notice within three months of the grant of administration to:

- a. the guardian of any of the deceased's children aged under 18; and
- b. children aged 18 or older who may be eligible to claim family provision.

The notice should be in a prescribed form. It should set out information about family provision, relevant time limits and obtaining independent legal advice.

R114

Personal representatives' duties to give notice should be satisfied when they have taken reasonable steps to search for and give notice to the required recipients.

R115

Where the estate can be distributed without personal representatives being appointed, there should be no notice requirements. However, trustee companies who administer estates having filed an election to administer the estate should observe the notice requirements.

R116

Personal representatives should not be required to give notice to potential testamentary promise claimants.

14.26 We consider the law governing personal representatives' duties to give notice to potential claimants would benefit from clarification in the new Act. This would enable personal representatives to consult the new Act to determine the extent of their obligations.

Duty to give notice to surviving partners

14.27 We recommend that the new Act should require personal representatives to give notice within three months of the grant of administration to:

- (a) the deceased's surviving partner; and/or
- (b) any person who the personal representatives reasonably apprehend was in an intimate relationship with the deceased at the time of death.

14.28 The purpose of this requirement is to ensure that any person who was in a qualifying relationship with the deceased is made aware of their rights under the new Act. However, it is undesirable for personal representatives to need to make difficult determinations as to whether the deceased was in a qualifying relationship. Instead, the notice requirements should apply to any person the personal representatives are reasonably aware was in an intimate relationship with the deceased at the time of death, whether qualifying or not.

14.29 The notice should be in a prescribed form and contain information about:

- (a) relationship property entitlements;
- (b) family provision claims;
- (c) criteria for qualifying relationships;
- (d) relevant time limits; and
- (e) obtaining independent legal advice.

14.30 The advantage of this approach is that surviving partners will be made aware of the law, which we understand is not always the case currently. As noted by some submitters, the notice procedure should reduce the likelihood of proceedings being filed out of time because the claimant was unaware of their rights.¹⁶

14.31 We recognise the difficulties in requiring personal representatives to determine whether the deceased was in a relationship at the time of their death, but we consider the benefits of the approach outweigh this potential difficulty. We anticipate that, in most cases, it should be relatively straightforward to determine whether the deceased was married, in a civil union or otherwise in an intimate relationship. Further, we recommend that the personal representatives' duties are satisfied when they have taken reasonable steps to search for and give notice to the deceased's partner.¹⁷

14.32 The requirement to give notice should only apply to personal representatives when there has been a grant of administration or when a trustee company administers an estate

¹⁶ Note this should take place alongside a general education campaign as we propose in Chapter 16.

¹⁷ As set out below regarding notice to the deceased's children, the Status of Children Act 1969 states what actions are deemed to constitute reasonable inquiries for the purposes of determining whether eligible persons exist who may claim an interest in a trust or estate by reason of the Act. These steps may provide a good reference for personal representatives when inquiring into whether the deceased was in a relationship.

having filed an election to administer the estate.¹⁸ In circumstances where the estate can be distributed without personal representatives being appointed,¹⁹ we recommend that there should be no notice requirements.

Duty to give notice to children

- 14.33 In Chapter 5, we present two options for reform the Government could consider in respect of family provision awards to children of the deceased. The first would allow all children and grandchildren to claim. The second option would limit eligibility to children who are under 25 or children who have long-term physical or mental disability. For both options, we recommend that a child of the deceased should include “accepted children”, being children for whom the deceased assumed in an enduring way the responsibilities of a parent, and whāngai.
- 14.34 If the Government decides to implement Option One, we do not consider personal representatives should be required to give notice to any other potential claimant under the new Act. We are mindful of concerns expressed by submitters about the onus and associated cost involved in locating all children and grandchildren of the deceased and serving them with notice. We also recognise the difficult assessments personal representatives may be required to make. For example, whether an individual qualifies as an accepted child of the deceased may not be readily apparent, particularly when the child may be an adult and the parental role the deceased took was more prominent in previous years.
- 14.35 If, on the other hand, the Government decides to implement Option Two, the new Act should require personal representatives to give notice within three months from the grant of administration to:
- (a) the guardian of any of the deceased’s children aged under 18; and
 - (b) children aged 18 or older who may be eligible to claim family provision under this option.
- 14.36 We anticipate it will be easier for personal representatives to locate and serve notice on these parties than adult children and grandchildren. We also consider it will be easier to determine whether a child is an accepted child or whāngai because we predict that the deceased would have been exercising parental responsibilities for those children at, or close to, the time of death. Further, to prevent the notice requirements from being too onerous, we recommend that the new Act should provide that the personal representatives’ duties are satisfied when they have taken reasonable steps to search for and give notice to children who are eligible to claim family provision.
- 14.37 For some estates, personal representatives will already be required to make “reasonable inquiries” to determine whether persons exist who are eligible to claim an interest under a trust or estate by reason of the Status of Children Act 1969. Section 6A deems an executor, administrator or trustee to have made reasonable inquiries when they have

¹⁸ See Trustee Companies Act 1967, s 36(1); and Public Trust Act 2001, s 93.

¹⁹ See s 65 of the Administration Act 1969, which provides that certain entities, such as superannuation funds, banks, or the employer of the deceased, can pay money to certain relatives of the deceased, such as a surviving partner, without administration of the estate needing to be obtained. The amount of money must not exceed the prescribed amount, which is currently set at \$15,000. In Chapter 16 we recommend that the Government should consider raising the monetary threshold for administering an estate without a grant of administration.

taken the steps set out in section 6A(1). These steps will be highly relevant for determining whether a personal representative has taken reasonable steps for the purposes of the new Act. However, they only relate to determining the existence of children eligible to claim. We do not recommend the new Act go so far as to deem specific actions as constituting reasonable steps for the purposes of giving notice. What qualifies as reasonable for purposes of the wider notice procedure under the new Act is likely to depend far more on the circumstances of each case.

- 14.38 The notice should be a prescribed form. It should set out information about family provision claims, relevant time limits and obtaining independent legal advice.
- 14.39 Where an estate can be distributed without personal representatives being appointed, there should be no requirement to give notice to the deceased's children, although the notice requirement should apply when a trustee company administers an estate having filed an election to administer the estate. When a trustee company is not involved and the estate does not require a formal grant of administration, it will be impractical and onerous to impose notice requirements.

No notice requirements regarding testamentary promise claims

- 14.40 We do not recommend that personal representatives should be required to give notice in a prescribed form to potential testamentary promise claimants. As claimants could be any individual and not just the deceased's family members, it could be difficult for personal representatives to identify these individuals.

The role personal representatives should take in proceedings should not be prescribed in the new Act

RECOMMENDATION

R117

The new Act should not prescribe the role personal representatives are to take in proceedings, except to provide a duty to place before the court information as recommended in R95.

- 14.41 We have considered whether the new Act should set out the role personal representatives should take in proceedings under the legislation. In particular, we have considered whether the Act should expressly provide that the personal representatives are to assume a neutral role.
- 14.42 Although we see some merit in prescribing in the new Act the role personal representatives should take, we do not favour this approach for several reasons:
- (a) As discussed in Chapters 10 and 13, we consider there are advantages in encouraging parties to settle disputes without going to court. If personal representatives are required by the statute to take a neutral position, it may be unclear when personal representatives ought to actively engage in settlement negotiations or let a court decide the matter.
 - (b) Personal representatives should be prepared to take a pragmatic approach depending on the nature of the claim and what roles other parties take in defending a claim. For example, when other beneficiaries actively defend the claim, we would

expect personal representatives to take a neutral and passive role. If, on the other hand, a person brought a baseless testamentary promise claim, we would expect personal representatives to defend the proceeding. To prescribe in the new Act what the approach should be in any given case would be cumbersome and impractical.

- (c) In our review of comparable jurisdictions, we are not aware of any jurisdiction that prescribes in its legislation the role personal representatives are to take, nor are we aware of any recommendations from law reform bodies in those jurisdictions to implement legislative guidance.

14.43 We do, however, recommend that the new Act require personal representatives to assist the court by placing before the court information as we discuss in Chapter 12. That is, the information in the personal representative's possession or knowledge concerning:²⁰

- (a) members of the deceased's family and whānau;
- (b) the financial affairs of the estate;²¹
- (c) persons who may be claimants under the Act; and
- (d) the deceased's reasons for making the dispositions made in the will or for not making provision or further provision for any person.

14.44 It should be noted the obligation only relates to information in the personal representatives' possession or knowledge. We expect this would not be an undue burden in most cases.

The court should have powers under the new Act to remove and replace personal representatives

RECOMMENDATION

R118

No provision should be made within the new Act for how personal representatives are to manage conflicts of interest, instead the general law on personal representatives' duties should continue to apply. The new Act should, however, contain a power for both te Kōti Matua | High Court and te Kōti Whānau | Family Court to remove or replace personal representatives where necessary or expedient.

²⁰ Currently provided for in s 11A of the Family Protection Act 1955. The Commission recommended a similar duty in Te Aka Matua o te Ture | Law Commission *Succession Law: A Succession (Adjustment) Act – Modernising the law on sharing property on death* (NZLC R39, 1997) at 152.

²¹ Depending on how the law may be reformed to deal with property that may have passed from the deceased without falling into the estate, such as jointly owned property passing by survivorship, personal representatives may need to place further information before the court. We discuss options to address property passing outside the estate in Chapter 8.

- 14.45 Although it appears conflicts of interest frequently arise when claims are made against estates, we do not consider it necessary for the new Act to provide guidance to personal representatives for managing conflicts. We understand that, in most cases personal representatives and their legal counsel will know how to manage the conflict consistently with their legal duties. Submitters generally favoured this approach.
- 14.46 We recognise, however, that there will be cases where it is necessary or expedient for the court to intervene to remove or replace a personal representative. We recommend that this power should be contained within the new Act so the matter can be dealt with in the same court and same proceedings without the need for a separate application to the High Court under the Administration Act.²² If the proceedings relating to the substantive claim are filed in the Family Court, we recommend that the Family Court should have jurisdiction to remove or replace personal representatives involved in that matter.
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²² We note our suggestion in Chapter 2 that there is merit in consolidating the different legislation regarding administration and succession into a single statute. If that were done, it would be unnecessary to duplicate provisions like the power to remove and replace personal representatives across the statute book.

CHAPTER 15

Cross-border matters

IN THIS CHAPTER, WE CONSIDER:

- the conflict of laws rules relating to succession, particularly entitlements to and claims against estates, and intestate succession.

CURRENT LAW

- 15.1 In 2019, an estimated 272 million people worldwide lived in a country other than their birth country. Between 500,000 and one million New Zealanders are estimated to live overseas.¹ Prior to 2020, Aotearoa New Zealand also had a high rate of net migration.² With the frequent movement of people and property between countries, it is inevitable that Aotearoa New Zealand's domestic succession laws will come into conflict with the domestic laws of another country.
- 15.2 With the exception of section 5 of the Administration Act 1969 (confirming the broad jurisdiction of te Kōti Matua | High Court (the High Court) in relation to administration and succession) and the choice of law rules in section 22 of the Wills Act 2007, the conflict of laws rules about claims against estates are found in the common law.
- 15.3 In Aotearoa New Zealand, matters of administration are governed by the law of the country in which the assets are located and a grant of administration is made.³ Where, for example, probate of a will is granted by the High Court in Aotearoa New Zealand, the personal representative will have authority to collect the New Zealand assets and pay any debts, according to New Zealand law. If, however, the deceased also owned property

¹ Paul Spoonley *The New New Zealand: Facing demographic disruption* (Massey University Press, 2020) at 119. We note that events such as the COVID-19 pandemic may encourage more New Zealanders to return from overseas and fewer to leave.

² Aotearoa New Zealand's annual net migration rate was 11.4 per 1,000 people in the year ended June 2019 (similar to 2017 and 2018). The rate is similar to Australia's in 2017–2018 but more than triple that in the United Kingdom: Tauranga Aotearoa | Stats NZ "New Zealand net migration rate remains high" (12 November 2019) <www.stats.govt.nz>.

³ Administration is concerned with the appointment of a personal representative, the collection of the assets of the estate and the payment of the estate's debts.

in Australia, a fresh grant of administration in Australia will be required for the personal representative to administer that property. A claim under the Law Reform (Testamentary Promises) Act 1949 (TPA) has been categorised by the courts as a matter of administration.⁴ This means that, if a grant of administration has been made in Aotearoa New Zealand, a court is able to entertain a claim under the TPA that may then be satisfied from that New Zealand property. For administration purposes, it does not matter where the deceased was domiciled when they died.

- 15.4 Succession is concerned with the distribution of the residue of the estate to those entitled to inherit either under the will or, if there is no will, under the intestacy regime set out in the Administration Act. The Family Protection Act 1955 (FPA) has been treated as a matter of succession because it is concerned with the appropriate distribution of the net estate (the remainder of the estate after debts are paid). In general, matters of succession are governed by the “scission” principle, which differentiates between movable and immovable property. Succession to movable property is determined by the law of the deceased’s domicile (lex domicilii) whereas succession to immovable property is determined by the law of the country where the property is situated (lex situs).
- 15.5 There are also conflict of laws rules that apply to wills, including the creation and revocation of a will, its validity and its construction. Apart from section 22 of the Wills Act, these rules are found in the common law. These rules also rely on the distinction between movable and immovable property and frequently use domicile as the relevant connecting factor.
- 15.6 There are some fundamental differences between the succession regimes in common law countries and in civil law countries, which may add complexity when a cross-border element arises. For instance, Aotearoa New Zealand and other common law countries distinguish between administration and succession, while civil law countries tend not to make the same distinction. Civil law jurisdictions often implement a system of forced heirship, whereas Aotearoa New Zealand allows for greater testamentary freedom.⁵

RECOMMENDATIONS IN THE PRA REVIEW

- 15.7 In our review of the Property (Relationships) Act 1976 (PRA), we identified several issues with the choice of law provisions in that Act.⁶ Section 7 of the PRA confirms that the Act applies to immovable property in Aotearoa New Zealand (not to immovable property situated overseas). In respect of movable property, it may apply to property outside Aotearoa New Zealand if one of the partners is domiciled in Aotearoa New Zealand at the date of an application under the PRA, at the date of any agreement between the partners relating to the division of their property or at the date of either partner’s death. The distinction between movable and immovable property prevents the resolution of property disputes under a single legal regime. The domicile test for movable property is problematic because it enables the application of the PRA in circumstances where

⁴ *Re Greenfield* [1985] 2 NZLR 662 (HC) at 666. However, it is perhaps questionable whether Parliament intended for this to be the case given its inclusion of s 3(5) of the Law Reform (Testamentary Promises) Act 1949, which contemplates the ability to extend directly or indirectly to property outside Aotearoa New Zealand and is equivalent to s 7(1) of the Family Protection Act 1955.

⁵ See the discussion on forced heirship in Chapter 5.

⁶ See *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at ch 19.

Aotearoa New Zealand might not be the country most closely connected to the relationship. Section 7 also operates as a unilateral choice of law rule, meaning that it only sets out when the PRA applies and is silent on which country's laws apply when the PRA does not apply. This creates uncertainty and risks leaving gaps in the law if no other country's law applies.

15.8 Section 7A applies where the partners have made an agreement on what law should be applied to their property before or at the time their relationship began. However, it fails to respect the autonomy of partners by not allowing for agreements to be made during the relationship.⁷ Section 7A(1) gives partners the right to agree that the PRA will apply to their property, even if neither partner is domiciled in Aotearoa New Zealand.⁸ The technical requirements in section 7A(2) may mean that many agreements, particularly those entered into outside Aotearoa New Zealand, may not be recognised even where the partners have organised their affairs in reliance on those agreements.⁹

15.9 We recommended the following:¹⁰

- (a) Section 7 of the PRA should be repealed, and in the absence of a valid foreign law agreement, the law to be applied to property disputes between partners shall be the law of the country to which the relationship had its closest connection.
- (b) There should be a presumption that the country to which a relationship had its closest connection is the country where the partners last shared a common residence unless either partner satisfies a court that the relationship had its closest connection with another country.
- (c) All of the partners' property, including movable and immovable property situated outside Aotearoa New Zealand, should be subject to the recommended rules of classification and division.
- (d) The court's broad ancillary powers to give effect to a division of relationship property should expressly include the power, in relation to property situated outside Aotearoa New Zealand, to make in personam orders against a partner to transfer property.
- (e) Section 7A of the PRA should be repealed, and new provisions made in relation to foreign law agreements, including that the agreement is valid under the law of the country that is chosen under the agreement or under the law of the country with which the relationship had its closest connection. The court should, however, retain discretion not to give effect to a valid agreement if it would be contrary to New Zealand public policy.

⁷ Our review noted other issues with s 7A of the Act. An implicit choice of law is insufficient to satisfy the technical requirements in s 7A(2): see Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [19.45]–[19.50].

⁸ If such an election is made, it would cover all property except for overseas immovable property.

⁹ For the full discussion of these issues, see Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [19.45]–[19.50].

¹⁰ For the full discussion of the recommendations, see Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at ch 19.

ISSUES

The scission principle

- 15.10 The scission principle distinguishes between movable and immovable property, requiring succession to movable property to be governed by the law of the deceased's domicile (lex domicilii) and succession to immovable property to be governed by the law of the country where the property is located (lex situs). This has been heavily criticised by legal commentators, law reform bodies and the judiciary.¹¹ It is seen to cause significant anomalies, particularly in intestate succession and FPA claims.
- 15.11 In cases where someone has died without a will, the lex situs rule for immovables might mean that a partner is entitled to two statutory legacies,¹² potentially at the expense of other family members.¹³
- 15.12 In FPA cases, the scission principle can frustrate the court's ability to award the level of provision it thinks fit or to access the whole of the estate.¹⁴ For example, when making an award under the FPA, a court may take account of the value of overseas immovable property, but it cannot make an award in respect of that property.¹⁵ A claim under the FPA may be made in respect of immovable property situated in Aotearoa New Zealand (even if the deceased is domiciled outside Aotearoa New Zealand on death)¹⁶ and to movable property situated anywhere only if the deceased was domiciled in Aotearoa New Zealand at the time of death.¹⁷
- 15.13 The distinction is becoming increasingly artificial because of the ease with which a person can convert movable property to immovable or vice versa¹⁸ and because both forms of property constitute value in the estate that should be available for appropriate division.

¹¹ Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [8.91] and [8.128]; Australian Law Reform Commission *Choice of Law* (ALRC Report 58, 1992) at [9.4]–[9.6]; and Paul Torremans (ed) *Cheshire, North & Fawcett Private International Law* (15th ed, Oxford University Press, Oxford, 2017) at 1352, discussing the reluctance of the judge in the English case of *Re Collens, decd* [1986] Ch 505 to see the widow succeed in both jurisdictions.

¹² A statutory legacy is a prescribed amount of money that a partner is sometimes entitled to in an intestacy. In Aotearoa New Zealand, the prescribed amount is currently set at \$155,000 and is available to a deceased's partner when the deceased was survived by a partner and one or more descendants, or a partner and one or more parents. We discuss this in detail in Chapter 7.

¹³ Although there is no New Zealand case law dealing with this issue, it has occurred in England and Canada with varying results: see for example *Re Collens, decd* [1986] Ch 505; *Re Thom* (1987) 50 Man R (2d) 187; and *Manitoba (Public Trustee) v Dukelow* (1994) 20 OR (3d) 378.

¹⁴ Section 7(1) of the Family Protection Act 1955 provides that in cases where the authority of the court does not extend or cannot directly or indirectly be made to extend to the whole estate, then to so much thereof as is subject to the authority of the court.

¹⁵ *Re Bailey* [1985] 2 NZLR 656 (HC) at 658–660; and *Moleta v Darlow* [2021] NZHC 2016 at [73]–[76].

¹⁶ *Re Butchart (Deceased)* [1932] NZLR 125 (CA).

¹⁷ *Re Terry (Deceased)* [1951] NZLR 30 (SC); *Re Knowles (Deceased)* [1995] 2 NZLR 377 (HC); and *Roberts v Public Trustee of Queensland* HC Christchurch M316-97, 13 November 1997.

¹⁸ Australian Law Reform Commission *Choice of Law* (ALRC Report 58, 1992) at [9.7].

Characterisation of TPA and FPA claims

15.14 The second issue relates to TPA claims being regarded as a matter of administration and FPA claims being regarded as a matter of succession.¹⁹ Neither statute contains an express choice of law rule, and as a result, the courts have had to determine how to characterise each claim. These claims are often pleaded in the same case, and the different categorisation can force artificial constraints on the court.²⁰

Relationship property claims

15.15 The third issue arises in relationship property claims. As noted above, the Commission has recommended that, in the absence of a valid foreign law agreement, the law to be applied to property disputes between partners on separation should be the law of the country to which the relationship had its closest connection (with a rebuttable presumption that the country to which a relationship had its closest connection is the country where the partners last shared a common residence). When considering the appropriate choice of law rule for family provision and testamentary promise claims, we need to keep this recommendation in mind.

RESULTS OF CONSULTATION

15.16 We received 14 submissions in response to the cross-border chapter of the Issues Paper.

Issues

15.17 Many submitters, including Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), the Family Law Committee of Auckland District Law Society (ADLS), MinterEllisonRuddWatts and Jan McCartney QC, said they agreed with the issues identified by the Commission in respect of cross-border matters. NZLS submitted that cross-border issues are significant, particularly as between Australia and Aotearoa New Zealand, and with the increase in migration to Aotearoa New Zealand and the ownership of assets in more than one jurisdiction.

15.18 Two submitters, Public Trust and Bill Patterson, questioned whether the problems were ones commonly experienced in practice. Public Trust said that it does not regularly deal with estates that have cross-border issues and although the Commission's reform suggestions should in theory simplify matters, there are unknown risks in the practical application of a new approach.

15.19 In their joint submission, Dr Maria Hook and Jack Wass submitted that an additional issue that should be considered is the extent to which the proposed choice of law rules should be subject to overriding mandatory rules. Hook and Wass said that it would be preferable

¹⁹ *Re Greenfield* [1985] 2 NZLR 662 (HC) at 666.

²⁰ *Re Greenfield* [1985] 2 NZLR 662 (HC), for example, involved claims under both the FPA and the TPA by a son against his mother's estate. Her estate consisted of movable property (money in a New Zealand investment fund) and letters of administration were granted in New Zealand to the New Zealand Insurance Co Ltd. The Court found that the mother had died domiciled in Australia. The applicable law to decide the succession of this movable property was therefore Australian law. For this reason, the FPA claim failed. However, the finding that the TPA was a matter of administration meant that the court was entitled to make an order in the testamentary promises action notwithstanding the Australian domicile of the deceased: see Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [8.127].

for any overriding statutory rules to be expressly identified and that this might include the existing regime relating to whenua Māori in Te Ture Whenua Maori Act 1993 (TTWMA) or proposed provisions that exempt taonga from the general law of succession.

Choice of law rules based on a personal connecting factor

- 15.20 Most submitters agreed that the scission principle, which differentiates the choice of law for movable and immovable property, should be abolished in respect of succession matters for the reasons described above.
- 15.21 One submitter, TGT Legal, agreed that the scission principle can lead to difficulties but disagreed with the proposal to remove its application in succession. TGT Legal submitted that the principle is consistent with the proper and efficient administration of the transfer of property, which is currently a matter of domestic law. Having a single jurisdiction deal with all matters of succession, TGT Legal said, would not be desirable owing mainly to the practical difficulties of dealing with foreign land and with enforcing New Zealand court orders overseas.
- 15.22 In place of the scission principle, we proposed in the Issues Paper that the connecting factor would be the deceased's last habitual residence, drawing on the definition in the European Union (EU) Succession Regulation.²¹ We proposed that habitual residence would have the objective of identifying the country to which the deceased had the closest and most stable connection. Submitters' views varied about what the appropriate personal connecting factor should be.
- 15.23 Some submitters raised concerns that the holistic interpretation of habitual residence might be difficult to apply in practice. For example, MinterEllisonRuddWatts submitted that the need to establish habitual residence by way of an "overall assessment of the specific circumstances of the case" imposes a significant evidentiary burden on the person asserting it and may lead to significant delay and expense.
- 15.24 TGT Legal preferred retaining the concept of domicile because it is a long-standing concept developed over centuries of common law jurisprudence. In TGT Legal's view, replacing domicile with habitual residence would not be helpful without a substantive reform to private international law. Until then, TGT Legal submitted that it would be preferable to reform the outdated provisions in the Domicile Act 1976 and also to apply domicile to all relationship property disputes.
- 15.25 Several submitters, including NZLS, ADLS and Chapman Tripp, agreed with the Commission's proposals in favour of habitual residence. NZLS submitted that habitual residence, with a definition that leads to a finding of a close and stable connection, would seem to be a more contemporary and universally applicable connecting factor than domicile:

While domicile may have resonated historically in New Zealand law, increasingly the concept of habitual residence is being utilised across jurisdictions. For civil law jurisdictions domicile is not a familiar concept and even in the countries that utilise the concept, domicile can have a range of interpretation options.

²¹ See art 21(1) and recitals 7 and 23–25 of Regulation 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107.

15.26 In NZLS’s view, it would be useful for the legislation to outline a range of factors relevant to the inquiry as proposed in the Issues Paper. NZLS said that it may also be helpful to cross-reference the habitual residence jurisprudence from child abduction cases in New Zealand courts where factors such as a settled intention and linking stability to “an appreciable period of time” in the country have been discussed and applied. This comparison with the analysis in child abduction cases was a specific concern of another submitter, Jeanne-Marie Bonnet.²² Bonnet agreed with the Commission’s proposed definition of habitual residence but was concerned that the term itself would be misinterpreted and equated with ordinary residence because there was precedent for this in child abduction cases in New Zealand.²³ In Bonnet’s view:

Despite the best attempts of the court in restraining itself to a purely factual analysis, the development of legal principles in interpreting habitual residence has already started, and it appears that New Zealand is stuck using the wrong principles ... there remains an unhelpful emphasis on intention at the “settled purposes” limb of the enquiry.

15.27 Bonnet submitted that the connecting factor used in the Commission’s PRA review, the “closest and most real connection”, would be a more appropriate alternative.

15.28 In the Issues Paper, we also proposed that courts should have some flexibility to interpret or adapt the rules to harmonise domestic and foreign law. We suggested this might be achieved by incorporating a rule of adaptation in the legislation. All submitters who commented on this proposal, including Public Trust, NZLS, ADLS and MinterEllisonRuddWatts, agreed with it.

15.29 Finally, in the Issues Paper, we took the preliminary view that disputes over relationship property following the death of a partner should also be governed by the law of the deceased’s last habitual residence to avoid fragmenting the law governing a deceased’s estate. This would differ from the choice of law rule recommended by the Commission in the PRA review for determining the law applicable to relationship property disputes for relationships that end on separation.²⁴ Hook and Wass expressed their support for this proposal but submitted that the substantive rules that govern a partner’s rights may be found in the applicable law’s succession regime or within the applicable law’s relationship property regime, depending on how the issue is classified in that jurisdiction. Hook and Wass submitted that a benefit of this approach would be that the need for adaptation will usually only arise in the case of foreign judgments or proceedings.

Scope of the choice of law rules

15.30 In the Issues Paper we proposed two alternative options about the scope of the issues that would be determined by the new rules. Neither option would preclude rules of the *lex situs* continuing to apply to the administration of estates.

²² Jeanne-Marie Bonnet is a law student currently completing her honours dissertation under the supervision of Dr Maria Hook, focusing on the most appropriate connecting factor for cases of cross-border intestacy.

²³ Bonnet cited two Court of Appeal decisions in support of this: see *K v P* [2005] 3 NZLR 590 (CA); and *Punter v Secretary for Justice* [2007] 1 NZLR 40. Bonnet also referred to the UK case *A v A (Children: Habitual Residence)* [2013] UKSC 60, [2014] AC 1, in which the test derived from *R v Barnet London Borough Council, ex parte Shah* [1983] 2 AC 309 (HL) was abandoned.

²⁴ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R130–R131.

- 15.31 Under Option One, the new Act would specify multilateral choice of law rules for issues relating to intestate succession, material and essential validity, revocation of wills, relationship property claims and claims in the nature of family provision and contribution.
- 15.32 Under Option Two, all matters of succession would be governed by new choice of law rules. These would be expressed in the proposed new Act and in the Wills Act. We proposed that the new rules would therefore cover successions with or without a will, relationship property claims on death and other claims against estates. Option Two could therefore also include repealing the current choice of law rules for formal validity contained in section 22 of the Wills Act and replacing this with choice of law rules based on the habitual residence of the deceased.
- 15.33 Two submitters, TGT Legal and Morris Legal, did not support either option. For TGT Legal, this was because both options presumed the removal of the scission principle and reliance on habitual residence, which they did not agree with. Morris Legal were concerned about the possible consequences of a broad application of habitual residence. They expressed two concerns as examples. First, that the test of habitual residence could lead to New Zealand law inadvertently applying to the distribution of estates of individuals who, while living in Aotearoa New Zealand, still consider their home to be an overseas jurisdiction. Second, that an individual could be habitually resident in Aotearoa New Zealand while still domiciled in their home country, and this might cause confusion as to which law governs the distribution of their estate because the different jurisdictions apply different tests.
- 15.34 The remaining submitters, Public Trust, NZLS, ADLS, Chapman Tripp and MinterEllisonRuddWatts, preferred for all matters of succession to be governed by new choice of law rules (Option Two). Their reasons included that it was easier to understand and would streamline the process, create consistency and allow for all matters of succession to be dealt with by the law of one place. Chapman Tripp queried whether these proposals would continue to allow a will-maker to make a will in one country to deal with the property situated there (particularly immovable property) and another in Aotearoa New Zealand to deal with the property here and, if that was to be the case whether a partner's relationship property claim could apply to the immovable property outside Aotearoa New Zealand as well as that inside.²⁵
- 15.35 Submitters expressed different views about the choice of law rule that should apply to capacity to make a will. For example, Chapman Tripp agreed with the proposal that the applicable law should be the law of the deceased's habitual residence at the time of making the will, while MinterEllisonRuddWatts considered that the capacity to make a will should be determined in the country in which the will is made.
- 15.36 The only two submitters who commented separately on the choice of law rule in respect of capacity to take under the will, Chapman Tripp and MinterEllisonRuddWatts, endorsed the Commission's proposal that this should be the law of the deceased's habitual residence at the date of death.²⁶

²⁵ We address how this might work in case studies at the end of this chapter.

²⁶ MinterEllisonRuddWatts' endorsement was subject to the comments expressed above about potential difficulties establishing habitual residence.

Foreign law agreements

- 15.37 In the Issues Paper, we proposed that partners should be entitled to decide the country's law that should apply to some or all of their property on death provided that their agreement is in writing, signed by the partners and meets the validity requirements of the law of the nominated country or the law of the country with which the relationship had its closest connection and giving effect to the foreign law agreement would not be contrary to public policy.²⁷ We said that these agreements could extend to determining what country's law should apply to any potential claims that the surviving partner might have against the deceased partner's estate.
- 15.38 Submitters unanimously agreed with this proposal.²⁸ However, two submitters commented on the validity requirements. TGT Legal were concerned about the possibility of circumstances arising where a foreign law agreement might be enforced in a New Zealand court when that agreement could not be enforced in the jurisdiction under whose law it was created. They said that, although such agreements are relatively common and validly created under local contract law, enforceability on divorce or death can be an issue, or the application of agreements can be restricted by forced heirship rules.
- 15.39 Morris Legal noted the Commission's recommendation in the PRA review that, if a relationship had no connection to the nominated country and Aotearoa New Zealand is the country with which the relationship had its closest connection, a foreign law agreement must meet the legal requirements of a valid agreement under New Zealand law. Morris Legal agreed with this approach in principle but requested that the Commission provide further guidance on the meaning of "no connection" to the nominated country and the point in time when that test will be applied.
- 15.40 Hook and Wass also agreed with the substance of this proposal but submitted that the agreements should be called "choice of law agreements" not "foreign law agreements" to avoid any confusion that they only apply to New Zealanders choosing a law other than their own.
- 15.41 In the Issues Paper, we also proposed that family provision claims for children and contribution claims would not be able to be the subject of a foreign law agreement. The submitters that responded to this proposal agreed.

Other matters

- 15.42 In the Issues Paper, we proposed that the court should have broad powers to give effect to relationship property, family provision and contribution awards, which would allow them to take account of property situated in another country and to make in personam orders. All submitters agreed with this proposal.

²⁷ These were the same requirements recommended in the PRA review: Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R137–R139 and [19.58]–[19.68].

²⁸ These were NZLS, ADLS, Public Trust, TGT Legal, Chapman Tripp, MinterEllisonRuddWatts, Morris Legal and the joint submission of Dr Maria Hook and Jack Wass.

- 15.43 We also proposed in the Issues Paper that any new legislative provisions should not refer to the application of renvoi.²⁹ This would allow the courts to determine the application of renvoi in a particular case when relevant. Most submissions we received supported this proposal.³⁰ NZLS said that it was conscious that renvoi is a rarely used doctrine and there are strong arguments advanced against its application, which can involve applying the conflict of laws rules of the foreign country in preference to our own. However, NZLS was persuaded by the comments of Hook and Wass that retaining renvoi as an option may be beneficial and achieve a more just result in some cases, particularly with respect to the issue of enforcement.
- 15.44 MinterEllisonRuddWatts agreed that the new law should not affect the application of renvoi but considered that the law should refer to and codify New Zealand's position on renvoi.
- 15.45 Just one submitter, MinterEllisonRuddWatts, commented on the matter of jurisdiction, to express their agreement with our proposal in the Issues Paper that the general rules relating to jurisdiction do not require reform in respect of succession matters.
- 15.46 Finally, in the Issues Paper, we proposed that the new Act should confirm that the *Moçambique* rule has no application in matters covered by that legislation. Submitters who responded to this proposal were supportive, including Public Trust, NZLS, ADLS, Chapman Tripp, MinterEllisonRuddWatts and TGT Legal.

CONCLUSIONS

- 15.47 In the following section we set out our reform recommendations and the reasons for those recommendations. At the end of this chapter, there are several case studies that illustrate how these recommendations might work.

RECOMMENDATIONS

R119

With the exceptions of succession to Māori land (under Te Ture Whenua Maori Act 1993) and succession to taonga (discussed in Chapter 3), all matters of succession should be governed by the new choice of law rules, which should be expressed in statute. The multilateral choice of law rules should identify the most appropriate system of law to govern the issue in question, whether that is New Zealand law or foreign law, with the exception of formal validity, which would continue to be governed by section 22 of the Wills Act 2007.

²⁹ Renvoi refers to the forum court's application of the foreign court's choice of law rules. This might exclude the foreign court's approach to renvoi (single or partial renvoi) or include it (double or total renvoi).

³⁰ See the submissions from NZLS, ADLS, Public Trust and TGT Legal.

R120

The applicable law for determining matters of succession should be the law of the deceased's last habitual residence. This should include successions with or without a will, relationship property claims on death and other claims against estates. Habitual residence should be defined in legislation, drawing on the definition in the European Union Succession Regulation, with the objective of identifying the country to which the deceased had the closest and most stable connection.

R121

The construction or interpretation of a will should be governed by the law intended by the will-maker. This should be presumed to be the law of their habitual residence unless there is a clear indication that the will-maker intended a different law to be applied.

R122

The applicable law for determining capacity to make a will should be the law of the deceased's habitual residence at the time of making the will, whereas the applicable law for determining capacity to take under the will should be the law of the deceased's habitual residence at the time of death.

R123

A rule of adaptation should be available and prescribed in statute.

R124

A New Zealand court should have the power to refuse to apply a foreign rule where doing so would be contrary to public policy.

R125

The Government should consider replacing the reference to "domicile" with "habitual residence" in section 22 of the Wills Act 2007.

Choice of law rules based on personal connecting factor

15.48 We conclude that the scission principle should not apply to matters of succession. Instead, we recommend that the choice of law rule for succession should be based on a personal connecting factor, with the benefit that succession to a deceased's estate may be dealt with under a single legal regime.³¹

15.49 We recommend that this connecting factor should be the deceased's last habitual residence, drawing on the definition in the EU Succession Regulation.³² The test of

³¹ We acknowledge that challenges will remain when seeking to enforce one jurisdiction's court orders in another jurisdiction and that matters closely related to the succession of estates, such as administration, would not be included in these proposals. We discuss these matters below.

³² See art 21(1) and recitals 7 and 23–25 of Regulation 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107. Article 21(2) provides an exception that another law should apply when it is clear from all the circumstances that the deceased was manifestly more closely connected to another Member State. This exception clause has been criticised because it undermines the desire for habitual residence to be determined using an overall assessment focusing on the core of the relationship, so we would not

habitual residence is intended to identify the country to which the deceased had the closest and most stable connection. This would be determined with reference to an overall assessment of the specific circumstances of the case, including the deceased's social, professional and economic ties to the country. The determination would also include consideration of the underlying aim of engaging the most relevant law for that case to give effect to the interests of the deceased, of people close to the deceased and of creditors.

- 15.50 Relevant criteria for evaluating the deceased's ties to a country might include the presence of the deceased's family members, the renting or purchase of a house, schooling of children, fluency in the language, the existence of a network of friends and acquaintances, employment in a local company, attending professional training or university courses and the opening of a bank account.³³ Whether the deceased intended to reside indefinitely in a country would not be an isolated element to be considered,³⁴ but intention would be demonstrated through the evidence of a deceased's social, professional and economic ties to the country and in this sense would be a relevant part of the inquiry.³⁵ The passage of time will play a significant role in determining habitual residence. For example, the more time a person spent residing in a country, the more likely it is that they will be determined habitually resident in that country.³⁶
- 15.51 There was some concern among submitters that an inquiry to determine habitual residence would impose too heavy an evidential burden for those involved in a dispute. However, the deceased's habitual residence will be easily identifiable in most cases. In circumstances where it is more complicated, we consider it preferable that courts are able to engage in an evaluative inquiry in order to make a finding about the country with which the deceased had the closest and most stable connection rather than to rely on the legalistic concept of domicile, which relies on intricate rules to determine both the domicile that one inherits as a child and the independent domicile one may subsequently acquire.³⁷
- 15.52 Our intention is that determining habitual residence should be an inquiry based on a wide range of possible factors, and courts should not become too reliant on establishing and applying legal principles.³⁸ We continue to believe that, in the long term, it will be

recommend its adoption in Aotearoa New Zealand: see Alfonso-Luis Calvo Caravaca "Article 21: General Rule" in Alfonso-Luis Calvo Caravaca, Angelo Davì and Heinz-Peter Mansel (eds) *The EU Succession Regulation: A Commentary* (Cambridge University Press, Cambridge, 2016) 298 at 318.

³³ These and additional criteria are discussed in Alfonso-Luis Calvo Caravaca "Article 21: General Rule" in Alfonso-Luis Calvo Caravaca, Angelo Davì and Heinz-Peter Mansel (eds) *The EU Succession Regulation: A Commentary* (Cambridge University Press, Cambridge, 2016) 298 at 303–304.

³⁴ Compare s 9(d) of the Domicile Act 1976.

³⁵ See the Supreme Court discussion about ordinary residence in *Greenfield v Chief Executive, Ministry of Social Development* [2015] NZSC 139, [2016] 1 NZLR 261 at [36]–[37]. See also Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [4.188].

³⁶ Alfonso-Luis Calvo Caravaca "Article 21: General Rule" in Alfonso-Luis Calvo Caravaca, Angelo Davì and Heinz-Peter Mansel (eds) *The EU Succession Regulation: A Commentary* (Cambridge University Press, Cambridge, 2016) 298 at 305–306.

³⁷ Compare ss 6 and 7 of the Domicile Act 1976. See generally Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at ch 4, [C.3].

³⁸ We note that in its submission, NZLS said that it may be helpful to cross-reference to the habitual residence jurisprudence from the child abduction cases where factors such as a settled intention and linking stability to "an

preferable for Aotearoa New Zealand to use the globally recognised connecting factor of habitual residence rather than to use the concept of domicile or a new phrase “closest connection”.³⁹

- 15.53 A minority of submitters thought that changing the law might not be justified and that the scission principle should continue to apply to matters of succession. Information is not available to allow us to quantify the extent of the problem caused by applying different choice of law rules to movable and immovable property. However, the distinction between movable and immovable property under the scission principle prevents some claims against estates being resolved under a single legal regime, which we consider undesirable in a globalised world. The costs associated with bringing claims in more than one jurisdiction may impede access to justice in some cases.
- 15.54 The abolition of the scission principle would not prevent will-makers continuing to make separate wills for property in different jurisdictions. In practice, it would likely be necessary to seek a grant of administration in the country in which immovable property is situated to deal with that property, although this in itself would not stop the New Zealand court exercising jurisdiction over all the will-maker’s property for the purpose of determining rights on succession.⁴⁰
- 15.55 We recommend that disputes over relationship property following the death of a partner should also be governed by the law of the deceased’s last habitual residence to avoid fragmenting the law governing a deceased’s estate. This would differ from the choice of law rule recommended by the Commission in the PRA review for determining the law applicable to relationship property disputes for relationships that end on separation.⁴¹
- 15.56 It is sensible that disputes between separating partners over their relationship property are decided in accordance with the law most closely connected to that relationship, particularly given the relationship property is likely to be situated in that country. However, this may be more complicated on death as not all countries have a relationship property regime like Aotearoa New Zealand.⁴² In other jurisdictions, a surviving partner’s entitlement may be characterised as a question of succession. If the same connecting factor applies in both cases, courts will not need to determine whether the issue should be characterised as a question of relationship property or as a question of succession in order to decide which jurisdiction’s law should govern the issue. Our intention is that, once the court has identified the law governing the partner’s claim on death, the court may

appreciable period of time” in the country have been discussed and applied. Conversely, submitter Jeanne-Marie Bonnet, cautioned against the New Zealand court’s reliance on those two elements of the legal principles that have developed to assist in determining habitual residence in child abduction cases.

³⁹ In the PRA review, we used “closest connection” because it needed to reflect the country most closely connected to the relationship.

⁴⁰ For example, by ordering a resident New Zealand executor to realise foreign immovable property and distribute the proceeds under New Zealand law where Aotearoa New Zealand was the deceased’s habitual residence.

⁴¹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R130–R131.

⁴² Meaning that they do not have a regime that provides entitlements to a surviving partner based on matrimonial/relationship property rights on inter vivos separation.

apply the applicable law's succession regime or relationship property regime, depending on how the issue is treated under the applicable law.⁴³

15.57 We have considered the alternative approach that disputes between partners over their relationship property should be decided in accordance with the law most closely connected to that relationship, whether that relationship has ended on separation or on the death of a partner. There is merit to this approach, particularly given the importance of relationship property entitlements in Aotearoa New Zealand's domestic policy. For example, in circumstances where Aotearoa New Zealand is the country most closely connected to the relationship, it might seem anomalous that a partner was entitled to a relationship property division under New Zealand law when the couple separated but loses this entitlement where their relationship ended on the death of one partner if the deceased partner was not habitually resident in Aotearoa New Zealand.

15.58 However, there are several reasons why we do not prefer this alternative approach:

- (a) We expect it to be rare that, when a relationship ends on the death of one partner, the country most closely connected to that relationship would differ from the deceased partner's country of habitual residence. Ascertaining a person's habitual residence involves an evaluation of social, professional and economic ties to a country. It is reasonable to expect this inquiry to identify the same country most closely connected to the couple's relationship given that the couple will commonly have lived and worked in that country for much of their relationship, and their family home or other relationship property will be situated there. It is also rare for a surviving partner to elect a division of relationship property. In most circumstances, a surviving partner will choose to take what was gifted to them in the will.⁴⁴
- (b) When there is a difference, this would generally be obvious to the couple. This is one of the benefits of preferring habitual residence over domicile. Because a new domicile can be obtained only with the requisite intention to remain indefinitely in a country, it could come as a surprise to a surviving partner that the law of the country in which the couple had built a life for many years is not the deceased's domicile. Such a surprise is much less likely to occur using habitual residence as the connecting factor. Further, where one partner has significant connections to a different country, the couple might choose to enter into a choice of law agreement, which, as we discuss below, might extend to an agreement about what should happen to the couple's relationship property when one of them dies.
- (c) Third, if the choice of law rule governing relationship property disputes on death differed from the choice of law rule governing succession matters, it is conceivable that a surviving partner (or beneficiaries of the estate in some circumstances) might use the different choice of law rules to enable them to obtain a windfall. For example, a surviving partner could potentially receive a significant share of their partner's estate under the relationship property law of one country plus a significant share of the estate under the intestacy regime in another country.

⁴³ As indicated in Dr Maria Hook and Jack Wass's submission. That would mean that, if the law of Germany is identified as the law applicable to matters of succession to the deceased's estate, the court would apply the law as it would be applied to the facts by the German court, even if the German court would characterise some of those rules as concerned with relationship property rather than succession.

⁴⁴ See Chapter 4, regarding relationship property entitlements.

- 15.59 We recommend that there should be an exception to this general rule in circumstances where the partners have separated prior to death and commenced proceedings to divide their relationship property and then one partner dies. Should this situation arise and the deceased partner's habitual residence is a different country from the country most closely connected to the relationship, the relationship property proceedings should be allowed to continue. The partners will have commenced the proceedings with reasonable expectations about the law that applied to those proceedings, and those expectations should not be undermined because one partner dies prior to the resolution of those proceedings.⁴⁵
- 15.60 We recommend that courts should have some flexibility to interpret or adapt the rules to harmonise domestic and foreign law. For example, this might include the ability to take into account the completion of a relationship property division when determining the estate and the respective shares of the beneficiaries.⁴⁶ It may be beneficial for a rule on adaptation to be set out in statute, such as that suggested by Gerhard Dannemann:⁴⁷
- (1) In the application and interpretation of both domestic and foreign law, courts must seek to avoid a situation in which the combination of rules from or decisions taken in different jurisdictions produces an outcome which differs from a common outcome for purely domestic, but otherwise identical cases in the same jurisdictions, unless an applicable rule intends such a different treatment.
- (2) If such a different outcome cannot be avoided by application and interpretation, courts may modify or set aside otherwise applicable rules if the outcome would otherwise violate human rights, in particular rights to equal treatment.
- 15.61 We also recommend that a New Zealand court continues to have the power to refuse to apply a foreign rule where doing so would be contrary to public policy. The concept of law being contrary to public policy is a well-established principle of private international law. The threshold for invoking the exception is high.⁴⁸ Te Kōti Pīra | Court of Appeal (the Court of Appeal) has stated that the policy infringement:⁴⁹
- ... must be of a fundamental or universal value, not simply the result of a ranking within a spectrum of relative values which are recognised in one legal system but not the other.
- 15.62 Internationally, courts have used the public policy exception where competing values of choice of law justify limiting the recognition of foreign law, particularly where the case had a close connection to the forum.⁵⁰

⁴⁵ This is consistent with the domestic law about the continuation of relationship property proceedings following the death of one or both partners: Property (Relationships) Act 1976, s 10D.

⁴⁶ See recital 12 of Regulation 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107.

⁴⁷ Gerhard Dannemann "Adaptation" in Stefan Leible (ed) *General Principles of European Private International Law* (Wolters Kluwer, Alphen aan den Rijn (Netherlands), 2016) 331 at 342.

⁴⁸ See the discussion on the public policy exception in Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [4.88]–[4.106].

⁴⁹ *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93 at [68].

⁵⁰ See Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [4.93]–[4.98], citing *Duarte v Black & Decker Corp* [2007] EWHC 2720 (QB), [2008] 1 All ER (Comm) 401 and *Rousillon v Rousillon* (1880) 14 Ch D 351 (Ch D). See also Alex Mills "The Dimensions of Public Policy in Private International Law" (2008) 4 J Priv Int L 201.

- 15.63 Submitters who commented on the adaptation rule and the public policy exception unanimously supported their use.

Scope of the choice of law rules

- 15.64 We recommend that legislation should contain multilateral choice of law rules that identify the most appropriate system of law to govern the issue in question, whether that is New Zealand law or foreign law.⁵¹
- 15.65 With the exceptions of succession to Māori land (under TTWMA) and the succession to taonga (discussed in Chapter 3), all matters of succession would be governed by the new choice of law rules, which would be expressed in statute. The statutory exclusion of Māori land and taonga would mean that succession to these taonga must always be determined by New Zealand law (which we mean to include tikanga), even in circumstances where the deceased was habitually resident in another jurisdiction.
- 15.66 This recommendation was endorsed by most submitters. It would have the benefit of codifying the choice of law rules in succession, removing the scission principle and replacing it with a personal connecting factor and streamlining the process for determining the applicable law in succession-related matters. No submitter preferred our alternative proposal that the choice of law rules be more limited in their scope as this proposal would continue to allow some succession matters such as the capacity to make a will or take under a will to be dealt with by the current common law choice of law rules. The only other alternative would be to leave the law as it is and for the Government to contemplate a broader review of conflict of laws in Aotearoa New Zealand.
- 15.67 The new rules would therefore cover successions with or without a will, relationship property claims on death and other claims against estates.⁵²
- 15.68 For example, the choice of law for determining an issue of material and essential validity, and for whether a will has been revoked would also be determined by the law of the deceased's habitual residence at death. The principal function of the validity rules is to determine whether there are any restrictions on the will-maker's freedom to dispose of their estate. Awards under the FPA involve invalidating dispositions under the will and are therefore treated as specific applications of the general conflict rules governing material or essential validity.⁵³ Forced heirship rules are also treated as affecting the validity of a will.⁵⁴ It may create difficulties of characterisation if the validity of a will continues to be governed by common law choice of law rules while family provision and testamentary promise claims are governed by the new statutory choice of law rules. Additionally, it is preferable that the question of whether a will has been revoked is governed by the same law as that which determines whether a will was validly made.

⁵¹ Further consideration should be given to the most appropriate place for these rules to sit. If the Government decides to consolidate multiple statutes relevant to the administration and succession of both testate and intestate estates into a single Act, it would be appropriate for that Act to include the choice of law rules. Until that time, it may be appropriate for the rules to sit within the new Act and other relevant statutes including the Wills Act and the Administration Act, or to be enacted in a new statute.

⁵² A testamentary promise claim should be treated as a matter of succession not one of administration.

⁵³ *Re Roper (Deceased)* [1927] NZLR 731 (SC) at 743; and *Re Butchart (Deceased): Butchart v Buchart* [1932] NZLR 125 (CA). See also Marcus Pawson *Laws of New Zealand Conflict of Laws: Choice of Law* (online ed) at [232]; and Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [8.109].

⁵⁴ Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [8.109].

- 15.69 The construction or interpretation of a will is currently governed by the law intended by the will-maker. This is presumed to be the law of their domicile unless there is a clear indication that the will-maker intended a different law to be applied. We do not propose any change to the rule that the law applicable to the interpretation of a will should be that intended by the will-maker. Rather, we recommend that the presumption should be that this is the law of the deceased's habitual residence rather than their domicile.
- 15.70 Another potentially significant change would be the effect on the current unclear choice of law rules around personal capacity to make a will or take under a will. Currently, personal capacity to make a will is governed by the scission principle. Capacity to make a will of immovable property appears to be governed by the *lex situs*, while capacity to make a will of movable property is governed by the law of the will-maker's domicile. Views differ about whether the point in time to determine the applicable law that decides capacity issues should be the time of making the will or the time of death.⁵⁵
- 15.71 We recommend that the applicable law for determining capacity to make a will should be the law of the deceased's habitual residence at the time of making the will and that capacity to take under the will should be determined by the law of the deceased's habitual residence at the time of death.
- 15.72 The new rules would not preclude rules of the *lex situs* continuing to apply to the administration of estates. For example, if a grant of administration is required in the country where property is located, this would still be necessary. Most (if not all) countries have specific requirements for dealings with land that would continue to need to be met.⁵⁶
- 15.73 We recommend that the Government should retain the current choice of law rules for formal validity contained in section 22 of the Wills Act but consider replacing the reference to domicile with habitual residence. That section incorporates a validating choice of law rule, which means that a will is treated as formally valid as long as it complies with the formalities of any one of the relevant legal systems.⁵⁷ Consistent with the abolition of the scission principle, the Government should consider extending the application of section 22 to immovable property and providing that a will of immovable property will be valid if it complies with the formal validity requirements of any of the laws specified in section 22 or the requirements of the *lex situs*.⁵⁸

⁵⁵ Lawrence Collins (ed) *Dicey, Morris & Collins on the conflict of laws* (15th ed, Sweet & Maxwell, London, 2012) at [27-024]; Paul Torremans (ed) *Cheshire, North & Fawcett Private International Law* (15th ed, Oxford University Press, Oxford, 2017) at 1340; and Martin Davies and others *Nygh's Conflict of Laws in Australia* (10th ed, LexisNexis Butterworths, Chatswood (NSW), 2020) at [38.9].

⁵⁶ To assist the understanding of the scope of these choice of law rules, the Government could consider including in statute a broader list of excluded matters. See for example art 1 of Regulation 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107. See generally House of Lords European Union Committee *The EU's Regulation on Succession: Report with Evidence* (6th Report of Session 2009–2010, 24 March 2010) at ch 4.

⁵⁷ This ensures, for example, that a will validly executed when the will-maker is habitually resident in Germany is not rendered invalid when the will-maker becomes habitually resident in Aotearoa New Zealand merely because the formalities differ between the countries. It is likely impossible for wills to comply with the formalities of all legal systems at the same time.

⁵⁸ See art 27 of Regulation 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107. The rules of the *lex situs* would continue to govern the actual dealings in relation to property.

Choice of law agreements between partners

RECOMMENDATIONS

R126

During their lifetime, partners should be entitled to agree that the law of a nominated country should apply to some or all of their property on death. These agreements should be subject to the same validity requirements recommended in R137 and R138 of the PRA review.

R127

The court should also retain a residual discretion to set aside a choice of law agreement if applying the law of another country or giving effect to the agreement would be contrary to public policy.

- 15.74 During their lifetime, partners should be entitled to agree that the law of a nominated country should apply to some or all of their property on death (a “choice of law agreement”). These agreements might take many forms. They might simply specify that the law of a nominated country should apply to the division of their property on death or the partners may make an agreement in accordance with the law of another country with respect to the status, ownership and division of some or all of their property (overseas property sharing agreement).⁵⁹ They might include mutual will agreements or other forms of succession agreements. The agreements could extend to determining that the law of a nominated country should apply to any potential claims that the surviving partner might have against the deceased partner’s estate.
- 15.75 Choice of law agreements should include agreements where the partners have made an implied choice of law in respect of some or all of their property. This addresses the risk that, in some cases, an agreement may fail to specify that the law of a particular country is to apply to the partners’ property but it is apparent from the terms of the agreement that the partners intended that law to apply.⁶⁰ Where the partners made an agreement about the status, ownership and division of some or all of their property in accordance with the law of another country and for whatever reason that agreement is unenforceable under that country’s law, it will generally be appropriate that the default laws of the nominated country will continue to apply.
- 15.76 These agreements should be subject to the same validity requirements recommended in the PRA review,⁶¹ meaning that a choice of law agreement will only be valid if it:

⁵⁹ In the PRA review, we preferred the term “foreign law agreements” because of concern that a narrow interpretation of the term “choice of law agreement” might exclude these latter overseas property sharing agreements. However, we acknowledge the risk that “foreign” is misinterpreted to mean “foreign to Aotearoa New Zealand” and have therefore reverted back to “choice of law agreement”. The definition in *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [19.57] should still apply.

⁶⁰ See *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [19.57].

⁶¹ *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R137–R138 and [19.58]–[19.61].

- (a) is in writing;
 - (b) is signed by both partners; and
 - (c) meets the legal requirements of a valid agreement under the law of the country that is applied under the agreement (the nominated country) or under the law of the country with which the relationship had its closest connection.
- 15.77 If a relationship has no connection to the nominated country and Aotearoa New Zealand is the country with which the relationship had its closest connection, a choice of law agreement must meet the legal requirements of a valid agreement under New Zealand law. We consider the point in time for determining whether there is any connection should be the time of making the agreement.
- 15.78 The court should also retain a residual discretion to set aside a choice of law agreement if applying the law of another country or giving effect to the agreement would be contrary to public policy.⁶² It is appropriate that a court has discretion not to give effect to a valid agreement (wholly or in part) in order to maintain the integrity of the New Zealand legal system and New Zealand family law policy. We also consider that a court should have the same discretion where the law of another country applies under the closest connection test.
- 15.79 As recommended in the PRA review, where only part of an agreement or a particular aspect of foreign law is contrary to public policy, the application of the new Act should be limited to remedying the specific public policy violation. In our view, this best promotes partners' autonomy to choose the property consequences of the end of their relationship.⁶³

Enforcement

RECOMMENDATION

R128

The court should have broad powers to give effect to relationship property orders, family provision awards and testamentary promise awards. These should expressly include the power, in relation to property situated outside Aotearoa New Zealand, to order a party to a proceeding to transfer property or pay a sum of money to another party.

- 15.80 We recommend that the court should have broad powers to give effect to relationship property, family provision and testamentary promise awards, and this should be expressed in statute. Where the estate property or relationship property includes property situated outside of Aotearoa New Zealand, the court's powers would allow them to make orders in respect of the property situated in Aotearoa New Zealand, taking account of the value of the overseas property. The court would also have the power to

⁶² Consistent with the Commission's R139 in *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019); and see also at [19.62]–[19.68].

⁶³ *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [19.68].

order a party to transfer property situated outside Aotearoa New Zealand or pay a sum of money to the other party (in personam orders).

Renvoi

RECOMMENDATION

R129

The courts should continue to determine the application of renvoi in a particular case when relevant but the application of renvoi should not be referred to in statute.

15.81 We recommend that the courts should continue to determine the application of renvoi in a particular case when relevant but the application of renvoi should not be referred to in statute.⁶⁴ As far as we are aware, renvoi is not commonly applied in Aotearoa New Zealand.⁶⁵ Dr Maria Hook and Jack Wass suggest that the doctrine is a potentially useful tool for the courts to retain as it may serve a jurisdictional function in cases where the New Zealand court seeks to recognise, support or supplement the subject-matter jurisdiction of the courts of the *lex causae*.⁶⁶ It may assist with the enforcement of a New Zealand judgment in the foreign jurisdiction.⁶⁷

Jurisdiction

RECOMMENDATION

R130

The new Act should confirm the broad subject-matter jurisdiction of te Kōti Whānau | Family Court and te Kōti Matua | High Court but should not otherwise include bespoke jurisdictional rules.

15.82 We recommend that the new Act should confirm the broad subject-matter jurisdiction of te Kōti Whānau | Family Court (the Family Court) and the High Court but should not

⁶⁴ Renvoi refers to the forum court's application of the foreign court's choice of law rules. This might exclude the foreign court's approach to renvoi (single or partial renvoi) or include it (double or total renvoi).

⁶⁵ Rina See "Through the Looking Glass: *Renvoi* in the New Zealand Context" (2012) 18 Auckland U L Rev 57 at 57–58. We are not aware of more recent case law applying renvoi. See also Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [4.52].

⁶⁶ Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [8.54].

⁶⁷ For example, where enforcement might impact the title of immovable property in that country.

otherwise include bespoke jurisdictional rules.⁶⁸ We want to avoid provisions that operate as a unilateral choice of law rule and a constrained jurisdictional rule.⁶⁹

- 15.83 Personal jurisdiction of the court should continue to be established in the usual manner according to the Family Court Rules and High Court Rules.⁷⁰ Rule 6.27 of the High Court Rules may require amendment to enable service without leave of the court. For example, it appears that a personal representative could not serve an interested party overseas without leave where the claim relates to succession and the deceased was domiciled in Aotearoa New Zealand but did not have land or other property situated here.⁷¹

Abolishing the *Moçambique* rule

RECOMMENDATION

R131

The new Act should confirm that the *Moçambique* rule has no application in matters covered by that Act.

- 15.84 We recommend that the new Act should confirm for the avoidance of doubt that the *Moçambique* rule⁷² has no application in matters covered by that Act. Under this common law rule, the courts have no jurisdiction in proceedings principally concerned with a question of title to, or the right to possession of, foreign immovable property, subject to two exceptions: the court's in personam jurisdiction to enforce contractual or equitable obligations⁷³ and the jurisdiction to determine questions of foreign title where they arise incidentally for the purpose of administering an estate.⁷⁴ The rule has been the subject of much criticism, with critics concerned that it produces illogical and unsatisfactory results.⁷⁵ The Court of Appeal is sympathetic to the criticism of the *Moçambique* rule.⁷⁶ The rule

⁶⁸ See Chapter 12 for discussion on the respective jurisdictions of te Kōti Whenua Māori | Family Court, te Kōti Matua | High Court and te Kōti Whenua Māori | Māori Land Court.

⁶⁹ For example s 7 of the Property (Relationships) Act 1976 and s 40 of the Draft Succession (Adjustment) Act in Te Aka Matua o te Ture | Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at 108.

⁷⁰ See the court rules relevant to the service of proceedings under the PRA, FPA or TPA: Family Court Rules 2002, r 130; District Court Rules 2014, rr 6.23–6.27; and High Court Rules 2016, rr 6.27–6.36.

⁷¹ Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [8.85].

⁷² Named after the leading House of Lords decision *British South Africa Co v Companhia de Moçambique* [1893] AC 602 (HL). The rule was treated as applicable in New Zealand in *Re Fletcher Deceased* [1921] NZLR 46 (SC).

⁷³ The leading authority is *Penn v Lord Baltimore* (1750) 1 Ves Sen 444 (Ch). See also *Birch v Birch* [2001] 3 NZLR 413 (HC) at [50].

⁷⁴ See *Re Bailey* [1985] 2 NZLR 656 (HC) at 659.

⁷⁵ David Goddard and Campbell McLachlan “Private International Law — litigating in the trans-Tasman context and beyond” (paper presented to New Zealand Law Society seminar, August 2012) at 157. Goddard and McLachlan reference *Hesperides Hotels Ltd v Muftizade* [1979] AC 508 (HL) at 543–544. In that case, Lord Wilberforce described a “massive volume of academic hostility to the rule as illogical and productive of injustice”: at 536. See also *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39, [2012] 1 AC 208 at [105].

⁷⁶ Most recently, in *Christie v Foster*, the Court stated that the criticisms of the rule appear to be well founded but that this was not the case to decide whether the *Moçambique* rule should be good law in New Zealand (as the case was considering land in New Zealand, not foreign land): *Christie v Foster* [2019] NZCA 623, [2019] NZFLR 365 at [75]. Similar

creates confusion, with practitioners and courts sometimes struggling to determine whether a claim falls within the rule or its exceptions.⁷⁷ The intention of our recommendations is to move away from the *lex situs* rule, and we note the comments of the Australian Law Reform Commission that retaining the *Moçambique* rule once the *lex situs* rule had been abolished would be anomalous.⁷⁸

CASE STUDIES

15.85 To further clarify how our recommendations on cross-border matters would apply in practice, we have included three case studies.

Case study – Zane

Zane dies in Aotearoa New Zealand with immovable and movable property here and immovable property in Belgium (assume Belgium requires local administration and has forced heirship rules). Zane has a valid New Zealand will that leaves all his immovable property to his friend Joe and the residual estate (movable property) to a charity. Zane has an adult child, Pierre, who he has not seen for 30 years, who lives in Belgium.

Zane had lived in Aotearoa New Zealand for 30 years. He was retired but had previously owned and managed a local dairy for 20 years and was well known in the community for his volunteer work at the local sports centre. In recent years, Zane had spoken frequently to friends about his desire to return to Belgium before he died.

Likely outcome under the current law

- 15.86 Probate is granted in Aotearoa New Zealand.
- 15.87 A New Zealand court might need to determine whether Zane was domiciled in Aotearoa New Zealand or whether his desire to return to Belgium before he died indicated that he never formed the intention to live here indefinitely and therefore remained domiciled in Belgium.
- 15.88 If the court determined Zane was domiciled in Aotearoa New Zealand, Joe could take the immovable property in Aotearoa New Zealand and the residual estate would go to the charity (both subject to a potential FPA claim from Zane's son, Pierre). Administration would be granted in Belgium. Pierre would take the immovable property in Belgium under the forced heirship rules. Joe would have no claim on that property. If Pierre chose to bring an FPA claim to obtain further provision from the estate in Aotearoa New Zealand, a court would take into account the property that he received in Belgium when deciding whether to make an award.

sentiments were expressed by te Kōti Pira | Court of Appeal in *Schumacher v Summergrove Estates Ltd* [2014] NZCA 412, [2014] 3 NZLR 599.

⁷⁷ See the comments in Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [7.74]–[7.77], citing *Schumacher v Summergrove Estates Ltd* [2013] NZHC 1387 and *Burt v Yiannakis* [2015] NZHC 1174, [2015] NZFLR 739.

⁷⁸ Australian Law Reform Commission *Choice of Law* (ALRC Report 58, 1992) at [9.10].

- 15.89 If the court determined Zane was domiciled in Belgium, Pierre could also dispute the charity's claim to the residual estate.

Likely outcome under our recommendations

- 15.90 Probate is granted in Aotearoa New Zealand.
- 15.91 It is likely that Zane's connections to Aotearoa New Zealand would mean that a New Zealand court would determine he was habitually resident here. Under our recommendations, this would mean that New Zealand law should apply to the succession of all of Zane's estate, including the property in Belgium.
- 15.92 Joe could take the immovable property in Aotearoa New Zealand and the residual estate would go to the charity (both subject to a potential family provision claim from Pierre, discussed below).
- 15.93 Administration is granted in Belgium. The following might happen:
- (a) Belgium's court applies its own choice of law rules and finds that Belgian law applies to the immovable property (either because the scission principle applies or Belgian law is otherwise found to be applicable) and considers that Pierre is entitled to the immovable property in Belgium under their forced heirship rules. Joe is unlikely to be able to access that property.
 - (b) The New Zealand court could grant in personam relief against the Belgian administrator in relation to the Belgian immovable property (requiring the administrator to realise the property and distribute the proceeds to Joe) but may decline jurisdiction to do so if the order would not be enforceable in Belgium.
 - (c) It is unlikely, but a Belgian court might apply New Zealand law and hold that Joe is entitled to all the immovable property. (However, there might be restrictions on foreign ownership, for example, that mean that Joe is only be entitled to the value of the property, which needs to be sold.)
- 15.94 Under Option One of our family provision proposals (discussed in Chapter 5), Pierre could claim family provision in Aotearoa New Zealand to obtain an award. The award could be met rateably against the whole estate or could be met from specific property. A New Zealand court would take into account any property Pierre inherited through the forced heirship rules in Belgium.

Case study – Solly and Alex

Solly and Alex are in a de facto relationship of 10 years' duration, and Aotearoa New Zealand is the country most closely connected to that relationship. They have a home in Wellington. Alex regularly travels to Texas as he has significant business interests there. Alex has three children from a former marriage who live in Texas. Solly and Alex separate and begin relationship property proceedings in Aotearoa New Zealand to divide their property. Then Alex dies. Before moving to Aotearoa New Zealand, Alex made a will in Texas in which he left everything to his children.

*Likely outcome under our recommendations*⁷⁹

- 15.95 Because the relationship property claim was filed before Alex died, these proceedings would continue in the New Zealand court.
- 15.96 If the couple had relationship property in Texas, the New Zealand court would include the value of that property in its division. Depending on the value of property in Aotearoa New Zealand and in Texas, the implementation of the division may or may not be able to be met through the property located in New Zealand. If not, the court would have the power to grant in personam orders requiring the sale and/or transfer of property to give effect to the appropriate division.
- 15.97 The total value of Alex's estate would be calculated once Solly had received his share of relationship property.
- 15.98 If Alex was found to be habitually resident in Aotearoa New Zealand, Solly might also be able to claim family provision under New Zealand law.
- 15.99 If Alex was found to be habitually resident in Texas, Solly's ability to claim against the estate would depend on Texan law.

Alternative facts and outcome

- 15.100 Suppose that Solly and Alex had not separated prior to Alex's death.
- 15.101 The most likely scenario is that Alex was habitually resident in Aotearoa New Zealand. This would mean that Solly could claim a division of relationship property under New Zealand law and bring a family provision claim if that was also appropriate.
- 15.102 However, if Alex was habitually resident in Texas, Texan law would be the applicable law to determine the succession to Alex's estate, including any relationship property claims on that estate. This would allow the same law to apply to all claims against the estate and therefore balance the interests of all relevant parties, including Solly's interests. In most cases, a New Zealand court would apply Texan law (if proceedings were brought in Aotearoa New Zealand for division) or enforce a Texan judgment (if proceedings were brought and judgment obtained in Texas).
- 15.103 However, depending on how Texan law would treat Solly, there might be rare cases where a New Zealand court does not apply Texan law or enforce a Texan judgment. For example, if Texan law did not regard a de facto partner as having any rights to relationship property so Solly received no interest in the New Zealand home, the court might consider that application of Texan law or enforcement of a Texan judgment, as the case may be, were contrary to public policy.

⁷⁹ We have not provided an example of the likely outcome under the current law as the current law was discussed in greater detail in the PRA review: *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at ch 19.

Case study – Fetu

Fetu dies without a will and was habitually resident in Aotearoa New Zealand. He is survived by his wife Ruth and his two children from a former relationship, Olivia and Nikau. Fetu owned the home in Gisborne in which the couple lived (worth \$600,000). He also owned a small apartment in New South Wales (NSW) worth \$400,000.

Likely outcome under the current law

- 15.104 Ruth would obtain letters of administration in both NSW and Aotearoa New Zealand.
- 15.105 The Gisborne home would be distributed according to the intestacy rules under New Zealand's Administration Act. This would mean that Ruth receives the personal chattels, a prescribed amount or "statutory legacy" of \$150,000 and one-third of the remaining \$450,000 (\$150,000). Her total share would be worth half the value of the home (\$300,000). Olivia and Nikau would each receive \$150,000.
- 15.106 The NSW apartment would be distributed according to the NSW intestacy rules.⁸⁰ Ruth would receive Fetu's personal effects, a statutory legacy of \$350,000⁸¹ and one-half of the remaining \$50,000. Her total share of the Sydney apartment would be \$375,000 (about 94 per cent of its total value). Olivia and Nikau would each receive \$12,500.
- 15.107 This means that Ruth would be entitled to two statutory legacies when she would only be entitled to one if both the properties were located in the same jurisdiction.

Likely outcome under our recommendations

- 15.108 Ruth would obtain letters of administration in both NSW and Aotearoa New Zealand.
- 15.109 As Fetu was habitually resident in Aotearoa New Zealand, the entire estate could be distributed according to the New Zealand intestacy rules. Under our recommendations, this would mean that Ruth receives the family chattels and \$500,000 (half the value of the whole estate, made up of the home in Gisborne and the apartment in NSW). Olivia and Nikau would share equally in the remaining half (\$250,000 each).
- 15.110 Suppose that Fetu was habitually resident in NSW. The entire estate could be distributed under NSW law. Ruth would receive Fetu's personal effects, a statutory legacy of \$350,000 and one-half of the remaining estate (including the home in Gisborne). Her total share would be \$675,000. Olivia and Nikau would share equally in the remaining half (\$162,500 each).

⁸⁰ Succession Act 2006 (NSW), ch 4.

⁸¹ This would be Consumer Price Index-adjusted, but for simplicity, we have excluded that calculation.

CHAPTER 16

Other reform matters

IN THIS CHAPTER, WE CONSIDER:

- the need for education about the law relating to succession;
- the court's power to declare wills valid when they do not comply with the requirements of the Wills Act 2007;
- the absence of recognition for ōhākī in state law;
- revocation of wills upon marriage or entering a civil union and revocation of certain dispositions under a will at the end of a marriage or civil union;
- the application of the law relating to succession to multi-partner relationships;
- the threshold for administering an estate without the need for a grant of probate or letters of administration; and
- claims against an estate and the availability of social security.

INTRODUCTION

16.1 This final chapter of the report addresses some separate and important matters that do not readily fit in the earlier chapters of the report.

THE NEED FOR EDUCATION ABOUT THE LAW RELATING TO SUCCESSION

16.2 The low levels of awareness and understanding of the law relating to succession, both among the public and professional advisers, has been a key theme emerging from our research and engagement throughout this review.

16.3 For example, some lawyers have told us that will-makers, their surviving partners and some lawyers do not have much knowledge of the Property (Relationships) Act 1976 (PRA) and how it applies on death. Just over half (57 per cent) of the respondents in the Succession Survey were “fully aware” family members can challenge a will if they think it

does not properly provide for them.¹ Respondents without a will (particularly younger respondents without a will) had lower levels of awareness.² Similarly, we have been told that many people have little or no awareness of other matters such as:

- (a) the importance of having a will and the way an intestate estate will be distributed;
- (b) the consequences of holding property in such a way that it does not fall into an estate, such as jointly owned assets or property settled on trust; and
- (c) how to make or resolve claims against estates.

Results of consultation

- 16.4 Submitters to the Issues Paper and the consultation website commented on the importance of improving public understanding of the laws relating to will-making and estates, with one website submitter stating that, “education is key to making changes successful”.
- 16.5 A consistent theme among submissions was the need for further initiatives to encourage the public to make wills, with some submitters suggesting that these should target groups of the population who are less likely to make wills. Citizens Advice Bureau described the need for a culture shift in Aotearoa New Zealand to support will-making as “a natural part of life, and something that is for everyone, not just those who own their own home or have a sizeable estate”.
- 16.6 Community Law Centres o Aotearoa (Community Law) commented that many of its clients are intimidated and confused by the legal system, with some clients even fearing that the consequences of getting something wrong when administering an estate could lead to criminal charges. Many Community Law clients are reluctant to engage if it means they must go to court. It is common that clients are unaware of timeframes and wish to contest the will more than 12 months after probate has been granted. Community Law considered that there is much work to be done to educate the public and make the law as accessible as possible. It would like to see information relating to succession communicated in plain English and te reo Māori and Māori concepts used as much as possible.
- 16.7 Death Without Debt submitted that the process of obtaining a grant of administration should also be made more accessible so that any person with an average degree of literacy is able to obtain a grant without the use of a lawyer.
- 16.8 Submitters to the Issues Paper supported our suggested steps that the Government could take to improve awareness and understanding about the law, particularly by providing prescribed information at certain interactions that may affect a person’s succession plans, for example, when buying or selling property or opening a joint bank account. Chapman Tripp noted that the information provided on Te Tāhū o te Ture | Ministry of Justice website is useful and would be a good place to present information about the new Act. Additionally, one website submitter suggested that tutorial videos

¹ Ian Binnie and others *Entitlements to Deceased People’s Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at [154].

² Ian Binnie and others *Entitlements to Deceased People’s Property in Aotearoa New Zealand: Public Attitudes and Values — A General Population Survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report supported by the Michael and Suzanne Borrin Foundation, May 2021) at [155].

about the court process would be useful so that people could get a better understanding about what to expect.

Conclusions

RECOMMENDATION

R132

The Government should consider ways to improve awareness and understanding of the law related to succession and the new Act.

- 16.9 While the new Act should improve the accessibility of the law by drawing together relevant provisions under one statutory regime, we consider further education for the public and professional advisers is needed.
- 16.10 We recommend that the Government should consider ways to improve awareness and understanding of the law related to succession and the new Act. Consistent with our recommendations in the PRA review, this should include consideration of:³
- (a) a one-off public education campaign, which could be timed to coincide with the implementation of the recommendations in the review;
 - (b) education in secondary school programmes and for professionals such as lawyers, financial planners, business advisers and chartered accountants;
 - (c) the provision of information at different points of interaction with government departments, such as when applying for a marriage or civil union licence, when applying for state benefits and when applying for New Zealand residency;
 - (d) introducing requirements on registered professionals or organisations such as real estate agents and banks to provide some form of prescribed information to clients when buying or selling property, applying for credit or opening joint bank accounts; and
 - (e) producing and providing information online, in Family Courts, High Courts and Māori Land Courts around Aotearoa New Zealand and in community organisations such as Citizens Advice Bureau and Community Law Centres.
- 16.11 Any education campaign should be tailored to target the specific communities it is intending to reach.

POWER TO VALIDATE WILLS

- 16.12 Section 14 of the Wills Act 2007 provides te Kōti Matua | High Court (the High Court) with the power to validate a document that appears to be a will but does not comply with the requirements for a valid will set out in section 11 of the Wills Act. The court is empowered under section 14 to make an order declaring the document valid if it is satisfied that the document expresses the deceased person's testamentary intentions.

³ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R5 and [2.72].

- 16.13 The court may only validate a non-compliant will when there is a “document”, which is defined under the Wills Act as “any material on which there is writing”. This precludes the court validating any evidence of testamentary intention in which there is not writing, such as audio or video recordings. Many individuals we heard from thought this was unsatisfactory. For example, the situation could arise where the court could not give effect to a video recording of a deceased’s explanation of their testamentary intentions, but had someone made written notes instead (arguably far less reliable than a video recording), the court could exercise its validation power. However, in *Pfaender v Gregory*, the High Court validated transcripts transcribed after the will-maker’s death of audio recordings of the will-maker providing their will instructions.⁴

Results of consultation

- 16.14 In the Issues Paper, we explained that the focus of this review is people’s substantive rights to an estate, assuming a valid will either exists or does not exist. However, given the comments we had received during preliminary engagement, we proposed to note the issue as a matter the Government may wish to consider further.
- 16.15 Several submitters commented on the court’s validation powers. Public Trust and Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) supported a review in this area. NZLS agreed that the Government should consider the issue further, including whether it should be contained in the new Act. Public Trust, however, submitted that the Commission should consider recommending an amendment to the Wills Act to allow people to take advantage of other mechanisms such as audio and video recordings.⁵ Public Trust submitted that these may be reliable sources of evidence, which can be further verified using available technical methods and practical steps. Public Trust’s experience through the COVID-19 pandemic has highlighted that reform is required to modernise the law.
- 16.16 One submitter, the Family Law Committee of Auckland District Law Society (ADLS), did not agree that oral or video recordings or documents recorded digitally should be validated as wills. In ADLS’s view, the courts have been too liberal in the exercise of their validation power under section 14.

⁴ *Pfaender v Gregory* [2018] NZHC 161 at [30]–[32]. These transcriptions were validated alongside a draft will and contemporaneous notes made by the deceased’s lawyer. This is in contrast to the view of the Court in an earlier case, *Re Feron* [2012] NZHC 44, [2012] 2 NZLR 551, where it was held that a will drafted after the deceased’s death based on instructions provided prior to death could not qualify as a document under s 14.

⁵ Public Trust noted that this is possible in New South Wales and Victoria. For example, in *Re Estate of Wai Fun Chan (dec’d)* [2015] NSWSC 1107, a video recording was held to be a document for the purpose of the dispensing power under s 8 of the Succession Act 2006 (NSW). See also s 9 of the Wills Act 1997 (Vic).

Conclusions

RECOMMENDATION

R133

The Government should consider reviewing the validation powers in section 14 of the Wills Act 2007, including whether the High Court should have the power to validate audio or visual recordings as a will or other expression of testamentary wishes.

- 16.17 We recommend that the Government should consider a review of the validation powers in section 14, including whether the High Court should have the power to validate audio or visual recordings as a will or other expression of testamentary wishes.
- 16.18 Matters requiring consideration and consultation could include:
- (a) the risk that people may be dissuaded from making valid written wills because audio or visual recordings can be validated by a court;⁶
 - (b) whether any restrictions would be placed on when an audio or visual recording would qualify for potential validation by a court – for example, whether the recording must have been made in the presence of witnesses; and
 - (c) what technical steps might be needed to verify the authenticity of the recording.
- 16.19 In the context of considering the section 14 validation power, the Government should be aware of ōhākī, as discussed below.

ŌHĀKĪ

- 16.20 Ōhākī may be understood loosely as an oral will.⁷ The physical act of giving an ōhākī is something close to a “deathbed declaration”, which is made as a person recognises the signs of oncoming death.⁸ It is sometimes made in the kāinga (home) of the person dying in the presence of their whānau.⁹ Traditionally, depending on the status of the person making the ōhākī, it might also be made publicly in front of extended whānau or hapū in order to cement and publicly validate the wishes of the person dying. The whānau recognise the situation and treat it with appropriate respect.¹⁰

⁶ We note, however, that, when powers to validate non-compliant wills were introduced in Australia in 1975 (on which s 14 of the Wills Act 2007 is based), concerns raised about this encouraging “sloppy will-making” turned out to be groundless: see Nicola Peart and Greg Kelly “The Scope of the Validation Power in the Wills Act 2007” [2013] NZ L Rev 73 at 73–74.

⁷ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 31.

⁸ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 119–120.

⁹ Norman Smith *Maori Land Law* (AH & AW Reed, Wellington, 1960) at 59.

¹⁰ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 120.

16.21 Ōhākī must be understood within the particular context in which it is practised.¹¹ There is no universal approach or standardised practice for Ōhākī, although similar tikanga values are present throughout. The person giving the Ōhākī is usually in a state of heightened tapu because they are close to death.¹² Whanaungatanga plays an important role, as the Ōhākī is given and validated in the presence of the whānau. The mana of the person dying will also reinforce the mana of the Ōhākī, and therefore the weight attributed to the Ōhākī.¹³

Issues

16.22 State law does not currently recognise Ōhākī. The Wills Act requires that a will must be in writing, signed and witnessed to have effect as a testamentary instrument.¹⁴ As a result, some Māori may die intestate despite expressing their testamentary wishes according to their tikanga, including through Ōhākī. This fails to recognise tikanga as an independent source of rights and obligations in Aotearoa New Zealand and arguably fails to meet the Crown's obligations under te Tiriti o Waitangi.

Results of consultation

16.23 In the Issues Paper, we asked whether Ōhākī should be recognised in state law as a will or as an alternative but equally valid form of testamentary disposition. We also asked what the appropriate requirements would be to evidence Ōhākī. The consultation website did not discuss Ōhākī.

16.24 We received eight submissions on Ōhākī. Te Hunga Rōia Māori o Aotearoa (THRMOA), Ngā Rangahautira, Public Trust, NZLS, Chapman Tripp, Morris Legal and Michael Reason and Azania Watene supported the recognition of Ōhākī in state law but ADLS did not, commenting that certainty is necessary.

16.25 Submitters generally preferred recognising Ōhākī as a valid expression of testamentary wishes but not subsuming it into the concept of a will. Chapman Tripp submitted that Ōhākī has its own mana and tapu and may be a more authoritative form of testamentary disposition than a will, “he tapu tō te kupu”. THRMOA observed that it must be framed broadly, as with any tikanga, to permit its evolution. Ngā Rangahautira said recognising Ōhākī would allow for Māori understandings of testamentary freedom to be recognised, balancing testamentary freedom and tikanga obligations due to the practice being intrinsically bound with whānau and whakapapa. Reason and Watene observed that a review of the succession laws cannot accurately encompass mātauranga Māori if it does not consider a place for Ōhākī. Morris Legal suggested that one way to recognise Ōhākī in state law would be to make an exception to the requirement in the Wills Act that a will must be in writing, strictly for the purposes of Ōhākī. Morris Legal also said that thought would need to be given to the process of obtaining probate of such wills, which might

¹¹ A review of the available literature reveals different approaches to Ōhākī. In our preliminary consultation with Māori, we heard stories about how Ōhākī was practised and understood in different ways within different whānau.

¹² Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 54.

¹³ See the example given by the Hon Dr Pita Sharples concerning the second Māori king, Tāwhiao: (10 October 2006) 634 NZPD 5565.

¹⁴ Wills Act 2007, ss 6, 8 and 11. Section 14 of the Act permits validation of wills that do not meet these formal requirements and, in one case, the High Court validated a transcript of an audio recording of a person speaking their will: see *Pfaender v Gregory* [2018] NZHC 161 at [30]–[32].

happen through the centralised probate registry or te Kooti Whenua Māori | Māori Land Court (the Māori Land Court).

- 16.26 Several submitters commented on how an ōhākī should be evidenced. NZLS said significant consideration would need to be given to this, and in its view, as a minimum there would need to be corroborative evidence from at least two witnesses present when the ōhākī was made. Ngā Rangahautira submitted that Pākehā practices towards evidential issues are not appropriate when ōhākī are contested. Western institutions like courtrooms, and the presence of strangers, such as officials, to evidence ōhākī, would inhibit the mauri of orality and contravene the intention of including ōhākī in succession law and may cause further difficulty for whānau at a difficult time. Public Trust said that, from an executor's perspective, reliable recorded evidence would be preferred to enable efficient administration of the estate and that this could be in the form of affidavits from those who were present at the time the ōhākī occurred. Reason and Watene noted the challenge of what would be sufficient evidence but suggested whānau wānanga may assist. Chapman Tripp submitted that whether circumstances deem the tikanga of ōhākī appropriate should be guided by independent pūkenga on a case-by-case basis.
- 16.27 Several submitters responded to a further question in the Issues Paper, confirming that written wills also provide a valuable opportunity for Māori to express testamentary freedom.

Conclusions

RECOMMENDATION

- R134** The Government should consider recognising ōhākī as an expression of testamentary wishes enforceable under state law.

- 16.28 Consultation indicated that Māori wish to have the choice to make either a written will or an ōhākī and have the ōhākī enforced under state law. During the passage of the Wills Act through Parliament, ōhākī were discussed several times by members of the Māori Party (as it was then called),¹⁵ who expressed a wish for the practice to be recognised within the law.¹⁶
- 16.29 The central issue that arises is how the Crown should exercise its kāwanatanga to facilitate the exercise of tino rangatiratanga by Māori over expression of testamentary wishes. We agree with submitters' views that a review of the succession laws cannot accurately encompass mātauranga Māori if it does not consider a place for ōhākī.
- 16.30 We think that state law should facilitate the ability for Māori to make and act on ōhākī in accordance with tikanga. This is not only appropriate because it permits the exercise of tino rangatiratanga over the expression of testamentary wishes but it may also respond to the statistically disproportionate number of Māori who die without making a will.

¹⁵ It has since changed its name to te Pāti Māori.

¹⁶ (10 October 2006) 634 NZPD 5565; (8 May 2007) 639 NZPD 9003–9005; and (23 August 2007) 641 NZPD 11458–11460.

- 16.31 There are nonetheless several issues to be resolved before implementing this, including matters that fall outside of our terms of reference and matters that will require further consultation with Māori.
- 16.32 We observe that one approach would be to amend the Wills Act to become the Wills and Ōhākī Act.¹⁷ This amended Act could:
- (a) acknowledge Ōhākī as a legitimate form of expressing testamentary wishes;
 - (b) require that the validity of an Ōhākī be determined in accordance with the tikanga of the whānau;
 - (c) set out a basis on which evidence of the Ōhākī is established;¹⁸
 - (d) provide for the resolution of disputes over the existence of the Ōhākī, its terms and its relationship with any written will that may have been made in accordance with the current requirements of the Wills Act; and
 - (e) provide for the Māori Land Court to have jurisdiction over these matters as appropriate.
- 16.33 In Chapter 7, we also discuss the potential for an intestacy regime governed by tikanga.

SECTIONS 18 AND 19 OF THE WILLS ACT 2007

- 16.34 Section 18 of the Wills Act revokes a person's will in its entirety when they marry or enter a civil union. The rule does not apply if it is clear from the will or the surrounding circumstances that the will was made in contemplation of the marriage or civil union.
- 16.35 Section 19 of the Wills Act applies when the court grants a dissolution or separation order under the Family Proceedings Act 1980 in respect of a marriage or civil union. The section applies to certain provisions relating to the will-maker's former spouse or civil union partner in the will-maker's will, namely:
- (a) the appointment of the spouse or partner as executor or trustee of the will;
 - (b) the appointment of the spouse or partner as a trustee of property disposed of by the will to trustees on trust for beneficiaries who include the spouse or partner's children;
 - (c) a disposition to the spouse or partner, except for a power of appointment exercisable by the spouse or partner in favour of the spouse or partner's children; or
 - (d) the disposition for the payment of a debt secured on:
 - (i) property that belongs to the spouse or partner; or
 - (ii) property that devolved by survivorship on the spouse or partner.
- 16.36 Section 19(4) provides that any provision of these kinds is void. The will must be read as if the former spouse or partner died immediately before the will-maker. The provision will remain, however, if the will makes it clear the will-maker intended the provision to be effective even if a court grants a separation or dissolution order.

¹⁷ See discussion in Chapter 2 about incorporating the Wills Act and other succession-related legislation into a new Inheritance Act.

¹⁸ This would require consideration of the appropriate tikanga relating to evidence. We note the comments from Ngā Rangahautira that Pākehā practices towards evidential issues would be inappropriate when Ōhākī are contested.

16.37 While sections 18 and 19 are located within the Wills Act, we consider they warrant our consideration in this review. Both provisions govern a person's entitlement to a deceased's estate solely based on the nature of the relationship (or termination of relationship) with the deceased. Our consideration of relationship property law on the death of a partner would be incomplete without considering these provisions.

Issues

16.38 Section 18 presumes that a marriage or civil union is such a significant event in a person's life that any prior will they had must no longer reflect their testamentary intentions.¹⁹ It assumes that the intestacy rules more closely reflect how the will-maker would wish their estate to be distributed.

16.39 We doubt these presumptions are accurate in contemporary Aotearoa New Zealand. It is now common for most couples to have lived for some time in a committed de facto relationship before choosing to marry or enter a civil union.²⁰ A marriage is therefore often seen as a formalisation of an existing relationship rather than a material change in commitment and obligation.²¹ Most individuals we heard from during our preliminary engagement agreed that section 18 requires reform as it no longer represents how people live their lives and organise their relationships.

16.40 We are also mindful that section 18 does not apply to people who enter long-term de facto relationships. That may mean the law provides different outcomes for relationships that are substantively similar, which risks being discriminatory on the grounds of marital status under human rights law.²²

16.41 Section 19 presumes that the will-maker would have wished to cut ties with their former spouse or civil union partner when the relationship is formally dissolved. In the Issues Paper, we expressed our preliminary view that this is a reasonable assumption to make. However, we said there are two main issues with section 19. First, like section 18, section 19 does not apply to de facto relationships, meaning the law may provide different outcomes for relationships that are substantively similar. Second, we anticipated that there will be many cases where people will have wished to cut ties with their former partner before they obtain a formal separation or dissolution order from the court. It may be some time after separation that former partners apply for formal orders.

¹⁹ See Te Aka Matua o te Ture | Law Commission *Succession Law: Wills Reforms* (NZLC MP2, 1996) at [120]–[121], which informed the Wills Act 2007.

²⁰ Te Aka Matua o te Ture | Law Commission *Relationships and Families in Contemporary New Zealand | He Hononga Tangata, he Hononga Whānau i Aotearoa o Nāianeī* (NZLC SP22, 2017) at 17.

²¹ See for example the recent case *Newton v Newton* [2020] NZHC 3337. A couple had executed wills while in a committed de facto relationship. Six years later, the couple married, not realising the law revoked their previous wills. Nevertheless, the Court accepted that, at the time the partners made their wills, they contemplated the relationship would endure and would have the status of marriage: at [4].

²² Section 19(1) of the New Zealand Bill of Rights Act 1990 and s 21(1)(b) of the Human Rights Act 1993 together affirm the right to be free from discrimination on the grounds of marital status, including being married, in a civil union or in a de facto relationship.

Results of consultation

- 16.42 In the Issues Paper, we presented our proposal to repeal section 18 of the Wills Act because a marriage or civil union does not necessarily represent a point in time when most will-makers would wish to change who should or should not benefit under their will.
- 16.43 Most submitters supported repealing section 18. This included Public Trust, NZLS, Professor Bill Atkin and many law firms and lawyers. These submitters broadly agreed with the issues identified by the Commission, with several submitters stating that the revocation of a will when entering a marriage or civil union was anomalous or no longer relevant to modern society.
- 16.44 Three submitters, ADLS, Bill Patterson and a property law practitioner,²³ expressed reasons in favour of retaining section 18 or a modified version of it. Patterson submitted that entering a marriage or civil union is usually a carefully considered decision that effects a significant change in circumstances. The ADLS Committee members were divided in their opinion, but some members considered that section 18 should be retained because there are still many cases where a marriage or civil union is not preceded by a qualifying de facto relationship. Those members submitted that applications for a marriage or civil union licence should therefore include literature explaining the revocation rules and should be accompanied by a standard form codicil that could be quickly and simply executed by the will-maker to record that, in anticipation of the marriage or civil union, the will-maker confirms that the provisions of their existing will should continue to be of effect after the ceremony. ADLS further commented that, in its view, the law is a justified limitation in terms of the New Zealand Bill of Rights Act 1990 and therefore the potential for discrimination is not one of great concern. The property law practitioner suggested that an additional category could be added to section 18(3) so that a marriage or civil union will not revoke a will if the will either expressly or by circumstance contemplates the parties' de facto relationship immediately preceding their marriage or civil union.
- 16.45 In the Issues Paper, we also proposed two amendments to section 19 of the Wills Act. First, it would apply to all relationship types, including de facto relationships. Second, it should apply two years after the couple ceased living together in a relationship.
- 16.46 Again, most submitters supported these proposals. Several submitters, however, noted possible issues or raised potential variations to consider. Chapman Tripp, for example, agreed that section 19 should apply to all relationship types but suggested that as soon as a couple has permanently separated, any provisions under a will where one benefits the other should terminate. NZLS agreed with our proposals but commented that, in the absence of an agreement recording the date of separation, there will likely be some difficulties deciding when a couple "ceased to live together in a relationship". Morris Legal also submitted that partners who have entered a settlement agreement should also be able to confirm that section 19 applies to their wills.²⁴
- 16.47 One submitter, ADLS, did not agree with the Commission's proposals regarding section 19 but provided no explanation of its reasons.
- 16.48 Finally, we asked whether these proposals for the reform of sections 18 and 19 of the Wills Act are problematic for Māori customary marriages. While we received several comments

²³ See Appendix 1 of the submission of NZLS. The property law practitioner is not named.

²⁴ Morris Legal referred to agreements under s 21A of the Property (Relationships) Act 1976.

on Māori customary marriages generally, we did not receive any specific comment about the interrelationship with our reform proposals for sections 18 and 19.

Conclusions

RECOMMENDATIONS

R135

Section 18 of the Wills Act 2007 should be repealed.

R136

Section 19 of the Wills Act 2007 should be amended to apply two years after the point when the partners in any relationship type ceased to live together in a relationship.

R137

The definition of de facto relationship in the Wills Act 2007 should be amended to refer to two people who “live together as a couple”, consistent with the definition in the Property (Relationships) Act 1976.

- 16.49 We recommend that section 18 of the Wills Act should be repealed because a marriage or civil union does not necessarily represent a point in time when most will-makers would wish to change who should or should not benefit under their will.
- 16.50 We recommend two amendments to section 19. First, section 19 should apply to the end of all relationship types, namely marriages, civil unions and de facto relationships. It should not be necessary for the de facto relationship to have lasted three years. A three-year qualifying period is generally used to determine eligibility to entitlements to relationship property and in an intestacy.²⁵ The three-year period is a measure of commitment and acts against the retrospective imposition of property sharing obligations on unsuspecting partners.²⁶ In this context, rather than determine eligibility, the focus is whether the will-maker would have wished to cut ties with their partner because of the separation. It would be odd if gifts to a former partner of a three-year relationship were rendered void but gifts to a former partner of a two-year relationship remained.
- 16.51 We note that the Wills Act defines de facto relationship by incorporating the definition of de facto relationship under section 29A of the Interpretation Act 1999, which refers to two people living together in the nature of marriage or civil union. The PRA’s definition, which the Administration Act 1969 incorporates, differs as its central concept is two people who “live together as a couple”. We consider that a uniform definition of de facto relationship across these closely related statutes (including the new Act) is desirable, and the Government should therefore also revise the definition of de facto relationship in the Wills Act.
- 16.52 The second amendment we propose is that section 19 should apply two years after the point when the partners in any relationship type ceased to live together in a relationship.

²⁵ See the discussion of qualifying relationships in Chapters 4 and 7.

²⁶ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [6.9].

We consider this point in time is more likely to reflect most people's intentions as to when they would wish their will to no longer provide for their former partner, regardless of whether a formal separation order or dissolution has been obtained. It also aligns with our recommendations in Chapters 4, 5 and 7 that former partners cease to be eligible under the new Act for relationship property entitlements, family provision awards and entitlements in an intestacy two years after separation.

MULTI-PARTNER RELATIONSHIPS

- 16.53 The PRA is based on the notion of “coupledom”.²⁷ Relationship property entitlements only arise in marriages, civil unions and de facto relationships that are intimate relationships between two people. Although the PRA contemplates relationship property entitlements arising in the context of contemporaneous relationships, relationship property law does not apply to intimate relationships involving three or more people.²⁸ Instead, people in multi-partner relationships must rely on the general remedies in property law or equity.
- 16.54 In the PRA review, we discussed how the PRA does not apply to multi-partner relationships and concluded that the property sharing regime should not be extended to multi-partner relationships at this time.²⁹ We reasoned that extending the regime to multi-partner relationships would be a fundamental shift in policy and should be considered within a broader context involving more-extensive consultation about how family law should recognise and provide for adult relationships that do not fit the mould of an intimate relationship between two people. Extending the property sharing regime to multi-partner relationships would also be a complex exercise. Careful consideration would need to be given to determining when and how multi-partner relationships should attract property consequences and what those property consequences should be.

Results of consultation

- 16.55 In the Issues Paper, we expressed our preliminary view to repeat the recommendations from the PRA review, namely that the property sharing regime should not be extended to multi-partner relationships at this time.
- 16.56 Most submitters who commented on the issue agreed with this view. Public Trust and NZLS said that further research in this area would be required to support any future law reform relating to multi-partner relationships. One submitter, Morris Legal, submitted that both the PRA and the new Act will need to resolve the difficulties associated with dividing property between parties following a polyamorous relationship, as identified in *Paul v*

²⁷ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [7.62], citing the discussion in Margaret Briggs “Outside the Square Relationships” (paper presented to Te Kāhui Ture o Aotearoa | New Zealand Law Society PRA Intensive, October 2016) at 135.

²⁸ *Paul v Mead* [2020] NZHC 666, (2020) 32 FRNZ 513. See also Chapter 4; and Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R33–R34 and [7.55]–[7.61].

²⁹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R35 and [7.75]–[7.77].

*Mead*³⁰ and, to the extent possible, it would be preferable to do this now while reforms of both succession laws and the PRA are under way.

Conclusions

RECOMMENDATION

R138

The Government should consider undertaking research to identify the nature and extent of multi-partner relationships in Aotearoa New Zealand and how multi-partner relationships should be recognised and provided for in the law.

- 16.57 The relationship property provisions in the new Act should be premised on an intimate relationship between two people. We observed in the PRA review that it is likely multi-partner relationships will become more prevalent in the future.³¹ The Government should consider undertaking research in this area to support any future law reform relating to multi-partner relationships.
- 16.58 Lastly, we note that partners to a multi-partner relationship can make wills and contracts through which they can arrange how property is to be distributed on a partner's death. As discussed above, public education may be useful.

DISTRIBUTING AN ESTATE WITHOUT PROBATE OR LETTERS OF ADMINISTRATION

- 16.59 Section 65 of the Administration Act provides that certain entities, such as superannuation funds, banks, or the employer of the deceased, can pay money to certain relatives of the deceased, such as a surviving partner, without administration of the estate needing to be obtained. The amount of money must not exceed the prescribed amount, which is currently set at \$15,000.³²
- 16.60 Trustee companies hold powers under the Trustee Companies Act 1967 to administer small estates without a grant of administration.³³ Instead, the trustee companies file with the High Court an election to administer the estate. The requirements for exercising this power are:³⁴
- (a) the deceased died either testate or intestate leaving property situated in Aotearoa New Zealand;

³⁰ *Paul v Mead* [2020] NZHC 666, (2020) 32 FRNZ 513.

³¹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [7.66] and [7.77].

³² Administration (Prescribed Amounts) Regulations 2009, reg 4.

³³ Trustee companies include Trustees Executors Ltd, AMP Perpetual Trustee Company NZ Ltd, PGG Trust Ltd, New Zealand Permanent Trustees Ltd and The New Zealand Guardian Trust Company Ltd: Trustee Companies Act 1967, s 2 definition of "trustee company".

³⁴ Trustee Companies Act 1967, s 36(1).

- (b) the gross value of the property does not exceed \$120,000 (or such higher amount prescribed by regulations);
 - (c) no person has obtained a grant of administration; and
 - (d) the trustee company would, in any case, be entitled to obtain a grant of administration.
- 16.61 Public Trust enjoys similar powers under the Public Trust Act 2001, again provided the gross value of the estate does not exceed \$120,000.³⁵
- 16.62 Throughout this review, many individuals and organisations have stressed to us that it should be possible to deal with estates of greater value without the need to obtain probate or letters of administration.

Results of consultation

- 16.63 The feedback we received in consultation was consistent with what we had heard earlier. Submitters considered that the \$15,000 limit in section 65 of the Administration Act should be increased. A particular issue was the situation of KiwiSaver accounts, which for many individuals may be the only asset greater than \$15,000.
- 16.64 Several submitters proposed alternatives:
- (a) Morris Legal said that Aotearoa New Zealand should follow the approach in Australia and England where each financial institution can set its own threshold for the amount of funds that can be released without requiring probate.
 - (b) ADLS said that the \$15,000 should be increased to match the amount in the Trustee Companies Act (the gross value of the property should not exceed \$120,000 or such higher amount as prescribed by regulations).
 - (c) MinterEllisonRuddWatts said that a grant of administration should only be required for estates of more than \$50,000 (CPI adjusted) where the estate does not involve immovable property. Further, personal representatives should be required to file a declaration in the High Court at the time of commencement of administration that they have elected to proceed without grant of administration and that the value of the estate is \$50,000 or less.
- 16.65 Kiwi Wealth, a KiwiSaver provider, said that in addition to the monetary threshold being too low, section 65 of the Administration Act has other difficulties. The most significant is its application to de facto partners. De facto partners can have difficulty evidencing their claim under section 65 because they do not have legal proof of a relationship. Kiwi Wealth also said de facto relationships can be ended more easily than marriages and civil unions and, in its experience, have the potential to create rifts between potential claimants under section 65.³⁶

³⁵ Public Trust Act 2001, s 93.

³⁶ Kiwi Wealth also submitted that s 65 of the Administration Act 1969 would benefit from a rewrite to make it less dense and easier to follow.

Conclusions

RECOMMENDATION

R139

The Government should consider whether to increase the monetary threshold for distributing an estate without a grant of administration.

16.66 Because the issue concerns matters of probate and administration rather than substantive rights to an estate, this issue has not formed part of our review. However, we recommend that the Government should consider whether to increase the threshold for distributing estate money without a grant of administration. This review might also consider whether different requirements should apply to KiwiSaver or other superannuation funds.

SOCIAL SECURITY AND THE FAMILY PROTECTION ACT 1955

16.67 Section 203 of the Social Security Act 2018 applies where a person has applied for or is in receipt of a benefit under the Act and they have a tenable claim under the Family Protection Act 1955 (FPA) but have failed to take reasonable steps to advance the claim. Te Manatū Whakahiato Ora | Ministry of Social Development may refuse to grant the benefit, grant it at a reduced rate or cancel a benefit already granted.

16.68 The predecessor provision to section 203 was first enacted in section 18(3) of the Social Security Amendment Act 1950. Parliamentary debate during the enactment explained that the provision was aimed at addressing what were known as “social security wills”.³⁷ Will-makers were making wills that left the substantial part of their estates to their adult children, leaving their surviving spouse very little so they qualified for social security benefits.³⁸

Results of consultation

16.69 Most submitters who commented on this issue supported the Commission’s proposed view that section 203 be repealed. These submitters were NZLS, MinterEllisonRuddWatts, Chapman Tripp and Bill Patterson. MinterEllisonRuddWatts submitted that compelling a potential claimant to issue proceedings exposes that claimant to an award of costs if unsuccessful.

16.70 ADLS was the only submitter to support the retention of section 203. No reasons were given. Public Trust said that it had not had sufficient experience with section 203 to form a view about whether it should be repealed.

³⁷ (25 October 1950) 292 NZPD 3726–3727.

³⁸ (25 October 1950) 292 NZPD 3726–3727.

Conclusions

RECOMMENDATION

R140 Section 203 of the Social Security Act 2018 should be repealed.

- 16.71 We recommend that section 203 of the Social Security Act should be repealed. We doubt the problems that existed in 1950 when the provision was first introduced cause the same issues today.³⁹ In recent times, the provision has rarely come before the courts, suggesting people are rarely declined social security entitlements for failing to pursue an FPA claim. Further, there may be good reasons why a person may decide not to make a claim against an estate. For example, they may wish to preserve family relationships and avoid dispute, or their relationship with the deceased may have been of such a nature that they feel uncomfortable seeking support from the estate.

³⁹ A potential issue may concern eligibility for residential care home subsidies, but they are governed by the Residential Care and Disability Support Services Act 2018 rather than the Social Security Act 2018.



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