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LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Report 39

Succession Law
A Succession (Adjustment) Act

*Modernising the law
on sharing property on death*

August 1997
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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18 August 1997

Dear Minister

I am pleased to submit to you Report 39 of the Law Commission:
Succession Law: A Succession (Adjustment) Act.

Right from the time of the enactment of the Matrimonial Property Act 1976 it has been considered anomalous that that statute's provisions do not apply where either spouse has died. A principal purpose of the changes we recommend is to ensure that the position after death marches in step with the position for the living.

In order to do its job the Commission has had to grasp such nettles as whether and to what extent the law governing adjustments of income and assets between spouses should also be applied to couples in a quasi-connubial relationship, how if so these relationships should be defined, and whether couples of the same sex should be treated equally. Your Ministry has been working concurrently to review the rules that apply to the property and support of spouses and de facto partners during their joint lifetimes. We and the Ministry have agreed that there must be a single set of rules applying both before and after death. Since the completion of this report we have received advice as to policy adopted by Cabinet, which does not wholly coincide with our views. These are all policy questions on which views may legitimately differ, and which are not necessarily best determined by lawyers. We think it preferable for the discussion of the best answers, now and in the future, to take our views into account and we present them unaltered.

As well as replacing the Matrimonial Property Act 1963, the measure we recommend would supersede the current Family Protection and Testamentary Promises Acts. The family protection legislation is now being used in a way that is incompatible with its original objectives and we have thought a fundamental examination of its rationale to be appropriate. The chief advantage of the testamentary promises legislation is its provision of a convenient machinery for determining claims. Our recommendations refine that machinery, and extend it so that it can apply as well to the similar cases where an estate retains unjustly valuable benefits contributed to a deceased.

We see considerable advantage as well in bringing these various applications and claims under the roof of a single statute in plain language.

The Commission recommends the enactment of the draft Succession (Adjustment) Act included in this report.

Yours sincerely

The Hon Justice Baragwanath
President

The Hon Douglas Graham MP
Minister of Justice
Parliament House
WELLINGTON

Preface

The Law Commission is undertaking the succession project with the approval of the Minister of Justice.

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

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

The ultimate aim is to have new succession legislation drafted in plain language which

- provides for these matters in fewer statutes (these being either parts of, or instead of, the comprehensive succession statute envisaged in the original project reference),
- simplifies the law,
- enables better effect to be given to the intentions of will-makers, and
- takes account of the diversity of New Zealand families.

The project has three main aspects:

- *Succession adjustment or testamentary claims* – The subject of this report. The draft Succession (Adjustment) Act which this report recommends would repeal and replace the 1949, 1955, and 1963 Acts listed above.
- *Succession as it applies to Māori families* – The Commission engaged Professor Pat Hohepa, Dr David Williams and Mrs Waerete Norman as consultants to advise on this aspect of the project: *The Taking into Account of Te Ao Māori in the Law of Succession: A Working Paper* (nzlc mp6, 1996). The Commission is continuing to consult with Māori at regional and national levels on ways that Māori decisions about succession to ancestral property can be given greater effect.
- *Wills* – The Commission is giving further consideration to this aspect of the project with a view to proposing necessary reforms. Having reported a Succession (Homicide) Act earlier in 1997 (*Succession Law: Homicidal Heirs* (nzlc r38, 1997), the Commission anticipates that it will soon be in a position also to submit a report on a Succession (Wills) Act.

Our work on succession adjustment has been greatly helped by consultation with legal practitioners, legal academics, judges, social scientists and other specialists (see Acknowledgements). The Commission acknowledges here, however, two signal contributions to the work in this report, those of Richard Sutton, Professor of Law at the University of Otago/Te Whare Wānanga o Otago, former member of the Commission and original convening Commissioner for the Succession Project, and Ross Carter, a Commission researcher. We emphasise that the views expressed in this report are those of the Commission and not necessarily those of the people who have helped us. The draft Act provisions were prepared by Mr GC Thornton qc, the Commission's legislative counsel.

1 Introduction

WHAT IS SUCCESSION LAW?

- 1 **T**he law of succession is the system of rules that says who gets people's property when they die.

IN WHAT PROPERTY ARE INTERESTS ADJUSTED?

- 2 At present, property (an *estate*) owned by a person who has died (a *deceased*) is distributed in different ways. This report recommends changes to rules that empower courts to adjust three ways in which property is distributed:
 - in accordance with the terms of the *will*, if the deceased was a *will-maker* (*testator* or *testatrix*);
 - in accordance with the *intestacy* provisions – Part III of the Administration Act 1969 – if the deceased left no will, or a will that does not dispose effectively of all of his or her property (the deceased died partly or wholly *intestate*);
 - in accordance with the rules that apply to *non-probate transactions* (eg, an entitlement as nominee of a savings account or superannuation benefit, or to some jointly-owned property) if the deceased owned property that when he or she died passed automatically to another or others outside a will or an intestacy.

WHY AND HOW ARE INTERESTS IN PROPERTY ADJUSTED?

- 3 Under present law people may ask courts to adjust interests in property a deceased owns on death on three main grounds:
 - *Matrimonial and de facto property* – A husband, wife or de facto partner of a deceased may claim a share in the deceased's estate (relying on the Matrimonial Property Act 1963, or the law of *constructive trusts*).

- *Family protection* – Certain members of a deceased's family, such as a husband, wife, child (of any age), grandchild, or parent may claim "adequate provision" for their "proper maintenance and support" (relying on the Family Protection Act 1955).
- *Testamentary promises* – People who contributed work or services to a deceased may claim a reasonable reward for the work or services, if the deceased fails to keep a promise, express or implied, to reward these contributors by will (relying on the Law Reform (Testamentary Promises) Act 1949, or the general law of contract or restitution).

WHY IS THE PRESENT LAW IN URGENT NEED OF REVIEW?

- 4 The present law needs review for four main reasons:
- It is anomalous that two sets of rules determine property adjustments between spouses: one set applies if either spouse has died when adjustment is sought, but another (newer) set applies if adjustment is sought when both spouses are alive.
 - Despite valiant attempts by courts to resolve the problems, the absence of comparable provisions governing adjustment between persons who have been in quasi-connubial relationships causes unnecessary cost, uncertainty and delay.
 - Claims by adult children under the Family Protection Act 1955 are often made on the basis not of need but on the basis that the will-maker breached an undefined moral duty. This regime is indefensible because will-makers cannot determine and comply with its requirements in advance, and because it may disregard moral imperatives of the will-maker that are not shared by whichever judge is called upon to decide the claim. Will-makers, during their lifetimes, are required by law to provide economic support only to certain children under 19. Step-children for whom a will-maker has assumed, in an enduring way, the responsibilities of a parent, may not be able to claim financial support from a deceased person's estate. Conversely, more distant relatives may (few actually do) claim financial support even though a will-maker during his or her lifetime had no similar duty to support those relatives.
 - The Law Reform (Testamentary Promises) Act 1949 provides an efficient but incomplete machinery for determining claims by people (including adult children) who contributed valuable benefits to a deceased. For example, although the Act deals with promises to reward benefits by will, promises to reward by

other means are excluded. Since the Act was passed courts have expanded the general law that applies if people supply will-makers with benefits (eg, work or services) in the hope of reward. Lawyers will be familiar with claims based on *constructive trusts* and the *law of restitution* (legal duties imposed on those who have acquired a benefit at another's expense). These similar claims should also be included in a refined statutory machinery.

- 5 The need for review is urgent. The existing law operates in a way that is less just, clear, consistent, and efficient than it can be. The newest statute our draft Act would replace was enacted in 1963 – since then values known and widely accepted in New Zealand communities have changed, but the existing law has not in all cases developed to reflect these changes. Around 27 000 people die each year in New Zealand, many leaving significant amounts of property. But the families, friends and communities who survive those who die can rely only on the deficient existing law.

WHAT DOES THIS REPORT DO?

- 6 The Commission recommends that Parliament replace and update the present law by enacting the draft Succession (Adjustment) Act contained in this report. In the rest of this report the Commission
 - describes how it arrived at its recommendations (paras 7–10),
 - explains why the changes it recommends are needed (chapter 2),
 - states and illustrates briefly the changes it recommends, outlining ways that the draft Act solves problems in the present law (chapter 3),
 - sets out the draft Act that would implement its recommendations together with a commentary explaining the detail of its provisions (see pages 35–170), and
 - acknowledges the individuals and groups who have contributed to the work in this report (see Acknowledgements).

HOW DID THE COMMISSION ARRIVE AT ITS RECOMMENDATIONS?

- 7 In August 1996 the Commission published a detailed technical paper on adjusting interests in the property a person owns on death.¹ It was distributed to over 600 individuals and organisations.

¹ *Succession Law: Testamentary Claims – A discussion paper* (nzlc pp24, 1996), referred to in this report as pp24.

The 1996 discussion paper

- considered the origins and development of the present law,
- suggested criteria for good laws of succession,
- discussed some objectives of the law of succession that seemed to the Commission questionable, and
- identified issues and options for the reform of the present law.

The paper set out and invited comments on the Commission's provisional conclusions, arrived at after extensive research and considerable preliminary consultation.² Complete draft provisions for a Testamentary Claims Act were included with a commentary on them, as were examples illustrating how the Commission's proposals would work. With amendments, the draft Act in the discussion paper has in this report become the draft Succession (Adjustment) Act.

- 8 Everyone may be affected, more or less, by the law of succession. For this reason the views of the community on changes to the law of succession are crucial. In a brief plain-language booklet the Commission also set out for public consideration and comment the present law and its proposals and options for reform.³ Examples were included to illustrate how the Commission's proposals would work. The booklet was distributed to interested individuals and groups in New Zealand communities, and to each of the MPs who represented New Zealanders in the 44th Parliament. There are over 1300 firms of barristers and solicitors in New Zealand – each was asked to consider the booklet and draw it to their clients' attention.
- 9 These two publications emphasised that the Commission's proposals were tentative, and welcomed critical comment and the expression of other options and views. Comment was sought especially from Māori, from cultural and ethnic communities, and from people who considered that they were affected by views the Commission expressed on issues of family structure and gender.

² For details, see pp24, vii. The Commission is continuing to consult on ways that Māori decisions about succession to ancestral property can be given greater effect.

³ *What Should Happen to Your Property When You Die?* (nzlc mp1, 1996).

- 10 Distribution and discussion⁴ of the papers led to 176 requests for further information, and 87 written and telephoned submissions (see Acknowledgements). Submissions received from a group, like the submission from the National Council of Women/Te Kaunihera Wāhine o Aotearoa, often expressed the views of the many members of the group. The submissions received were thoughtful and constructive. In its further work the Commission ensured that each submission was considered carefully and completely. The Commission repeats here its thanks to all those who contributed time and effort to comment on the proposals and options for change.
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⁴ See, for example: *Herald*, 22 August 1996; *National Business Review*, 30 August 1996; *National Business Review*, 6 September 1996; [1996] 19 TCL 34–1; *Herald*, 30 October 1996; *Chartered Accountants' Journal*, November 1996, 62; (1996) 467 *Lawtalk* 8–10; [1996] NZLJ 339–342; (1996) 468 *Lawtalk* 17–18; [1997] NZLJ 53–55, 61–62; *Ruka v DSW* (1996) 13 FRNZ 622, 637 (CA); Fisher (ed), *Matrimonial Property* (Butterworths, Wellington, 1997), para 2.14; *Trapski's Family Law: Family Protection and Testamentary Promises* (Brooker's, Wellington, 1997), paras WI1.06, IN.3; (1997) 11 Aust J Fam L 123–125; (1997) 16 E&TJ 230.

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Problems of the present law

- 11 In this chapter the Commission explains in more detail why the changes it recommends are needed.

SOME STATISTICS

- 12 Some 27 000 people die in New Zealand each year.⁵ A significant proportion of those who die leave assets. Such statistics as we have show that a grant of administration is not always sought: courts each year make only around 13 000 grants (of probate or letters of administration). This may be because the estate is small in size or because property passes as a non-probate asset. Where, for example, the deceased and spouse owned a family home as joint tenants, the deceased's interest passes automatically to the surviving joint tenant.
- 13 Estate sizes vary, but from work done in the 1980s it appears that around 65% of estates will be worth \$41 000 or less in June 1997 terms, and 90% worth \$171 000 or less. Of course the pattern of values in cases where claims have been worth pursuing is different. A study was made of 235 cases from 1984–1995 where children claimed against their parents' estates under the Family Protection Act 1955.⁶ Of these, 52.7% (124) of the estates were worth less than \$150 000.

PARTNERS' PROPERTY AND FINANCIAL SUPPORT

Widows and widowers

- 14 Under the present law, section 5 of the Matrimonial Property Act 1963, a widow or widower may claim a share of a deceased's

⁵ For details, see pp24, paras 20–23.

⁶ See Peart, "Awards for Children under the Family Protection Act 1955" (1995) 1 BFLJ 224, 225. For details of this survey and another, of 50 cases from 1985–1995 by widows and widowers under the Matrimonial Property Act 1963, see pp24, fns 10, 50–51 and 134–135.

property. The share is based, usually, on the contribution that the widow or widower made to the property. When introducing the Matrimonial Property Bill 1975 to the House of Representatives, the Minister of Justice, the Hon Dr AM Finlay qc, said:

Broadly speaking, the approach of the present law is to give a wife some rather vague and undefined rights in her husband's property, if she can prove them. By way of contrast, the approach of this Bill is to give each spouse a share in the matrimonial property as a whole, as of right. (3 October 1975, (1975) 402 NZPD 5115)

- 15 For spouses whose marriages ended on divorce on or after 1 February 1977 the Matrimonial Property Act 1976 introduced comparable (usually equal) sharing of both spouses' property.⁷ It was generally accepted that the Act should shortly afterwards be applied as well to matrimonial property on the death of a spouse.⁸ This has not occurred. Despite courts more and more often exercising their discretion under the 1963 Act to give widows and widowers results that approximate those for divorced spouses under the 1976 Act, the anomaly remains that a widow can be in a worse position than a divorcing spouse.⁹
- 16 As long ago as 1983 a High Court judge felt moved to say:
I cannot see why the entitlement of a widow to share in the assets of the marriage partnership which has been determined by her husband's death should be any less than that of a wife whose partner is still alive and whose marriage partnership has been determined by a quarrel or by desertion. (*In Re Judge* (unreported, 3 March 1983, High Court, A52/81))
- 17 The Matrimonial Property Act 1963 s 5 needs urgent review. Section 5 does not require that both spouses' property be brought into account. Nor does it make clear whether a property claim is

⁷ *Matrimonial Property – An Explanation of the Matrimonial Property Bill 1975* (1975) AJHR E.6.

⁸ In 1977 the chairman of the Statutes Revision Committee Mr JK McLay mp said that
[a] number of submissions [to the Committee] advocated that the principles in the [1975] Bill should be extended to operate after the death of a spouse . . . there was general agreement that that should occur. In the meantime the 1963 Act must continue in force for . . . matrimonial property proceedings after the death of one party; this is an interim situation which all would regard as unsatisfactory but [then] unavoidable. (*The Matrimonial Property Act 1976* (Legal Research Foundation Seminar Papers, University of Auckland, 1977), 18)

⁹ The *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, Wellington, 1988) recommended that this anomaly be removed.

in addition to or instead of any property the widow or widower receives from an estate or as a non-probate asset.

- 18 In relation to the financial support of spouses, the Family Protection Act 1955 also needs urgent review. At present it fails to integrate properly financial support (that takes into account fully the consequences for a spouse of a marriage)¹⁰ with other classes of claim available to a spouse.

De facto partners (including those of the same sex)

- 19 In 1975 the then Minister of Justice accepted that the law governing de facto partners' property needed to be changed. As introduced to the House of Representatives the Matrimonial Property Bill 1975 was meant to be applicable as well to the property of de facto partners. In the paper explaining the Bill the Hon Dr AM Finlay qc said that

[w]hile the Government acknowledges the argument that extending the law in this way might be thought to diminish the status of marriage, we are far from convinced that this would be its effect. Indeed, it might equally well be said that without such a provision men wishing to avoid sharing their property and earnings would be discouraged from entering into lawful marriage and tempted to form irregular liaisons. On practical and humanitarian grounds there seems everything to be said for allowing justice to be done, and the interests of children indirectly protected, and the opportunity for exploitation diminished, by legislative intervention. ((1975) AJHR E.6, 13)

- 20 Again, this necessary change has not occurred.¹¹ A widespread misconception resulted: that the 1976 Act applies *already* to de

¹⁰ In *Z v Z* (1996) 15 FRNZ 88 the Court of Appeal stressed that the proper interpretation of the financial support law that applies to spouses on divorce, the Family Proceedings Act 1980 Part VI, should include consideration of any disproportionate imbalance in spouses' potential earning capacity after a marriage of significant duration. The court also suggested that its decision in *Slater v Slater* [1983] 1 NZLR 166 had been misconstrued or the principles in it applied "with undue rigidity". For discussion, see Henaghan, "Are Future Earnings Matrimonial Property?" [1996] NZLJ 323; Henaghan, "B to Z and Back to A" [1997] NZLJ 3, 4; Hicks, "More Just Results?" (1997) 1 BFLJ 122, 124; Webb, "The Partnership Law Aspects of *Z v Z*" (1997) 1 BFLJ 137–141.

¹¹ Mr JK McLay mp said too that "save for one issue (the inclusion of *de facto* marriages)" the Statutes Revision Committee "dealt with the Bill on a completely non-partisan basis": *The Matrimonial Property Act 1976* (Legal Research Foundation Seminar Papers, University of Auckland, 1977), 12.

facto partners.¹² This fact weakens significantly the argument that de facto partners know and (at least implicitly) approve of their lack of legal protection so that their autonomy would be compromised by applying a statutory regime of (usually equal) sharing.

- 21 In the law of constructive trusts courts recognise already that “the ordinary features of a shared life” taken alone usually make it just for property to be shared. Courts have developed trust law to recognise (but not start by treating as equal) de facto partners’ contributions to property (if not to partnerships with will-makers). But ascertaining de facto partners’ rights to property remains expensive and slow, and results are difficult to predict. Uncertainty now surrounds the way the contributions of partners (including those of the same sex)¹³ will be assessed, and partners have no support claim. Judges have acknowledged that the legislature might more properly assess and express social expectations in this field, and might do so in a more comprehensive way.¹⁴
- 22 Agreements, for several reasons, fail to protect de facto partners adequately. Heterosexual partners who are unwilling to marry already can,¹⁵ but usually do not, protect their property rights or financial support through contracts. Most partners lack the foresight or means, their values or culture may be opposed to a contract, or a stronger partner can oppose the suggestion. A 1994 House of Lords decision in a related context recognised that
- [t]he “tenderness” shown by the law to married women is not based on the marriage ceremony but reflects the underlying risk of one cohabitee exploiting the emotional involvement and trust of the other. Now that unmarried cohabitation, whether heterosexual or homosexual, is widespread in our society, the law should recognise this. Legal wives are not the only group which are now exposed to the emotional pressure of cohabitation. (*Barclay’s Bank Plc v O’Brien* [1994] 1 AC 180, 194 HL(E))

¹² The Legal Services Board in 1994 said that failed attempts to have the Matrimonial Property Act 1976 apply to de facto relationships created “[a] degree of mythology [which] . . . developed to the point where seriously incorrect perceptions of the state of the law were being retailed in the community”: *Report of the Legal Services Board/Te Poari Ratonga Ture for the Year Ended 30 June 1994* (1994) AJHR E.7, 24–26. The board mounted a media campaign to counter the widely-held misconceptions or lack of knowledge about property rights arising within de facto relationships.

¹³ Even if the partners had no sexual relationship; compare, for example, *Hamilton v Jurgens* [1996] NZFLR 350: Webb, “Quasi de facto relationships and marriage” (1997) 1 BFLJ 113, with *Vaney v Bright* [1993] NZFLR 761.

¹⁴ See, for example, the references in pp24, para 140, fn 83.

¹⁵ See pp24, para 140.

- 23 The number of de facto partners in New Zealand is still growing in a significant way.¹⁶ From the statistics we have, we can expect around 1600 people who die each year to be in a de facto partnership. Over 40% of de facto couples have children, compared to 60% of married couples. Other statutes have recognised the “important legal, public policy and demographic implications” of the increases in the numbers of de facto partners.¹⁷
- 24 New Zealand’s law concerning de facto partners’ property and support has not kept pace with that of Australia, Canada and England. The general tendency in these jurisdictions has been to make provision for de facto partners (including those of the same sex)¹⁸ in legislation dealing with lifetime claims, or claims against deceased partners’ estates, or both.¹⁹
- 25 De facto partners are as entitled as married partners to a statutory regime to disentangle their financial affairs when one of them dies. The inclusion in the regime recommended by the Commission of de facto partners is both efficient and just. The draft Act the Commission recommends is of course also consistent with the requirements of the New Zealand Bill of Rights Act 1990 s 19 and Human Rights Act 1993 s 21.²⁰
- 26 Finally the responses to the discussion paper’s proposals for the property division (endorsed by 56.2% of respondents) and support

¹⁶ pp24, paras 131–133.

¹⁷ See, for example, Domestic Violence Act 1995; Child Support Act 1991; Accident Rehabilitation and Compensation Insurance Act 1992; Social Security Act 1964.

¹⁸ See, for example: De Facto Relationships Act 1996 (South Australia); Domestic Relationships Act 1994 (ACT); Family Provision Amendment Act 1996 (ACT); Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (1993); Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993); Atherton, “Family Provision” (Victorian Attorney-General’s Law Reform Advisory Council, Expert Report 1, completed July 1994, published 1997).

¹⁹ See pp24, paras 134 and 143.

²⁰ For discussions of what New Zealand’s human rights law’s equality guarantees require, see pp24, paras 143–145; *Quilter v Attorney-General* (1996) 14 FRNZ 430; Schnurr, “Claims by Common Law Spouses and Same-sex Partners Against Estates” (1996) E&TJ 22; Hon Justice Kirby, “Homosexual Law Reform: The Road of Enlightenment” (1997) 6 Australasian Gay & Lesbian LJ 1; Hon Chief Justice Nicholson, “The Changing Concept of Family – The Significance of Recognition and Protection” (1997) 11 Aust J Fam L 13; Oosterhoff, “Succession Law in the Antipodes: Proposals for Reform in New Zealand” (1996) 16 E&TJ 230, 241–245, citing *M v H* (unreported, 18 December 1996, Ontario Court of Appeal, Charron and Doherty JAA

claim (endorsed by 64% of respondents), show that there is considerable community support for now treating de facto partners in an even-handed manner.

CHILDREN AND OTHER RELATIVES

Minors, children disabled or training under 25, and other relatives

- 27 Children of any age can now apply for “adequate provision” for their proper maintenance and support under the Family Protection Act 1955.
- 28 Overseas jurisdictions have restricted claims by children to younger and disabled children, both for clarity and to accord better with community expectations about the limits of parental responsibility. For example, in 1996 the legislature in the American state of Louisiana, following a referendum, altered the state Constitution to limit forced heirship. It is now limited to children under 24 years of age and children of any age who, because of mental or physical disability, cannot care for themselves or their property.²¹ On 28 February 1997 in the Canadian province of New Brunswick, Royal Assent was given to a similar (though lesser) amendment to the Provision for Dependants Act 1991 s 3. When the Amendment is

concurring, Finlayson JA dissenting). In the Human Rights Commission's “Consistency 2000” Project New Zealand's government has sought to remove or justify even distinctions on prohibited grounds that date from before the prohibited grounds of discrimination introduced by the Human Rights Act 1993. The Law Commission considers that excluding same-sex de facto couples from property division or support legislation would be an inconsistency with the New Zealand Bill of Rights Act 1990 s 19 that:

- would need to be noted on the request to include the Bill in the legislative programme (Legislation Advisory Committee, *Guidelines on Process and Content* (rev ed, 1991), appendix A; *Cabinet Office Manual* (rev ed, 1996),
- the Attorney-General would be obliged to report to the House (New Zealand Bill of Rights Act 1990 s 7);
- the Human Rights Commission could make the subject of a report to the Prime Minister (Human Rights Act 1993 s 5(h)(iii)); and
- would be the subject of critical public discussion and debate, see, for example: “Gay couples face exclusion”, *Dominion*, 21 April 1997, 2; “MP attacks gay exclusion”, *Christchurch Star*, 30 April 1997, “Exclusion – equal rights are out the door”, *Express*, 1 May 1997, 1; “Gay partners' rights”, *Dominion*, 5 May 1997; “Property rights”, *City Voice*, 22 May 1997, 12.

²¹ For discussion, see Brashier, “Protecting the Child from Disinheritance: Must Louisiana Stand Alone?” (1996) 57 Louisiana LR 1; Spaht, “Forced Heirship Changes: The Regrettable ‘Revolution’ Completed” (1996) 57 Louisiana LR 55.

proclaimed, it will clarify both will-makers' duties and, for claimants, when claims are worth making.²²

- 29 There is now a significant inconsistency between the laws that apply before and after the death of a will-maker. By contrast to the law that applies after death (the Family Protection Act 1955), will-makers' duties during lifetime to support children financially are confined to children under 19 years of age. The law that applies to will-makers before death now also makes provision for support claims by a stepchild if a step-parent has assumed, in an enduring way, the responsibilities of a parent of that stepchild.²³ But on death stepchildren's claims are limited. Similarly, while will-makers are not required by law during their lifetimes to support parents or grandchildren, on death these more distant relatives may (few actually do) claim financial support. A significant proportion (60%) of those who commented on the financial support claim for minor and disabled children proposed in the discussion paper supported the basis and priority suggested for these claims.

Adult children not claiming for significant value they have contributed

- 30 In relation to claims by adult children, the manner in which courts apply the Family Protection Act has changed considerably since 1955, but without any express parliamentary approval. Two cases, 40 years apart, illustrate this change. In the first case the judge said:

Now, here is a testator who seemed to be disposed to think that he would like to leave the capital of his estate to charities, but he recognised his immediate obligations to his widow and also his obligations to his son and his daughter. I do not say it is a just will. On the contrary, I think it is an unjust will, but what right have I to intervene in the guise of making an order under this Act? As I understand the matter, I have no jurisdiction to do so unless I am first satisfied (whatever my views are of the wisdom or otherwise of the testator's provisions) that there is a need for maintenance. And I just cannot say that in the case of the son – we will deal with his case first of all – because, while I think a father should leave a substantial part of his estate to his

²² The Provision for Dependants Act Amendment Act 1997 (New Brunswick) s 1 substitutes a new section 2(1) in the 1991 Act to clarify that "maintenance and support" awards from a deceased person's estate are to be made only if a child's resources (including all that the child received from the deceased's estate) are insufficient for that child to provide adequately for himself or herself.

²³ Child Support Act 1991 ss 2, 7, 99.

immediate relatives, other people might think otherwise, and this testator, being free to make his will as he chose, subject only to the duty to make provision for his son if he was not sufficiently provided for, in my view, was free to make the will he did. (*In Re Blakey* [1957] NZLR 875, 877)²⁴

- 31 In the second case, which is only one recent illustration of the general pattern,²⁵ the adult sons who claimed successfully were in no financial need whatsoever. The judge said that:

The approach which I must take is that Mr Forward was entitled to leave his property as he chose, subject to his not being in breach of moral duty to any of his dependants. If I find a breach of moral duty, the award which I make must be no more than is necessary to remedy the breach. Bearing in mind that it is now firmly established that the Family Protection Act is concerned with moral and ethical considerations as well as purely financial ones, I am satisfied in this case that a wise and just father ought to have left something to his two sons. His estate was of such a size that he could readily recognise them in this way without any risk of failing to fulfil his duty to his widow. (*Re Forward* (unreported, 11 December 1996, High Court, Christchurch, M 398/91), 6)

²⁴ *Blakey* was one of the later decisions (proceedings filed 8 March 1955) under the Family Protection Act 1908, the provisions of which were consolidated in the 1955 Act. The 1955 Act received the Royal Assent and came into force on 26 October 1955, but applies to estates of persons dying before or afterward: s 2(2). North J's decision referred to the "tendency . . . in the last few years . . . [to] take a benevolent view . . . [of applications and] on occasions, it might be said that there was a tendency to make new wills". (For cynicism about "making new wills" see [1964] NZLJ 313, and compare more recently *Re McIntosh* (1990) 7 FRNZ 580, 584: "I am enjoined by law not to make a completely new will.") North J referred to *Allardice* (1910) 29 NZLR 959, 12 GLR 753 and *Dillon v Public Trustee* [1941] NZLR 557, [1941] GLR 22 as authority that the Act imposed no automatic duty on a will-maker to make provision on moral grounds, but instead authorised court-ordered provision only if the adult child was actually in need and the estate had the means to meet that need. The *Blakey* approach was later overruled in *Harrison* [1962] NZLR 6 (itself limited by *Young* [1965] NZLR 294), but echoes of the denial of jurisdiction in *Blakey* can be seen too in *Re Rough* [1976] 1 NZLR 604, and *Re Swanson* [1978] 2 NZLR 469.

²⁵ See Peart (1995) 1 BFLJ 224, 226 and pp24, 61. Compare *Re Campbell* (unreported, 11 November 1993, DC, Papakura, FP 055/118/93), 6: doubting that

children of a testator can expect to inherit as once might have been traditionally favoured. Emphasis on independence, and the ability of an adult to organise his or her affairs broadly as one would wish without undue interference . . . are I think reflections of modern social thinking. See too the decisions of the Court of Appeal favouring surviving partners in *Clements v Clements* [1995] NZFLR 544 and *Wightman v Steenstra and Others* (unreported, 18 June 1997, CA 268/96).

- 32 The effect of the cases, Peart concludes, is that
 it is no overstatement to say that children nowadays have a right to share in their parent's estate, irrespective of age or financial position. ((1996) 10 Int J of Law, Policy and the Family 105, 118)
 Parents' duties during their lifetimes to provide financial support to minor and disabled children and former spouses are widely accepted and clearly defined. By contrast, claims by adult children under the Family Protection Act 1955 are in urgent need of review.²⁶
- 33 The test of a will-maker's "moral duty" to adult children has never been expressly approved by Parliament as a test for entitlement.²⁷ The test assumes that there is general acceptance of the exact content of a will-maker's moral duty to adult children. No social inquiry the Commission knows about supports this assumption.²⁸

²⁶ See pp24, paras 47–51 and 200–224.

²⁷ Bale, "Palm Tree Justice and Testator's Family Maintenance – The Continuing Saga of Confusion and Uncertainty in the BC Courts" (1987) 26 ETR 295 argued that in *Walker v McDermott* (1931) SCR 94 the Supreme Court of Canada first put a similar moral obligation gloss on the equivalent provincial legislation: the Wills Variation Act (1979) RSBC c 435 (British Columbia). Bale argued that courts applying the Act must reject the "moral duty" gloss to restore "rationality and predictability" to the law. See too Leslie, "The Myth of Testamentary Freedom" [1996] 38 Arizona LR 235, 270–273. Oosterhoff, "Succession Law in the Antipodes: Proposals for Reform in New Zealand" (1997) 16 E&TJ 230, 236 says that:

Emphasising the testator's "moral duty" leads to a judicial free-for-all. Alternatively, one might say, in a free adaptation of the words of John Selden, that with such judicial power a testator's "moral duty" will vary according to the conscience of each individual judge, and as that is longer or narrower, so is the duty.

Selden is quoted (Pollock (ed), *Table Talk of John Selden* (1927), 43) as saying of equity:

Equity is a roguish thing. For law we have a measure . . . equity is according to the conscience of him that is Chancellor, and as that is longer or narrower, so is equity. 'Tis all as if they should make the standard for the measure a Chancellor's foot."

²⁸ Although most people want to pass on their assets to members of their family, a research study undertaken in New Zealand suggests that older people value their freedom of disposition and the right to decide who their beneficiaries will be: Thorns (1995) 5 Social Policy Journal of New Zealand 30, 38. A British study drew similar conclusions, see Finch and Masson, *Negotiating Family Responsibilities* (Tavistock/Routledge, London, 1993). A 1990 Australian survey showed domestic property (a dwelling, or land for a dwelling, or both) being somewhat more likely to pass through the female line than the male line, though the difference was small. Of the 294 main male householders and the 336 main female householders who lived in the 372 households sampled, 22 of the males (7.5%) and 37 of the females (11.0%)

The test also makes a second incorrect assumption: that New Zealand society is culturally and ethnically homogenous.²⁹ This assumption of homogeneity may make it difficult for will-makers and their families to have their different ethnic and cultural values recognised, respected and protected.³⁰ The consequences of the absence of any norm of this kind are that a deceased's perception of his or her moral duty is overruled by a particular judge's assessment of current social norms. This assessment is necessarily based on the judge's personal sense of the fitness of things, shaped by such factors as religious and cultural background, family history and attitudes, and personal experiences.

- 34 The law has become unclear in its purposes. Failure by the courts to articulate (beyond the obscure concept of moral duty) why precisely they are altering a will-maker's arrangements results in a situation where wills are varied according to the subjective values of the particular judge who chances to deal with the matter. This makes it difficult to assess whether the court's distribution is more commendable than the will-maker's. There are appreciable differences in the awards made to adult children. These differences mean that conscientious will-makers find it hard to know and comply with the requirements of the law, and bring the law into disrepute. Even though it is not clear now (if it ever was) that the reasons for court intervention are understood or widely accepted by the wide variety of communities and families in New Zealand, claims by adult children succeed in a very high percentage of cases.
- 35 A very high proportion (almost 90%) of those who commented on claims by adult children accepted the Commission's analysis that the present law is seriously deficient.³¹

received gifts or inheritances of domestic property. These were both inter-generational (eg, from parents) and within the same generation (eg, from a spouse or partner): Mullins, *Exploring the Line of Descent in the Intergenerational Transmission of Domestic Property* (Research Program of School of Social Sciences, Australian National University, Urban Research Program Working Paper No 55, September 1996).

²⁹ See pp24, paras 29–30 and appendix A.

³⁰ See, for example, *In the Estate of Y* (unreported, 16 May 1995, HC, Auckland, M 1732/88), where there were affidavits to the effect that the will-maker had disposed of his estate in accordance with Chinese custom and tradition, but the court overruled the will-maker's dispositions by reference to "the moral standards of the New Zealand community": pp24, paras 32–33.

³¹ Only 10.34% of those who commented supported the present law as not deficient or as deficient but still the best that could be done.

COMPENSATING CONTRIBUTORS FOR BENEFITS THEY HAVE CONFERRED

- 36 A contributor is any person who, during a deceased's lifetime, contributes a benefit (eg, money, property, work or services) to the deceased. Contributors may be part of a deceased's family, but need not be. Usually, however, they will have a close relationship with the deceased. Otherwise they are unlikely to wait until the deceased's death before they are paid for their services. People who contribute in this way should have a specific statutory claim.

General law

- 37 Under the general law³² contributors who want to be paid for the benefit must bring a claim under one of the following:
- *Contract* – Contributors may show that the deceased agreed orally or in writing that they would be rewarded by will and meant the agreement to have legal effect.
 - *Estoppel* – Contributors may show that a deceased encouraged them to believe or expect that they would receive an interest in the deceased's property, and they then provided a benefit to the will-maker in reliance on this expectation or belief.
 - *Restitution (quantum meruit and quantum valebat)* – Contributors may show that the deceased has been *unjustly enriched* because the deceased:
 - requested the benefit which the contributors provided, and did not pay for it; or
 - knew (or should reasonably have known) that the contributors provided the benefit expecting to be paid, if the deceased had a reasonable opportunity to reject the benefit and did not do so.
 - *Trusts* – Contributors may show that:
 - they meant to retain an interest in the property given as a benefit (under a *resulting trust*); or
 - they and the deceased acted in a way that shows that both meant to share property preserved or increased as a result of the benefit (under an *implied or inferred trust*); or
 - although there was no common intention, the deceased remained silent in circumstances where it is reasonable that contributors share in the property they contributed to (under a *constructive trust*).

³² See pp24, paras 291–298.

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

Statutory claim based on testamentary promises

- 39 The general law (a mosaic of statute law, common law, and equity) is overlaid by special statutory rules which provide additional grounds for a contribution claim. Under the Law Reform (Testamentary Promises) Act 1949 a deceased must pay the reasonable value of work or services to the person who provided them, if the deceased made a testamentary promise. To make a statutory claim contributors must show that the deceased promised to reward them by will for providing work or services. The promise need not be an enforceable contract under the general law.
- 40 There are a number of problems with the present statutory claim. Some of these problems go to basic policy.
- 41 It is a significant defect that the statutory claim can be made only by contributors who can show that they are "promisees". This may well be too limiting for a statutory code (although under the present law a general law claim can be brought in the alternative). Moreover, the effect of a promise may vary. Nowadays courts may find that a promise gives rise to a contractual, an estoppel or a restitutionary claim. This classification makes a difference to the remedies available. The statute obscures this difference.
- 42 There are also technical problems. Even where a promise grossly undervalues the services provided, the court can award no more than the amount specifically promised. Yet the converse does not apply – the court is not obliged to award the value of the promise, or to specifically enforce it, if an award of lesser value is "reasonable". The present law also requires that a promise be to reward a contributor personally. The contributor may have asked instead that his or her own family be rewarded, because "[t]here is a real sense in which provision for one's dependants [or nominees] can be a reward for oneself".³³ Even so, the present law does not permit the contributor to nominate who will get the benefit of the promise.

³³ Coote in Northey (ed), *A G Davis Essays in Law* (Butterworths, Wellington, 1965), 1; Property Law and Equity Reform Committee, *Working Paper on Reform of the Law Reform (Testamentary Promises) Act 1949* (circa 1974). For an example, see *McMillan v New Zealand Insurance Co* [1956] NZLR 353, 357–358.

- 43 Another problem is that the 1949 Act does not expressly prohibit recovery on claims where the contributor provided a benefit unlawfully or under an illegal agreement or arrangement.³⁴ The general law is less generous if a contractual or equitable claim involves illegality.
- 44 Despite these limitations and difficulties, contributors' claims are frequently brought under the 1949 Act. This is due in part to the courts' generous interpretation of the term "promise". But the interplay between statute law and the general law is complex and artificial.

EFFICIENT ESTATE ADMINISTRATION

- 45 Estate administration is more efficient if claims under the three (1963, 1955 and 1949) Acts can be heard in a single proceeding.³⁵ If all bases for adjusting succession are set out clearly in one Act the law should also be easier to find, understand and apply. Where clearer law does not prevent a dispute arising, it may limit the scope of a dispute, or encourage non-court resolution of that

³⁴ Courts in some cases have however implied a public policy prohibition on recovery like that in the general law of contract and in equity. See, for example, *Heathwaite v NZ Insurance Ltd* [1951] NZLR 6, where although a promise not to marry (compare Human Rights Act 1993 s 136) was not in breach of public policy, the court asserted that benefits conferred unlawfully or under an illegal arrangement would usually not be compensable. This implied prohibition is illustrated by a series of unreported cases brought under the Act by de facto partners. See, for example, *Birtwistle v Marshall* (unreported, 17 November 1969, SC, Auckland, A 87/69), 7, where Henry J said, rejecting the claim of the separated but not divorced deceased's de facto partner (herself a divorcee), that "nothing in the statute excludes the policy of the law in refusing its aid to promises founded on future illicit cohabitation". Later cases like *Wright v Slane* (unreported, 4 September 1978, SC, Auckland, A937/75) and *Chambers v Weston* (1982) 1 NZFLR 377 read down this prohibition, and for heterosexual partners see now: Property Law Act 1952 s 40A (inserted by the Property Law Amendment Act 1987 s 2); pp24, paras 140, 297.

³⁵ See currently High Court Rules (Judicature Act 1908, Second Schedule) 453–454, and District Court Rules (SR 1992/109) 446–447. See too pp24, paras 333–361. However, as Beck [1997] NZLJ 61, 61–62 says, claimants will continue to need to take proceedings in the High Court if in any case jurisdiction is required: to grant equitable relief under constructive trusts and specific performance of estate contracts; to grant administration or probate and to decide testamentary incapacity disputes; and (despite the District Courts Act 1947 s 34(2A), inserted by s 7 of the District Courts Amendment Act 1996) to make tracing orders under the Administration Act 1969 s 49.

dispute, often faster and less expensively than a court hearing. The draft Act can also improve the machinery in the present law by:

- making non-probate assets part of the property subject to claims;
 - dealing with attempts to avoid the impact of claims;
 - clarifying priorities between conflicting claims and between estate beneficiaries;
 - saying how social welfare benefits relate to rights to have an estate adjusted; and
 - allowing claimants, will-makers, administrators and lawyers to make binding agreements to settle claims before or after the death of a will-maker.
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3

Overview of the Succession (Adjustment) Act

- 46 **T**his chapter summarises our recommendations. It explains each briefly then provides an illustration of how the legislation the Commission recommends would work (para 92). The draft Act provisions and the commentary on them provide greater detail (see pages 35–170). In this chapter and in the commentary, to distinguish them from references to current provisions, references to the draft Act are given in full and in italics, eg, *Part 1, section 1, Schedule 1*.

HOW THE DRAFT ACT IS SET OUT

- 47 The Commission's recommendations and the draft Act are set out mainly according to the rights to claim of particular groups of relatives. In broad terms the Commission's recommendations and the draft Act provisions to implement them are grouped under these headings:
- widows and widowers (paras 52–55)
 - de facto partners (paras 56–68)
 - children (paras 69–71)
 - adult children (paras 72–77)
 - other relatives (paras 78–83)
 - contributors (paras 84–88), and
 - necessary procedural reforms (paras 89–91).
- 48 On balance our recommendations are more favourable to claimants than the present law in providing for widows' and widowers' claims. They are considerably more favourable than the present law governing claims made by de facto partners. On the other hand, they restrict claims made by will-makers' adult children and other relatives.
- 49 We also set out, in one set of statutory provisions, the rights of people whose actions have contributed to the will-maker's estate

(paras 36–44). These people may or may not be family members. Contributions may take the form of services, additions to the will-maker's assets, or actions which save the will-maker significant expense.

- 50 Two different types of claim are found in our recommendations:
- *property division* and *contribution claims*, where claimants seek the return of benefits they have conferred on the will-maker; and
 - *support claims*, where the will-maker had a special and immediate responsibility for claimants, who seek to be supported for their reasonable needs in life.
- 51 The draft Act does not apply to Māori when they succeed to Māori freehold land, Māori incorporation shares, or trust property under Te Ture Whenua Māori/Māori Land Act 1993 (see *section 4*, para C11).

OVERVIEW OF THE DRAFT ACT

Widows and widowers

- 52 Currently, if the will-maker does not leave his or her widow or widower enough of the estate, the surviving spouse may apply for an award under the Matrimonial Property Act 1963. Usually this award is based on the claimant's contributions to the couple's property. The law, unlike that which applies on divorce, includes no presumption of equal sharing. Widows or widowers may also apply for an award for maintenance and support under the Family Protection Act 1955. The size of each award is fixed by the court in its discretion.
- 53 Instead, we recommend that:

Widows and widowers may:

- apply for a property division based on the claimant's contribution to the marriage partnership (presumed to be equal in value to the will-maker's); and
- make a support claim to permit the claimant to enjoy a reasonable, independent standard of living, until the claimant can reasonably be expected to achieve an independent standard of living, having regard to the financial consequences of the marriage for the claimant. (See *Part 2*)

Property division

- 54 Our recommendation will make the law conform with well-accepted principles of matrimonial property between living spouses. In particular, the division we recommend:
- divides property equally, except where a case for unequal sharing is demonstrated;
 - brings into account property owned by both parties to the marriage;
 - assures a surviving spouse a share of capital at the end of the marriage; and
 - will be reasonably predictable in its operation, because when it departs from principles of equality it relies on established matrimonial property law.

Support claim

- 55 Our recommendation is based on a principle which will spell out when an award will be made, and if so, how much it will be. It allows the court to take account of differences both in economic circumstances and in the nature and consequences of each relationship.

De facto partners

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

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

- a property division, and
- a support claim, on the same basis as widows and widowers.

(See *Part 2*)

- 58 This recommendation:
- provides greater certainty and just resolutions of property division and support issues for the growing numbers of de facto partners in New Zealand;

- balances the freedom of individuals and fairness between de facto partners by making the consequences of a de facto relationship reasonably clear and allowing de facto partners freedom to make different arrangements;
- simplifies and rationalises the law, reconciling it with the law which applies to married people and allowing courts to address property division and support issues more clearly and consistently;
- reduces the ability of either partner or their estates to draw matters out and obtain an unduly favourable settlement by means of protracted and expensive litigation; and
- recognises that determining de facto partners' property division and support affects the position of partners' children.

59 The recommendation also complies with s 19 of the New Zealand Bill of Rights Act 1990 (see para 24).

Definition

60 The Commission recommends that property division and support claim provisions apply to de facto partners,³⁶ whether of the same or opposite sex. But what is a “de facto relationship”?

61 Various efforts have been made to define the term, many of which have been either too rigid to allow justice to be done in each case or have included expressions that are too subjective. Definitions by reference to the nature of the relationship are preferable. Statutes have occasionally used fixed criteria (like living together for a specified period, membership of the household at the time of death, or being maintained by the deceased – dependency – at the time of death). These have the potential to create arbitrary and anomalous distinctions between those protected and those unprotected, without making it significantly clearer the relationships to which the legislation is intended to apply.

62 In particular, proposed minimum time periods for a de facto relationship to have existed are misconceived. If the parties to a relationship have mixed their assets and incomes and committed themselves to the possibility of financial disadvantage as a result of the relationship, then the law should resolve their situation fairly, without regard to the time period involved.

63 Almost all the New Zealand legislation that applies to de facto partners does so by reference to the concept of legal marriage. The

³⁶ See draft Act *section 9(2)*, para C32, and pp24, paras 146–157.

wording “relationship in the nature of marriage” is most commonly used (17 statutes use the expression “in the nature of marriage”, even when the legislation includes same sex relationships, for example, the Domestic Violence Act 1995 s 2).³⁷ Courts and tribunals have discussed “relationships in the nature of marriage” in a number of cases.³⁸

- 64 No other form of words effectively describes how close the relationship must be, in terms of emotional and financial co-dependence. The Commission’s preliminary paper *Evidence Law: Privilege* (nzlc pp23, 1994) adopted the following definition:

A de facto partner is a person living in a relationship in the nature of marriage (including a relationship between two persons of the same sex).
(See section 9(2))

- 65 Drawing on case law and previous legislative attempts at a definition, the Commission suggested in its *Privilege* paper that the key factors relevant to whether a relationship was “marriage-like” included the living arrangements of the couple, their emotional and sexual relationship, and any pooling of financial resources. The Commission concluded that these factors were in

³⁷ The 17 Acts (and some of their sections) which use this expression are the: Accident Rehabilitation and Compensation Insurance Act 1992 s 3; Child Support Act 1991 s 2; Companies Act 1993 s 2; Customs and Excise Act 1996 s 96(a); Domestic Violence Act 1995 s 2; Education Act 1989 s 92; Electricity Act 1992 s 111(2)(e); Family Proceedings Act 1980 s 2; Holidays Act 1981 s 30A(8); Human Rights Act 1993 s 32; Income Tax Act 1994 s OB1; Legal Services Act 1991 s 2; Overseas Investment Act 1973 s 2A; Protection of Personal and Property Rights Act 1988 s 2; Residential Tenancies Act 1986 s 2; School Trustees Act 1989 s 2; and the Social Security Act 1964 ss 27A(1), 63.

³⁸ Most recently *Ruka v DSW* (1996) 14 FRNZ 622 (CA); discussed in McDonald, “A relationship in the nature of marriage” [1996] NZLJ 423; Dawkins, “Criminal Law: Battered Women” [1997] NZ Law Rev 50–56; *Director-General of Social Welfare v W* [1997] 2 NZLR 104.

The meaning of the words “in the nature of marriage” as used in the Social Security Act 1964 ss 27A(1) and 63 will not automatically be applied as well to provisions which, like section 9(2) of the draft Act (see para C31), serve different purposes. In *Ruka* the majority of the Court of Appeal, while not expressly approving of the outcome that the same words be accorded 17 different meanings, expressly mentioned this outcome, and stressed the importance in any case of the purpose for which the words are used. Considering in *Ruka* whether for the purposes of the Social Security Act 1964 a relationship was “in the nature of marriage”, the Court of Appeal

large part common sense. In the majority of cases, it should be readily apparent whether the relationship is covered. A list of factors relevant to determining whether a person is living in such a relationship is neither necessary nor desirable. The same applies in the law of succession.

Same-sex couples

- 66 The Commission accepts that the proposal to link same-sex couples with the concept of a “de facto relationship”, through the terms “in the nature of marriage”, may be controversial. This controversy is sometimes linked with the perception that same-sex couples are more likely to have temporary relationships with no long-term commitment. But the courts will take the temporary nature of the relationship into account in deciding whether it is in the nature of marriage. Courts will also take into account whether there has been commingling of property and whether any financial disadvantage has resulted from the relationship. This is unlikely to occur if the relationship is a temporary and uncommitted relationship (see paras 61–62).
- 67 Putting to one side the issue of long-term commitment, the issue is about descriptions and symbols. It raises a question about the

majority also asked two particular questions:

The first question was whether between the parties there was “*financial interdependence*”. As defined by the Court of Appeal in *Ruka*, this inquiry is clearly also *relevant* to the court’s inquiry under *section 9(2)*. *Ruka* may incline courts to go further and also consider it *essential* to any *section 9(2)* relationship “in the nature of marriage”. “Financial interdependence” remains unsettled in its precise meaning and emphasis, even under the Social Security Act 1964. But financial interdependence may simply reinforce the *section 9(2)* requirement that partners merged (or if their partners’ needs required they would have merged) their incomes and assets so that the draft Act should apply to untangle their finances by compelling the dead partner’s estate to divide property and pay support.

The second question was whether the parties had a *mental and emotional commitment* to the relationship for the foreseeable future. This matter would under *section 9(2)* be also *relevant* if not *essential*. It is the special intimacy of domestic partners that entitles them to a special property division entitlement and to claim support. It may be a vain hope that surviving partners will never also be battered partners. However, in the *section 9(2)* context, courts are unlikely to be called on by a dead and abusive partner’s estate to discount or disregard a mental commitment objectively discernible in the physical indicia of the relationship because the surviving partner was a battered woman who lacked capacity to leave that relationship. Even if made, an argument of this kind would seem unlikely to be accepted in the context of *section 9(2)*.

effects of acknowledging in a statute that the two types of relationships are comparable, and of the linking of gay and lesbian relationships with those in the nature of marriage. But in the Commission's view, considerations of simplicity and precision of drafting are decisive. We could perhaps devise a separate provision for same-sex couples, not linked explicitly with the concept of marriage. This would serve the same purpose without offending those people who object to the use of the term "marriage" in this context. But it would draw on exactly the same criteria as do the words "in the nature of marriage" (eg, companionship, property sharing, lawful intimacy, financial and other reliance, commitment, and so on). It would be difficult to capture in any other form of words the required intensity of the relationship. Parliament has accepted recently a very similar wording for use in a related context (Domestic Violence Act 1995 s 2).

- 68 Of those who commented on the definition proposed for de facto partners in the discussion paper, 69% supported it.

Children

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

- 70 We recommend a clear right to claim support in three cases:

Children may make a support claim only if they are:

- minors; or
- under 25 and undertaking educational or vocational training; or
- unable to earn a reasonable, independent livelihood because of a physical, intellectual or mental disability which occurred before the child reached 25. (See *Part 3*)

- 71 The Commission considers that separating out the claims of children who are likely to be dependent on the will-maker has these advantages:
- it is clear and specific;
 - it eliminates the confusion which exists in the present law;

- it complies with expectations held within the community and with the principles of support law (Child Support Act 1991 s 4);
- it complies with international obligations (International Covenant on Civil and Political Rights 1966 articles 23(4) and 24 and United Nations Convention on the Rights of the Child 1989 articles 18(1), 23, 27 and 28); and
- it limits children's claims so that more significant claims (eg, spouses, young children's, de facto partners' and contributors' claims) can be given full effect, and the less clear adult child's claim ranked lower.

Adult children

- 72 With two very limited exceptions (see para 77) the Commission recommends:

Adult, independent children should have a claim only in respect of valuable benefits they have conferred on a parent during the parent's lifetime. (See paras 84–88 and *Part 4*)

- 73 No doubt if adult independent children could make only contribution claims many parents would continue to make provision during their lives and under their wills for their children, and to treat their children equally, just as they do now. But this is what they would want to do. The real question is whether, if this is not what they want to do, courts should be empowered to override their wishes and to substitute for the will-maker's wishes the court's view of how the estate should be distributed.
- 74 As far as the Commission can determine from the sociological advice and the submissions it has received, there is no clear and uniform expectation that all New Zealanders must leave their property to their adult children either equally or at all. There would be little or no public support for a legal rule that would compel all or part of a parent's estate to be shared (in the absence of a partner) equally among adult children at the option of any adult child. We have referred already (see para 34) to the absence of any agreement about what precisely the content of a will-making parent's "moral duty" to an adult child might be. In the absence of agreement of this kind, judicial rewriting of wills is in the Commission's view not supportable. The view has been advanced that even so there is a point where the terms of a will are so patently capricious as to justify interference. But this argument employs an extreme case to support a logically untenable proposition.

- 75 Powers to provide for adult children that are as extensive and indeterminate as those in the present law would, if applied to the living, be judged rightly as unacceptable. No reason has been advanced why they should apply after a will-maker's death.
- 76 Finally, the corrosive effect on family relationships of claims by adult children should not be overlooked. There is also the delay that under the present law these claims can cause in the administration of estates and the uncertainty that the possibility of these claims can add to the process of will-making.
- 77 In dealing with human affairs there are times when logic must yield to compassion. A majority of Commissioners considers that provision should be made for claims other than contribution claims by adult children in two narrow sets of circumstances:

Adult, independent children should also be entitled to make claims:

- where they are genuinely in need and it is possible, without unfairness to those otherwise entitled to the estate of the deceased, to provide periodic payments sufficient to alleviate their need (the child would make a *needs claim* for a *needs award*); and
- where what is sought by the child is no more than a memento or keepsake of modest value (these *memento claims* would be disposed of swiftly and simply by a Disputes Tribunal).

(See sections 29–30)

Other relatives

- 78 Grandchildren, stepchildren and parents are currently permitted to make claims under the Family Protection Act 1955. The grandchild's claim is often used where a child is dead or irresponsible; the court passes part of the child's entitlement down to the child's children. There are restrictions on claiming in some cases. Stepchildren, for example, may claim only if they are currently being, or are legally entitled to be, supported by the will-maker.
- 79 We recommend that support claims should depend on establishing a direct responsibility between the will-maker and claimant. In particular:

A child who is not a child of a will-maker, but for whom the will-maker has assumed, in an enduring way, the responsibilities of a parent, may be permitted by the court to make a child's support claim. (See Part 3)

But no other relative should be able to make a claim.

- 80 Where the will-maker established an ongoing and nurturing relationship with a child and became responsible for that child, the will-maker's estate should continue to discharge that responsibility. The Commission suggests that this will achieve a proper balance between certainty and flexibility. Moreover the proposal relies on rules, already established under ss 2, 7 and 99 of the Child Support Act 1991, which apply to will-makers during lifetime.
- 81 If a will-maker chooses to assume a parent-like responsibility for meeting a minor child's needs, then the court will be able to make a support award for the child. The amount will be calculated in the same way as the support award proposed for minor and other children. Of course, only will-makers who were custodians (the sole or principal providers, or persons who shared substantially in the provision of a minor child's ongoing daily care) are likely to have assumed a parent-like responsibility to meet the needs of that child.
- 82 A will-maker should not be regarded as having assumed an enduring responsibility like that of a parent of a child, simply because he or she had a relationship in the nature of marriage with a parent of a child.
- 83 The Commission has not overlooked cases where property passes to the will-maker from the estate of a partner who has children from an earlier marriage. These children often fairly expect to succeed to their parent's property through the will-maker. We also recommend that the estate of a partner who dies first be able to apply for a property division against the surviving partner (in practice applications are most likely to be made against the survivor's estate). This recommendation provides additional protection for children of the will-maker's partner who are not children of the will-maker.

Contributors' claims

- 84 People may have contributed to the will-maker's estate, in various ways and at various times, during the will-maker's lifetime. Sometimes this is done under a contract, in which case it will have been paid for in the normal way. But often those close to a will-maker make no definite arrangements. Under present law, these people may claim under the Law Reform (Testamentary Promises) Act 1949, if the will-maker promised to reward them by will (see paras 36–38). Alternatively, there are various rights under the general law (see paras 39–44).
- 85 We recommend a statutory provision following the general principles of the common law. Broadly stated, it would provide that:

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

- an express *promise* to make provision for the claimant; or, where there is no such promise,
- the estate *retaining the benefit* of the services in circumstances *where it is unjust* for the estate to do so. (See Part 4)

- 86 The Commission considers that the recommendation:
- ensures that people who have conferred benefits on the will-maker without appropriate recompense will be able to make a claim;
 - includes cases where the will-maker has not made an explicit promise to reward the contributor, but where justice requires compensation;
 - sets out clear principles for determining the size of awards and when they will be made; and
 - in particular, ensures that contribution claims are dealt with separately from claims based on need and recognition of parental duties.
- 87 The Commission's recommendation also sets out limits on when claims should succeed. Awards cannot be made merely because:
- *Claimants have been promised or believe that they will receive something under the will when they have given nothing in return.* We do not propose any relaxation of the well-established rule that the courts do not assist people who have not given anything in return for the promises on which they rely.

- *Claimants have conferred the benefit making it clear at all times that they do not expect to receive any kind of reward.* The proposal is not a charter for claims by people who perform family and good-neighbourly services and later change their mind about not being paid. If benefits are represented as gratuitous, claimants should get what they consistently hold themselves out as wanting: nothing.
 - *Claimants have conferred a benefit where there is no express agreement and good reason to believe that the will-maker will not reward them for it.* Where, for example, the will-maker does not know that the claimant is performing services, the will-maker has no opportunity to reject them and therefore should not ordinarily be liable to pay for them. Similarly, where the will-maker makes it clear to the claimant that nothing will be paid for the services, it is then unjust for the claimant to seek payment later.
- 88 There will always be difficulties in finding out what the intentions of the parties are. They can only be ascertained by looking at the nature of the services and any discussions which have taken place between the parties. But even if there are no express arrangements, courts should be permitted to make an award if services are substantial and the parties have not determined that the services will go unrewarded. Their silence may be caused not by that determination, but by the closeness of the relationship and their unwillingness to spell out terms which people bargaining at arm's length would not hesitate to include.

Procedural reforms

- 89 We recommend provisions dealing with matters under two general headings.

Jurisdiction, awards and priorities

- 90 *Part 5* provides for matters including:
- which court should have jurisdiction to deal with claims or applications against an estate;
 - what is the "estate" against which awards can be made;
 - how to deal with attempts by the will-maker to avoid the impact of claims or applications against his or her estate;
 - priorities between conflicting claims;
 - priorities between estate beneficiaries;
 - orders for interest on awards; and
 - private international law: jurisdiction and conflicts.

Making and settling claims

- 91 *Part 6* concerns matters including:
- time limits for making claims; and
 - agreements to waive and settle claims or applications against an estate.

EXAMPLE OF HOW THE RECOMMENDATIONS WOULD WORK

- 92 This example is designed to show the effect of our recommendations:

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

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

When he died, the will-maker left an estate of \$239 000. Claims were brought by the de facto partner (then aged 76), the will-maker's daughter (then aged 50), and his son's four children. It was not alleged that any of the claimants were in poor financial circumstances.

- 93 Under the draft Act the claims would be dealt with in the following way. The de facto partner, without needing to prove the promise, would get one half of the property accumulated during the relationship. (It would be different if the will-maker and the de facto partner had intended some other sharing method.) The judge would need to look for property in the partner's own name. This might be drawn into the sharing regime, in which case she would have to give credit for it. As well as her property entitlement, she might receive a support award. That would give her an additional sum (probably as capital) from the will-maker's estate. She would receive an even larger amount if the court upheld the promise in the terms alleged.
- 94 The rest of the estate might go to the charity named in the will. Under our draft Act the adult daughter would not have a claim. In

cases like this where the daughter had little to do with the will-maker for many years, we consider that it is doubtful whether she should. The grandchildren would have no claim, because the grandfather had not accepted the responsibility of being their parent on an enduring basis while alive.

- 95 This outcome may be contrasted with what actually happened.³⁹ The judge reviewed the family relationships. He referred to the parties' very different perceptions of the will-maker (as shown in the affidavits) and the "strained and fractured relationships between the parties". He looked at the financial circumstances of the daughter and grandchildren, though he did not find any of them to be experiencing acute financial hardship.
- 96 Dealing first with the de facto partner's claim, he accepted that the promise had been made. He held that it meant that she should be well provided for, particularly in respect of accommodation. He rejected any extra or alternative claim for a beneficial interest in the estate by way of constructive trust. She was awarded \$95 000. Though her claim was successful, she was expected to bear all her own legal costs.
- 97 The daughter was awarded \$45 000 under the Family Protection Act 1955. Each of the grandchildren was awarded \$16 500 under that Act. The judge pointed out that the grandchildren were estranged from their father and could get no support from him, at a time when they were beginning to establish themselves and "would be assisted in achieving reasonable goals by a lump sum injection of funds".
- 98 This example shows that the Commission's proposals could make a considerable difference to the way in which the law of succession adjustment is applied. The Commission intends no criticism of the particular judgment, which was well within established patterns of decision. But it is useful to consider where that tradition has led.
- The de facto partner's claim had to depend, not on the clear merits of her relationship with the will-maker and the work she had done for him, but on the existence of the will-maker's informal promise, which was uncertain in its terms.
 - No enquiry needed to be made into the couple's affairs as a whole, even though the claimant had property in her own name which, perhaps in fairness, should have been brought into account.

³⁹ *Re B* (unreported, 9 August 1995, HC, Wellington, CP 228/93).

- The will-maker was obliged to leave a substantial sum to a daughter whom he had seen only twice in the previous 18 years.
 - To justify that result the court had to look into strained family relationships over a long period, and try to assess where responsibility might lie for the difficulties.
 - The will-maker was also obliged to leave a similar sum, in total, to support his four grandchildren even though he had not been under any obligation to support them in his lifetime, nor had he in fact done so.
- 99 A will-maker may well have to grapple with these issues. Whether the law should require the courts to do so, however, is doubtful. It does not seem helpful for the courts to revisit the will-maker's family relationships, unless the task is undertaken with a clearly defined objective, and the relevant principles are well articulated.
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DRAFT SUCCESSION (ADJUSTMENT) ACT

Public Act . . . of 199–
Royal assent: Day Month 199–
Comes into force: Day Month 199–

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The Parliament of New Zealand enacts the
Succession (Adjustment) Act 199–

PART 1
PRELIMINARY

1 Purposes

The principal purposes of this Act are

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

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

COMMENTARY

Section 1

- C1 The draft Act provides for five categories of claims against estates: property division entitlements, support claims, adult child's needs claims, memento claims, and contribution claims. It develops and replaces in one Act the present claims under
- the Matrimonial Property Act 1963 (preserved by the Matrimonial Property Act 1976 s 57(4)),
 - the Family Protection Act 1955, and
 - the Law Reform (Testamentary Promises) Act 1949.
- It also substantially codifies a variety of general law claims for remuneration of benefits conferred on will-makers during their lifetimes.
- C2 The draft Act extends the categories of claimants in two respects, the first an important one. Formerly only legally married people had a right to make a statutory claim. Now both married people and those living in de facto relationships will be able to make statutory claims for property division and support. The two groups are both referred to in the Act as **partners** (see *sections 9* and *10(2)–(3)* and paras C32 and C35). The second respect in which the Act extends the existing law is to introduce for children of a deceased person (as defined by *section 26*) a memento claim (see *section 30* and paras C112–C117).

2 Principles

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

Definitions: **benefit**, **de facto partner**, **estate**, **memento claim**, **needs award**, **needs claim**, **property division order**, **provision**, s 8; **partner**, ss 9, 10(3); **child of a deceased person**, ss 8, 26

Section 2

- C3 This section states the principles which apply to each category of estate claim.
- C4 *Subsection (2)* states the principles which apply to domestic partners' property division entitlements. The same principles apply to the division of married partners' property whether their relationship ends on separation or on death. This changes the present, broadly discretionary, approach to dividing spouses' property when their marriage ends on death (Matrimonial Property Act 1963). All claims will now be governed by the rules which apply to property division between spouses during their joint lifetimes (Matrimonial Property Act 1976). (See, however, the note to *Part 2* of the draft Act, paras C26–C30.) The Act presumes partners' contributions to their relationship to be of equal value, and this presumption is the usual basis for partners' property division.
- C5 *Subsection (3)* states the principles which apply to partners' support claims. The rights of both surviving spouses and children under the present legislation are based on a right to "adequate provision for their proper maintenance and support". No clear and principled approach to making awards is spelt out in that legislation (Family Protection Act 1955, Matrimonial Property Act 1963). Under the draft Act surviving partners whose resources are insufficient to permit them to maintain a reasonable, independent standard of living have a right to support from the will-maker's estate until they can reasonably be expected to maintain themselves, having regard to the financial consequences of their partnerships.
- C6 *Subsection (4)* provides that will-makers' children also have a right to support from the will-maker's estate if they are under 20, under 25 and undergoing education or training, or permanently disabled since youth.
- C7 *Subsection (5)* provides that will-makers' children who have no right to support from the will-maker's estate may make a needs claim if they require a needs award to be provided with the necessities of life.

(Section 2 commentary continues overleaf)

(Section 2 continued)

- C8 *Subsection (6)* states the principles which apply to contribution claims. People who conferred benefits on a living will-maker must under existing law show that the will-maker promised to remunerate them for those benefits by his or her will (Law Reform (Testamentary Promises) Act 1949). Alternatively or additionally, they may make one of many claims under the general law of contract or the law of restitution. Both the statute and the common law are now replaced by two claims based on (a) express agreement, and (b) unjust enrichment. These correspond broadly to the law of contract and restitution respectively. But they have been adapted to meet the needs of claims against an estate. In particular, it will be easier for carers of older and disabled people to bring claims than it is under the present law.
- C9 *Subsection (7)* provides that a child of a deceased person may claim a chattel from the property of the deceased that has a special significance for the child as a memento or keepsake.

3 Commencement

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

4 Application

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

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

5 Application to testate and intestate estates

Applications for property division orders, support awards, needs awards, memento orders, and contribution awards may be made under this Act against the estate of a deceased person whether or not the deceased person died leaving a valid will disposing of all or part of his or her estate.

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

Section 3

- C10 This section allows a period of 6 months for will-makers and potential claimants to become informed about and to consider how the Act affects them, so that, if they wish, they may make or alter their arrangements before the Act comes into force.

Section 4

- C11 *Subsection (1)* provides that claims may be made against will-makers' estates under the Act if the will-maker dies after the Act comes into force. The present law will continue to apply for those who die earlier. In the case of partners' claims, the present law will continue to apply where they separate before the Act comes into force, or where one of the partners dies before that time.
- C12 *Subsection (2)* provides further that property division claims may be made under the Act by administrators of will-makers' estates against will-makers' surviving partners (see *section 10(2)* and para C35).
- C13 *Subsection (3)* provides that the Act does not apply to interests in property currently defined and disposed of in accordance with Te Ture Whenua Māori/the Māori Land Act 1993.

Section 5

- C14 This section makes it clear that applications under the Act for awards and orders against the property of a deceased person may be made whether or not that deceased person left a will.

6 Act to be a code

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

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

Origin: *Matrimonial Property Act 1976* s 4

7 Act binds Crown

This Act binds the Crown.

Section 6

- C15 The Act will have effect in place of common law and equitable rules which apply to property disputes between partners, but will not affect the law that applies where a partner is acting as a trustee.

Section 7

- C16 The Act will bind the Crown. It will apply, for example, if a claim or application is made against property left to the Crown in a will: see *A New Interpretation Act* (nzlc r17, 1990), chapter IV.

8 Definitions

In this Act

administration means

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

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

award means a support award, a needs award, or a contribution award;

benefit

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

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

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

contribution claim means a claim made under section 31;

contributor means a person who during the lifetime of a deceased person provided a benefit to the deceased person or to another person at the request of the deceased person;

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

de facto partner has the meaning given in section 9;

Section 8 continues overleaf

Section 8

- C17 This section defines all terms used in more than one place in the Act. This commentary discusses the more important definitions.
- C18 **Administration** and **administrator** are defined to include all formal modes of administration by all possible administrators. Intestacies are also included in the legislation: see *section 5*, para C14.
- C19 **Benefit** is a term used in respect of contribution claims. It means a thing of significant value that a contributor has provided to the will-maker when alive and for which the contributor claims provision from the will-maker's estate. It excludes services that are no more than the natural and usual incidents or consequences of life within a family: *Re Welch* [1990] 3 NZLR 1, 7. A benefit may be of value because it has an objective value (that is, the contributor conferring it made the estate more valuable). Or it may be valuable because the deceased person regarded it as valuable, even though others would not (eg, companionship).
- C20 **Contributors** may make contribution claims. They are people who contributed a benefit to will-makers when the will-makers were alive.

(Section 8 commentary continues overleaf)

distribution includes a sale, letting, or other disposition or alienation pursuant to an option granted or directed or authorised to be granted by a will or by any instrument creating a trust in any case where the consideration for the sale, letting, or other disposition or alienation is less than the administrator or trustee might reasonably have been expected to require if the option had not been so granted or directed or authorised to be granted; and also includes a forgiveness or release of a debt or other liability or a release of any security for a debt or other liability which, by a will or any instrument creating a trust, is given or directed or authorised to be given for less than full valuable consideration;

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

homestead has the meaning given in section 13;

memento claim means a claim made under section 30;

memento order means an order made by a Disputes Tribunal in respect of a memento claim for a chattel made under section 30;

needs award means an award made by a court in respect of a needs claim made under section 29;

needs claim means a claim made under section 29;

non-probate assets has the meaning given in section 52;

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

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

partnership chattels, in relation to a partnership,

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

Section 8 continues overleaf

(Section 8 continued)

- C21 **Partnership chattels** are one of three categories of partnership property divided when a property division claim is made (the other two are the **partnership home** (see para C22 and *section 13(5)*, paras C41–C42) and **other partnership property**, *section 18(1)*, paras C53–C60). Partnership chattels are, broadly, items of personal property used in the home or for the partnership and grouped with the partnership home. They are usually (because there is a strong presumption that they will be) divided equally between the deceased person's estate and the surviving partner (*section 12*, paras C37–C40). Other partnership property is also presumptively divided equally, but the presumption of equal sharing is not so strong (*section 17*, paras C51–C52). **Separate property** is usually not divided (*sections 19 and 20*, paras C62–C71). The present law applying to claims against estates (Matrimonial Property Act 1963 ss 5 and 6) does not categorise partners' property in this way nor presume that courts divide it in any particular way. At present courts divide spouses' property as appears just. Courts must consider spouses' respective contributions to a matrimonial home, and may consider spouses' respective contributions to other disputed property.

(Section 8 commentary continues overleaf)

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

partnership property has the meaning given in section 18;

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

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

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

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

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

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

separate property has the meaning given in section 19;

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

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

Origin: *Administration Act 1969* ss 2 (administrator), 46 (distribution); *Law Reform (Testamentary Promises) Act 1949* s 2 (promise); *Matrimonial Property Act 1976* s 2 (homestead, partnership chattels, partnership home, personal debt, separate property)

(Section 8 continued)

- C22 A **partnership home** is the only or principal residence used by the deceased person and his or her surviving partner. Homes settled under the Joint Family Homes Act 1964 can also be partnership homes subject to property division claims (currently they are not subject to spouses' property claims if the spouses were cohabiting when either died: Matrimonial Property Act 1963 s 5(6)).
- C23 **Personal debts** is a term defined for use in respect of partners' property division entitlements. Personal debts are not usually deducted from the value of **partnership property** (see *section 23*, paras C78–C83). Personal debts are debts which do not fall within one of the expressly defined debts which will be deducted from partnership property.
- C24 **Promise** is a term defined for use in respect of contribution claims. Contributors who claim on the basis of the deceased person's promise of remuneration must show that the promise was express (*sections 31(1)(a)* and *33(1)*, paras C118 and C123–C125). This differs from the present law (Law Reform (Testamentary Promises) Act 1949 s 3(1)) under which courts can accept express *and* implied promises. Implied promises will be dealt with under the heading of unjust enrichment (*sections 31(1)(b)* and *35*, paras C118 and C129–C134).
- C25 **Remunerate** is also used in respect of contribution claims to refer to the provision the contributor actually receives in return for the benefit contributed. Unlike the present law (Law Reform (Testamentary Promises) Act 1949 s 3(1)), the draft Act includes as **provision**; anything given or promised to be given, in return for contributions. A promise of remuneration would include, for example, a promise to transfer property during the will-maker's lifetime, for example, in old age.

NOTE ON PART 2 OF THE DRAFT ACT

- C26 The form that *Part 2* of the draft Act ultimately takes will depend in large measure on the state of the law governing property division when proceedings are brought when both partners are still alive. The Minister of Justice has stated publicly that he has asked his Ministry to progress reform of the Matrimonial Property Act 1976 and also legislation governing the property of de facto couples.
- C27 We do not know what these reforms will be (though issues and possible reforms were foreshadowed by the report of a Working Group in 1988). As regards husbands and wives, therefore, the present draft is based on the present provisions of the Matrimonial Property Act 1976. Any changes in the principles governing property division would need to be reflected in this part of the Act, so that the situations before and after a person dies may be consistent.
- C28 The provisions dealing with married partners have been drafted in the present form to show how matrimonial property law provisions interrelate with estate claims. This has had the result that 16 provisions of *Part 2* of this draft Act have been taken (with necessary adaptation) from the Matrimonial Property Act 1976.
- C29 As regards our proposals for division of property between de facto partners, we recognise that, if they were implemented now without the enactment of corresponding provisions relating to living partners, there would be a considerable difference between the law which applies during the partners' lifetimes, and the law which applies after one of them dies. This may not be easy to justify, although there is something to be said for the view that the law should be more favourable to claimants against the estates of dead partners, than it is to claimants who are separated from a living partner. One reason in support of some distinction is that the deceased's needs have come to an end.
- C30 For the present, we assume that there will be some legislation in place governing property division during de facto partners' lifetimes when our legislation is implemented. What form it will take we do not know. The Commission's tentative view is that the relevant principles of matrimonial property law could readily be applied in the de facto situation, with minor modifications. We have prepared our draft Act accordingly, hoping that it will be useful in any public debate there may be on that issue.

PART 2
THE PROPERTY AND SUPPORT OF PARTNERS

Subpart 1 – Partners and their entitlements

9 Who is a partner?

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

Section 9

- C31 This Part deals with partnership property. For married couples, comparable rights exist under the Matrimonial Property Act 1976 during their joint lifetimes only (see s 5 of that Act). The provisions in this Part will apply where either partner dies. Either the surviving partner, or the estate of a partner who has died, will be able to apply for a property division (see *section 10(2)*).
- C32 *Section 9* defines a **partner** for the purposes of property division applications and support claims. A person's partner must at some time have been either that person's husband or wife or de facto partner. A de facto partnership is defined as "a relationship in the nature of marriage", and includes a relationship between two persons of the same sex (for similar definitions see the Matrimonial Property Bill 1975 cl 49, Electricity Act 1992 s 111(2)(e), and the Domestic Violence Act 1995 s 2).
- C33 At present when a relationship ends on death, only spouses may initiate statutory property divisions and make support claims (Matrimonial Property Act 1963 s 5, Family Protection Act 1955 s 3). De facto partners may make what the draft Act styles a "contribution" claim under the Law Reform (Testamentary Promises) Act 1949 or under the general law. When both de facto partners are living, they may make property claims under the general law, and may have more limited support claims under statute (Family Proceedings Act 1980 s 81).

10 Property and support applications by partners

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

Definitions: **administrator**, **court**, **estate**, **support claim**, s 8; **partner**, s 9

11 Election by partners

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

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

Section 10

- C34 *Subsection (1)* provides that partners may institute a property division, or make a support claim, or initiate a property division and make a support claim. The court cannot consider a partner's support claim without considering what division of partnership property the partner is or would be entitled to (*section 24(2)*, para C86). At present spouses may choose to bring any combination of property claims (Matrimonial Property Act 1963) and support claims (Family Protection Act 1955).
- C35 *Subsection (2)* provides that the administrator of the estate of a deceased partner may institute a property division against a surviving partner (or the estate of a partner who outlived the deceased partner). This is also permitted under the present law (Matrimonial Property Act 1963 s 5(7)). In practice, it may not be worthwhile for the administrator to bring property division proceedings during the survivor's lifetime. The claim is likely to be met by the survivor's claim for support. But on the survivor's death, the equalisation of estates may well be desirable, for example, to secure provision for the children from the previous marriage of the partner who dies first.

Section 11

- C36 The present law is unclear on how a partner's property claim should be affected by any property the surviving partner receives under the will-maker's will (Matrimonial Property Act 1963, *Re Mora* [1988] 1 NZLR 214). The draft Act does not compel surviving partners to institute a property division. But when the court has determined both the property entitlements and the support award (*section 10*) and dealt with claims by any other person (*section 66*, paras C225–C228), surviving partners must choose between taking either:
- what they receive from the deceased's estate – reduced as necessary to satisfy other valid claims against the estate (if any, *section 60*, paras C207–C211); or
 - the amount of the property division order the court must make in their favour.

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

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

- (1) A partner is entitled on a property division to be awarded an equal share of the partnership home and the partnership chattels.
- (2) If
 - (a) the partners or either of them have sold the partnership home with the intention of applying the proceeds of the sale wholly or in part towards the acquisition of another home as a partnership home; and
 - (b) that home has not been acquired; and
 - (c) not more than 2 years have elapsed since the date when those proceeds were received or became payable, whichever is the later,a partner is entitled on a property division to be awarded an equal share in those proceeds as if they were the partnership home.
- (3) If subsection (2) does not apply and either there is no partnership home or the partnership home is not owned by the partners or one of them, a partner is entitled on a property division to be awarded an equal share in such part of the partnership property as the court thinks just to compensate for the absence of an interest in the partnership home.
- (4) This section is subject to sections 13, 14, 15, 21 and 70.

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

Origin: *Matrimonial Property Act 1976* s 11

Section 12

- C37 This section sets out how courts on property division applications divide the partnership home or its equivalent, and also partnership chattels.
- C38 Under *subsection (1)* courts divide the partnership home and partnership chattels equally between the surviving partner and the deceased partner (or the estates of two deceased partners) unless one of the provisions in *subsection (4)* or *section 16* applies. In particular, these exceptions are:
- the partnership home was a homestead (*section 13*, paras C41–C44); or
 - the partnership was one of short duration (*section 14*, paras C45–C48); or
 - extraordinary circumstances make equal sharing repugnant to justice (*section 15*, para C49); or
 - each partner owned a home capable of becoming a partnership home when the relationship began (*section 16*, para C50); or
 - one partner's separate property has been sustained by the application of matrimonial property or the actions of the other partner, or one partner's separate property has been diminished by the deliberate actions of the other partner (*section 21*, para C72); or
 - the partners agreed in a fair manner on a different division of this partnership property (*section 70*, paras C235–C240).
- C39 *Subsections (2) and (3)* provide that where there is no partnership home, equivalent funds may be set aside and divided as the partnership home would have been. This applies
- where there is no partnership home, or
 - where the partnership home was not owned by one or both partners, or
 - where the partnership home was sold with the intention of applying the proceeds of the sale towards the acquisition of another home.
- C40 The present law which applies on the death of a spouse (Matrimonial Property Act 1963 ss 5 and 6) does not categorise spouses' property in this way nor does it presume that courts divide it in any particular way. Currently courts divide spouses' property as appears just. Courts must consider spouses' respective contributions to a matrimonial home, and may consider spouses' respective contributions to other disputed property.

13 Homesteads

- (1) If the partnership home is a homestead which is owned by the partners or either of them, section 12(1) does not apply but a partner is instead on a property division entitled to be awarded an equal share of a sum of money equal to the equity of the partners or either of them in the homestead.
- (2) A partner who does not have a beneficial interest in the land on which the homestead is situated is, until his or her share of that sum is paid or otherwise satisfied, to be taken to be beneficially interested in that land.
- (3) For the purposes of subsection (1), the value of the homestead is to be determined in accordance with an apportionment of the capital value of the land on which the homestead is situated. Such apportionment is to be made and the capital value is to be determined by the Valuer-General on the requisition of either partner as at the date of the making of the valuation.
- (4) Either partner may appeal to the High Court against any apportionment made or any value determined by the Valuer-General under this section.
- (5) In this section, **homestead** means a partnership home where the dwellinghouse that is the partnership home is situated on an unsubdivided part of land that is not used wholly or principally for the purposes of the household, but does not include a partnership home that is occupied
 - (a) under a licence to occupy within the meaning of Part VIIA of the *Land Transfer Act 1952*; or
 - (b) because of the ownership of a specified share of any estate or interest in the land on which the dwellinghouse that is the partnership home is situated and because of reciprocal agreements with the owners of the other shares; or
 - (c) in the case of a flat or town house which is part of a block of flats or town houses or is one of a number of flats or town houses situated on the same piece of land, under a lease or other arrangement under which the occupants of the flat or town house are entitled to exclusive possession of it;
- (6) This section is subject to sections 14, 15, 21 and 70.

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

Origin: *Matrimonial Property Act 1976* s 12

Section 13

- C41 **Homestead** is a term used to distinguish **partnership homes** from other unsubdivided land on which they are situated, such as farms or business properties. *Paragraphs (a)–(c) of subsection (5)* make clear that while landsharing schemes (like licences to occupy and tenancies in common with cross-leases or licences) do not count as homesteads, they may still be partnership homes.
- C42 When dividing partners' property, courts must separate partnership homes from other unsubdivided land where they are situated, such as farms or business properties. If the partnership home, whether owned by one or both partners, is a homestead, then the partners share equally in the equity of the partners or either of them in the homestead (unless any of *sections 14, 15, 21* or *70* apply: see para C38), but not necessarily in the rest of the land on which the homestead is situated.
- C43 *Subsection (2)* protects partners making property division claims by deeming them to have beneficial interests in the land until their shares of the equity of homesteads are paid.
- C44 *Subsections (3) and (4)* set out a process for deciding how much of the land on which the homestead is situated should be apportioned to the homestead and what the value of that apportioned land should be. The Valuer-General makes these decisions, which either partner may challenge by appeal to the High Court.

14 Partnerships of short duration

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

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

Origin: *Matrimonial Property Act 1976* s 13

15 Extraordinary circumstances

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

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

Origin: *Matrimonial Property Act 1976* s 14

Section 14

- C45 While the partnership home and the partnership chattels are normally divided equally between the partners (*sections 12 and 13, paras C37–C44*), this does not occur when the partners' relationship was one of short duration.
- C46 *Subsection (3)* defines a partnership of short duration as one where the partners have lived together in marriage or in a de facto relationship for a period of less than 3 years (or longer if the court considers it just having regard to all the circumstances). In calculating this (usually 3-year) period, the court may deduct periods where separated partners live together again for less than 3 months in an attempt at reconciliation.
- C47 *Subsection (1)* provides that if the partnership was one of short duration, then equal sharing of the partnership home (or equity in the homestead) and partnership chattels does not apply:
- if they were owned wholly or substantially by a partner when the relationship began; or
 - if one partner received them during the relationship by inheritance, under a trust or as a gift; or
 - where one partner's contribution to the relationship was clearly disproportionately greater than the other partner's contribution.
- C48 *Subsection (2)* provides that if equal sharing does not apply, then the partnership home (or equity in the homestead) and partnership chattels are divided in accordance with the partners' respective contributions to the partnership (*section 22, paras C73–C77*).

Section 15

- C49 Partnership homes (or equity in homesteads) and partnership chattels will not be shared equally if courts consider that extraordinary circumstances make equal sharing repugnant to justice. Courts divide this property instead according to the partners' respective contributions to the partnership (*section 22, paras C73–C77*).

16 Adjustments where each partner owned home when partnership began

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

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

Origin: *Matrimonial Property Act 1976* s 16

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

- (1) On a property division, a partner is entitled to be awarded an equal share in partnership property other than property to which section 12 or 13 applies unless that partner's contribution to the partnership has been clearly greater than that of the other partner.
- (2) If under subsection (1) a partner is not entitled to an equal share in partnership property, or any part of it, the share of that partner in the partnership property or in that part of it is to be determined in accordance with the contribution of that partner to the partnership.
- (3) This section is subject to sections 21, 22 and 70.

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

Origin: *Matrimonial Property Act 1976* s 15, compare *Matrimonial Property Act 1963* s 6

Section 16

- C50 Sometimes both partners owned homes when the partnership began. Either property could have become the partnership home, but only one was chosen. So, when the court divides the partnership property, only one partner's home (or the proceeds of it after it is sold) is included in this property for division. This section permits the court to adjust the sharing of partnership property so as to compensate for that imbalance.

Section 17

- C51 This section sets out how courts on property division claims divide the residual category of partnership property (*section 8*, paras C21–C22). For a definition of **partnership property** see *section 18(1)*, paras C53–C60. The method of division laid down in this section does not apply to
- the partnership home (or homestead), and
 - the partnership chattels
- which are divided under *section 12*, paras C37–C40. Separate property is not divided at all.
- C52 Under *subsection (1)*, courts will divide the residual partnership property equally between the surviving partner and the deceased partner (or the estates of two deceased partners) unless:
- under *subsection (2)* one partner's contribution to the relationship has been clearly greater than that of the other partner, in which case courts divide this property in accordance with the partners' respective contributions to the partnership (*section 22*, paras C73–C77); or
 - under *subsection (3)* one partner's separate property has been sustained by the application of matrimonial property or the actions of the other partner, or one partner's separate property has been diminished by the deliberate actions of the other partner (*section 21*, para C72); or
 - under *subsection (3)* the partners agreed fairly on a different division of this partnership property (*section 70*, paras C235–C240).

18 What is partnership property?

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

Section 18 continues overleaf

Section 18

- C53 *Subsection (1)* defines **partnership property**, which courts divide when partners apply for a property division. Partners' property will often be included for division under one or more paragraphs.
- C54 Under *paragraphs (1)(a)* and *(1)(b)* partnership property includes the **partnership home**, and the **partnership chattels**, both defined elsewhere in the Act: *section 8*, paras C21–C22.
- C55 *Paragraph (1)(c)* includes property owned jointly or in common or in equal shares by the partners.
- C56 Other partnership property is defined by *subsection (1)* by reference to the date the partners acquired it or the purpose for which it was acquired.
- C57 Under *paragraph (1)(d)* property either partner owned immediately before the partnership began, if acquired in contemplation of the partnership beginning and intended for the common use and benefit of the partners, is partnership property.
- C58 *Paragraph (1)(e)* defines partnership property to include property acquired by either partner after the partnership began (except property which is separate property under *sections 19* and *20*). Similarly, under *subparagraph (1)(f)* any property which either partner acquired for the partners' common use and benefit out of their own separate property after the partnership began, is partnership property. *Paragraph (1)(g)* includes any increase in value in any of the property described in *paragraphs (a)–(f)*.
- C59 *Paragraphs (1)(h)–(1)(j)* include as partnership property specified policies of assurance, policies of insurance and superannuation pensions, rights or benefits.
- C60 *Paragraphs (1)(k)–(1)(l)* permit partners to agree in a fair manner (*section 70*, paras C235–C240) that any other property may be partnership property. Under *paragraph (1)(l)* other provisions in the Act or other Acts may declare specified property to be partnership property.

(Section 18 commentary continues overleaf)

- (2) For the purposes of this Act, the value of any property to which an application for a property division relates is, subject to sections 13 and 70, to be its value as at the date of the hearing of that application by the court of first instance unless that court, or on an appeal under section 42 the High Court or the Court of Appeal or Her Majesty in Council, in the exercise of discretion otherwise decides.

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

Origin: *Matrimonial Property Act 1976* ss 2(2), 8

(Section 18 continued)

- C61 *Subsection (2)* provides that partnership property is usually to be valued as at the date of hearing of the application for the property division by the court of first instance. This provision should ensure that increases in the value of partnership property that accrue after the death of one or both partners, but before an application for division is first heard, are included in the property for division (compare, for contribution and support awards, *section 44*, paras C156–C157).

19 What is separate property?

- (1) Separate property consists of all property of a partner which is not partnership property.
- (2) Subject to subsection (6) and to sections 16 and 18(1)(f), all property acquired out of separate property, and the proceeds of any disposition of separate property, is separate property.
- (3) Subject to subsection (6), any increase in the value of separate property, and any income or gains derived from such property, is separate property unless the increase in value or the income or gains are attributable wholly or in part
 - (a) to actions of the other partner; or
 - (b) to the application of partnership property,in either of which events the increase in value or the income or gains are partnership property.
- (4) All property acquired by either partner while they are not living together as partners or after the death of a partner is separate property unless the court considers that it is just in the circumstances to treat such property or any part of it as partnership property.
- (5) Subject to any agreement made under section 21 of the *Matrimonial Property Act 1976* and to any agreement made under section 70 of this Act, all property acquired by either partner after an order of the court (other than an order under section 25(3) of that Act) has been made defining their respective interests in the partnership property, or dividing or providing for the division of that property, is separate property, except that where the partnership property has been divided on the bankruptcy of a partner
 - (a) the partnership home and any partnership chattels acquired after division may be partnership property; and
 - (b) any other property acquired by either partner after the discharge of that partner from bankruptcy may be partnership property.
- (6) Subject to section 20, any separate property which is or any proceeds of any disposition of, or any increase in the value of, or any income or gains derived from, separate property, which are, with the express or implied consent of the partner owning, receiving, or entitled to them, used for the acquisition or improvement of, or to increase the value of, or the amount of any interest of either partner in, any property referred to in section 18 is partnership property.

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

Origin: *Matrimonial Property Act 1976* s 9

Section 19

- C62 This section defines **separate property**, which courts do not divide on partners' property division claims.
- C63 *Subsection (1)* defines separate property negatively as all property of a partner which is not partnership property (*section 18(1)*, paras C53–C60).
- C64 *Subsection (2)* provides that separate property may become partnership property where:
- income or gains derived from separate property is used, with the express or implied consent of the spouse entitled to them, to acquire or improve partnership property: *subsection (6)*; or
 - separate property is used, after the partnership began, to acquire property for the common use and benefit of the spouses: *section 18(1)(f)*, para C58; or
 - the court adjusts the division of partnership property to compensate where both partners owned homes when the partnership began, and only one is included as partnership property when the partners' property is divided: *section 16*, para C50.
- C65 *Subsection (3)* provides that courts will regard as partnership property any increases in the value of separate property which are attributable to the actions of the other partner or the application of partnership property.
- C66 *Subsection (4)* provides that property either partner acquires, while the partners are not living together as partners or after the death of a partner, will be separate property unless the court considers it just in the circumstances to treat it as partnership property.
- C67 *Subsection (5)* deals with any property either partner acquires after the court has made an order for the division of partnership property. It must be separate property unless:
- the parties fairly agreed otherwise under the Matrimonial Property Act 1976; or
 - the parties fairly agreed otherwise under *section 70* of the draft Act (paras C235–C240); or
 - the partnership property was divided on the bankruptcy of a partner under the Matrimonial Property Act 1976 and
 - a partnership home and partnership chattels are acquired after the division, and
 - other property is acquired after the discharge of that partner from bankruptcy and that property, according to the principles set out in *section 18*, is partnership property.

20 Property acquired by succession, survivorship, trust or gift

- (1) Property that is
- (a) acquired by succession or by survivorship or as a beneficiary under a trust or by gift from a third person; or
 - (b) the proceeds of a disposition of property to which paragraph (a) applies; or
 - (c) acquired out of property to which paragraph (a) applies, is not partnership property unless, with the express or implied consent of the partner who received it, the property or the proceeds of any disposition of it have been so intermingled with other partnership property that it is unreasonable or impracticable to regard that property or those proceeds as being separate property.
- (2) Property acquired by gift from the other partner is not partnership property unless the gift is used for the benefit of both partners.
- (3) Notwithstanding subsections (1) and (2) and section 19(4), both the partnership home and the partnership chattels are partnership property unless designated separate property by an agreement made in accordance with section 21 of the *Matrimonial Property Act 1976* or section 70 of this Act.

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

Origin: *Matrimonial Property Act 1976* s 10

21 Sustenance or diminution of separate property

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

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

Origin: *Matrimonial Property Act 1976* s 17

Section 20

- C68 This section further defines **separate property**, which courts do not divide on partners' property division claims.
- C69 *Subsection (1)* provides that property acquired by inheritance, under a trust or by gift from a third person (or the proceeds of that property or property acquired with them) is separate property. An exception is made if, with the implied or express consent of the partner who received it, the property is so intermingled with partnership property that it is unreasonable or impracticable to regard it as separate property.
- C70 *Subsection (2)* provides that property one partner acquires by gift from the other partner is partnership property only if used for the benefit of both partners.
- C71 *Subsection (3)* provides that the partnership home and partnership chattels are partnership property, even if acquired:
- by inheritance, under a trust or by gift from a third party (*section 19(1)*, para C63); or
 - by gift from the other partner (*section 19(2)*, para C64); or
 - when the partners were not living together as partners or after the death of a partner (*section 19(4)*, para C66);
- unless the partners fairly agreed otherwise under the Matrimonial Property Act 1976 s 21 or *section 70* (paras C235–C240) of this Act.

Section 21

- C72 This section deals with actions of a partner which increase or diminish the partners' separate property. Here exceptions are made to the general principles of division based on equal sharing or contribution. The exceptions apply to all partnership property, including the partnership home and chattels:
- Under *subsection (1)*, where one partner's separate property has been sustained by the application of partnership property or the actions of the other partner, the other party's share of the matrimonial property may be increased.
 - Under *subsection (2)*, where one partner's separate property has been materially diminished in value by the other partner's deliberate actions, the other party's share of the matrimonial property may be decreased.

22 Contribution of partners

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

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

Origin: *Matrimonial Property Act 1976* s 18

Section 22

- C73 This section defines partners' contributions to a partnership for the purposes of partners' property division applications.
- C74 The present law for property division (when a marriage ends on the death of a spouse) requires courts to divide the spouses' property "as appears just": Matrimonial Property Act 1963 s 5. Courts must consider spouses' respective contributions to a matrimonial home, and may consider spouses' respective contributions to other disputed property: Matrimonial Property Act 1963 s 6(1)–(1A). Courts may consider spouses' contributions whether in the form of "money, payments, services, prudent management, or otherwise howsoever". Courts may make orders even though spouses make no contributions in the form of money payments and their other forms of contribution are of a "usual and not extraordinary character": *Haldane v Haldane* [1976] 2 NZLR 715, 726–727.
- C75 The draft Act instead follows the present law for property division when marriages end on separation: Matrimonial Property Act 1976 s 18; Angelo and Atkin (1977) 7 NZULR 237, 251. Under *subsection (1)* courts must consider partners' respective contributions to the partnership, which need not be monetary in form nor directly related to acquiring, preserving or improving particular property.
- C76 Under *subsection (2)* courts must not presume monetary contributions to be more valuable than non-monetary contributions.
- C77 Under *subsection (3)* courts may consider partners' misconduct in determining partners' respective contributions to partnerships, and the appropriate property division award to make, only if that misconduct
- was gross and palpable, and
 - significantly affected the extent or value of partnership property, but not otherwise.

23 Subtraction of debts from partnership or separate property

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

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

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

Section 23

- C78 Parties to a domestic relationship will incur (separately or together) a variety of debts which may be unpaid when one of them dies. It will make a significant difference to the division whether those debts are charged to one or both partners. This section sets out whether courts on property division claims should deduct particular debts from either:
- partnership property (which courts divide between surviving partners and deceased partners' estates); or
 - separate property (which courts do not usually divide).
- C79 Debts which are seen as "personal" to a partner should generally be charged to that partner's separate property. **Personal debts** are defined in *section 8* (see para C23). *Subsection (1)* provides that courts will deduct from partnership property
- under *paragraph (a)*, any joint debts of the partners (whether secured or unsecured), and
 - under *paragraph (b)* (as regards property owned by a debtor partner), any personal debts which exceed the value of the debtor's separate property.
- C80 *Section 23(1)(b)* has important practical effects as regards any particular property owned legally by one of the partners. Creditors of that owner will take priority over the claims of the other partner, if the debtor's separate property is insufficient to meet the debts (see *sections 56–57*, paras C192–C199). The other partner can claim priority only in respect of partnership property which is held in that partner's name.
- C81 By contrast the present law which applies on the death of a partner does not classify spouses' debts as joint or personal nor deduct them from disputed property in a similar way. Secured creditors' rights are unaffected where the court makes an order, and spouses' claims are sometimes accorded the same priority as creditors' claims: Matrimonial Property Act 1963 s 8; *Re Madden* (1993) 11 FRNZ 45.
- C82 *Subsection (2)* permits courts, when one partner's personal debts have been paid or satisfied out of partnership property, to
- increase the other partner's division of partnership property proportionately, or
 - include in the partnership property assets which form part of the other partner's separate property, or
 - have the other partner pay compensation out of his or her separate property.
- C83 The subsection is of little assistance to the partner who is not the debtor, if the debtor partner is insolvent.

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

- (1) A partner of a deceased person who was either married to the deceased at the time of his or her death, or was living in a relationship in the nature of marriage with the deceased at the time of his or her death, may make a support claim against the estate of the deceased if the surviving partner does not have sufficient resources to enable him or her to maintain a reasonable, independent standard of living.
- (2) An assessment under subsection (1) of whether a partner has sufficient resources must take into account any property division order made in favour of the partner or to which that partner is entitled.

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

Section 24

- C84 This section sets out the requirements for surviving partners' support claims.
- C85 To make a support claim, *subsection (1)* requires surviving partners to show that they have insufficient resources to maintain a reasonable, independent standard of living. At present, the law of support requires widows and widowers to show that they have not received "adequate provision for their proper maintenance and support": Family Protection Act 1955 s 3. Instead the draft Act broadly follows the present spousal support rules for when a marriage ends on dissolution of marriage during spouses' joint lifetimes: Family Proceedings Act 1980 s 64.
- C86 Under *subsection (2)* survivors whose resources are insufficient to maintain a reasonable, independent standard of living are treated by the court as if, before making a support claim, they applied for and received a property division to enhance their financial resources. Surviving partners cannot make a support claim without resorting first to their divisions of partnership property.

25 Assessment of support award

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

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

Section 25

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

PART 3
SUPPORT, NEEDS AND MEMENTO CLAIMS
BY CHILDREN OF A DECEASED PERSON

26 Who is a child of a deceased person?

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

Definitions: *de facto partner*, s 9

Origin: *Child Support Act 1991* s 99

Section 26

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

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

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

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

Definitions: **child of a deceased person**, **support claim**, ss 8, 26

28 Assessment of child's support award

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

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

Origin: *Family Protection Act 1955* s 13

Section 27

- C99 This section sets out the basic rules governing support. A claim may be made only if the child is:
- under 20; or
 - under 25 and still being educated or trained; or
 - unable to earn a reasonable, independent living because of disability arising before the child reached 25.
- When making an award, the court cannot fix an amount which would take support beyond the age limits set out above, or (in the case of disabled children) beyond the time when the child might be expected to earn an independent living.
- C100 For the form an award might take, see *section 45* (lump sum or periodic payments, paras C158–C161) and *section 50* (establishment of trust fund, paras C168–C172).
- C101 Under the present law, the court has much more extensive powers, which are not limited by reference to the age or the means of the will-maker's children: Family Protection Act 1955. It has been the basis for substantial awards of capital to adult children who have obtained their independence. In many cases these are mature people who are approaching retirement.
- C102 The Commission has included no provision that would continue courts' current powers under the Family Protection Act 1955 to make awards in favour of adult children, but see *sections 29–30*, paras C106–C117.

Section 28

- C103 *Subsection (1)* requires a reasonable standard of support, covering maintenance, education and assistance to achieve independence. The court may not award more than is reasonably necessary to achieve that standard: *subsection (2)*. The criteria the court is to take into account are set out in *subsection (3)*.
- C104 *Subsection (4)* provides that the court is not to take into account means-tested social welfare payments in making an award. The will-maker must support the child in full, and not just "top-up" the amounts payable by the Department of Social Welfare. That Department remains a provider of last resort.
- C105 An exception is made for children over 25. They will be means-tested on what they in fact receive from the estate, but will not be expected to make claims against a parent's estate in order to relieve the state from the cost of support. This is a change from the existing law: Family Protection Act 1955 s 13; *Re B* (unreported, 16 August 1995, DC, Auckland, FP 004/1343/92).

29 Which adult children of a deceased person can make a needs claim?

- (1) A child of a deceased person may make a needs claim against the estate of the deceased if he or she
 - (a) is an adult; and
 - (b) is not entitled to make a support claim against the estate of the deceased; and
 - (c) requires a needs award in order to be provided with the necessities of life.
- (2) A needs award
 - (a) can be made only against the residue of the estate of the deceased person; and
 - (b) must not exceed the amount that is required to provide the child with the necessities of life; and
 - (c) despite sections 43 and 45, is to be an award for periodic payments, unless the child and all other persons affected by the award agree to a lump sum award.
- (3) When deciding whether a child requires a needs award in order to be provided with the necessities of life, the court must have regard to any other resources available, or likely to become available, to the child including:
 - (a) any benefit to which the child or his or her spouse or de facto partner is entitled under Part I of the *Social Security Act 1964*; or
 - (b) any income or assets of a spouse or de facto partner of the child.
- (4) The court may refuse to make a needs award, or may make a needs award of a lesser amount than it might otherwise have made, because of
 - (a) the extent to which the needs of the child are the result of the child's own acts or omissions; or
 - (b) the effect that the making of a needs award would have on the speedy and efficient administration of the estate of the deceased person; or
 - (c) any other matters the court considers relevant.
- (5) A child whose needs award is discharged under section 51 is not entitled to make a further needs claim.
- (6) In subsection (2) **residue of the estate** excludes
 - (a) non-probate assets that have been called in under section 52; and
 - (b) property the subject of prior transactions that has been called in under section 54; and
 - (c) assets that are necessary to satisfy fully property division orders, contribution awards, and support awards.

Definitions: **child of a deceased person**, **contribution award**, **de facto partner**, **needs award**, **needs claim**, **property division order**, **support award**, **support claim**, s 8; **non-probate assets**, s 52(2).

Section 29

- C106 A child of a deceased person (with the extended meaning *section 26* gives to these terms) may make a needs claim if he or she – *subsection (1)*:
- is an adult,
 - is not entitled to make a support claim, and
 - requires a needs award to be provided with the necessities of life.
- C107 A needs award – *subsection (2)*:
- can be made only against the residue of the estate of the deceased person,
 - cannot exceed what is required to provide the child with the necessities of life, and
 - must take the form of periodic payments unless the child and all other affected parties agree otherwise.
- C108 A court deciding whether a child requires a needs award in order to be provided with the necessities of life must (*subsection (3)*) consider the resources that are (or are likely to become) available to the child, including any welfare benefit to which the child is entitled, or the income (including any welfare benefit entitlement) or assets of a spouse or de facto partner of the child.
- C109 A court may refuse a needs award, or reduce a needs award, because of – *subsection (4)*:
- the extent to which the needs of the child are the result of the child's own acts or omissions; or
 - the effect that the making of a needs award would have on the speedy and efficient administration of the estate; or
 - any other matters the court considers relevant.
- C110 A child whose needs award is discharged cannot make a further needs claim: *subsection (5)*.
- C111 *Subsection (6)* defines **residue of the estate** by excluding the property specified.

30 Memento claim

- (1) A child of a deceased person may make a memento claim against the estate of the deceased for a chattel that has special significance to the child as a memento or keepsake.
- (2) Despite section 41, a memento claim is to be lodged in a Disputes Tribunal established under the *Disputes Tribunals Act 1988* and a Disputes Tribunal may order that the ownership of the chattel vest in the claimant.
- (3) Part 6 does not apply to a memento claim.
- (4) The respondent in a memento claim is the person who would be entitled to the chattel under the will or on the intestacy of the deceased person.
- (5) If the deceased person is survived by a partner, the Disputes Tribunal may order that the chattel be retained in the possession of that partner during his or her lifetime before passing to the child of the deceased person.
- (6) A Disputes Tribunal cannot make an order under this section if the monetary value of the chattel is
 - (a) greater than the monetary value specified in section 10(3) of the *Disputes Tribunals Act 1988*; or
 - (b) so great that an order vesting the ownership of the chattel in the child of the deceased person would unjustly favour that child at the expense of the person who would otherwise be entitled to the chattel under the will or on the intestacy of the deceased.

Definitions: **child of a deceased person**, memento claim, memento order, s 8; **partner**, ss 9, 10(3)

Section 30

- C112 A child of a deceased person (with the extended meaning *section 26* gives to those terms) may make a memento claim against the estate of the deceased for a chattel that has special significance to the child as a memento or keepsake (*subsection (1)*).
- C113 A memento claim is to be lodged with a Disputes Tribunal established under the Disputes Tribunals Act 1988; *Part 6* of the draft Act is not to apply to a memento claim (*subsections (2) and (3)*).
- C114 A Disputes Tribunal may order that the ownership of the chattel vest in the claimant (*subsection (2)*).
- C115 The respondent to a memento claim is the person who, under the will or on the intestacy of the deceased, would be entitled to the chattel (*subsection (4)*).
- C116 A Disputes Tribunal may order that a chattel remain in the possession of a surviving partner of the deceased and pass to a child only on the partner's death (*subsection (5)*).
- C117 A Disputes Tribunal cannot make a memento order if the monetary value of the chattel is:
- greater than the "as of right" monetary limit on the jurisdiction of Disputes Tribunals provided for in the Disputes Tribunals Act 1988 s 10(3); or
 - such that an order would unjustly favour the child at the expense of the person who would be entitled to the chattel under the will or on the intestacy of the deceased (*subsection (6)*).

PART 4
CLAIMS BY CONTRIBUTORS

31 Contribution claims

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

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

Section 31

- C118 There are two broad grounds on which claims will be able to be made for contributions to the will-maker or to the will-maker's estate (*subsection (1)*):
- The fact that the will-maker expressly promised to make provision for the contributor (see *section 33*).
 - The fact that the will-maker's estate has been unjustly enriched as a result of the benefit conferred by the contributor. The concept of unjust enrichment is already well known in the law, and is further refined here by the provisions of *section 35*.
- C119 No claim may be made if the contributor has already been fully remunerated (*subsection (2)*). A claim does not die with the death of the contributor, but may be made by the contributor's administrator for the benefit of the contributor's own estate (*subsection (3)*).
- C120 This Part of the Act does not greatly change existing law. However, the present law is complex and is derived from a variety of legal sources. Part of it is found in the Law Reform (Testamentary Promises) Act 1949, which applies where there is an express or implied promise to leave property by will, made in return for services. Another part derives from the common law actions for *quantum meruit* and *quantum valebat*. Yet another part is equitable, based on the doctrines of estoppel and constructive trust. More recently, these general law doctrines have been grouped together as part of the law of restitution. But they remain separate sets of rules, whose precise definition is still subject to debate.
- C121 This complex set of laws is replaced by the two principles referred to in *subsection (1)*.

32 Limitation of contribution claims by partners

A person cannot make a contribution claim in respect of any benefit provided to a partner of that person if the benefit

- (a) has been taken into account in a property division under the *Matrimonial Property Act 1976* or under the law applying to the division of property of de facto partners during their joint lifetime; or
- (b) has been or could be taken into account in any property division under this Act.

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

33 Contribution claim based on express promise

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

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

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

Section 32

C122 This section sets out the relationship between the contribution claim and the property division claim which is available to domestic partners. Generally the process of property division takes precedence. That is to say, any contribution made to a partnership by one of the partners will be taken into account in the course of the property division, and not otherwise. Contribution claims cannot be made unless they are independent of the partnership (eg, for benefits provided after the partners have divorced, and their property has been divided).

Section 33

C123 The essential requirements of the claim based on a promise are that:

- the contributor provided a benefit during the will-maker's lifetime (see the definition of **benefit**, *section 8*, para C19); and
- the will-maker expressly promised to make provision for the contributor, either by will or otherwise during the will-maker's lifetime.

C124 These provisions are wider than those of the present Law Reform (Testamentary Promises) Act 1949. First, the concept of "benefit" is probably more general than the concept of "work or services" used in that Act (though those words have been generously construed by the courts). Second, these provisions cover any form of promised provision (eg, by way of gift or transfer at an undervalue during the will-maker's lifetime), whereas the 1949 Act is limited to promises to make testamentary provision. However, the limitations of the 1949 Act are for the most part made up by principles of general law.

C125 In one respect *section 33* is narrower than the 1949 legislation. It does not apply to implied promises. These are promises gathered from the circumstances (eg, the will-maker may show the contributor the terms of a will, without actually saying that a provision will continue in force until the will-maker's death; or may give the contributor the idea that he or she "will be looked after", no specific promise being made). Implied promises are dealt with instead by *section 35*.

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

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

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

Origin: *Contracts (Privity) Act 1982 s 4*

Section 34

- C126 The purpose of this section is to deal with express promises to provide for someone other than the contributor. For example, a neighbouring farmer may look after the will-maker's stock for a substantial period of time, on the understanding that the will-maker will in due course transfer certain paddocks to the farmer's son. In general, contractual promises to benefit a third party, such as the son, can be sued on by that third party: Contracts (Privity) Act 1982. The section follows that principle.
- C127 *Subsection (1)* sets out the main condition under which third parties may enforce the promise. They must be designated in some way (even if only by reference to a particular class of people: eg, "my sons"). They may then make a claim based on the promise in the same way as if they were the contributor (*subsection (2)*). But they cannot do so unless the promise is intended to create a benefit which is enforceable by them (*subsection (3)*).
- C128 Various issues can arise where defences against liability (eg, the set-off of another debt owed by the contributor) would be available against the contributor, or where the contributor subsequently agrees with the will-maker to vary or discharge the contract. Are third party beneficiaries bound by such defences or variations? In general they are, but in some circumstances they ought to be able to enforce the original contract. These have been fully worked out in the provisions of the Contracts (Privity) Act 1982. *Subsection (4)* and *Schedule 1* adapt these provisions to contribution claims based on express promises.

35 Contribution claim based on unjust retention of benefit

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

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

Section 35

- C129 This section defines the circumstances in which it is “unjust” for the will-maker or the will-maker’s estate to retain a benefit which has been conferred by the contributor, without making appropriate remuneration.
- C130 Under *subsection (1)*, the basic elements of the claim are that:
- the contributor provided a benefit during the lifetime of the will-maker; and
 - the will-maker either knew it was being provided, or else was not sufficiently competent to know of it; and
 - it is just that provision be made for the contributor.
- C131 These elements are qualified in various ways. The term **benefit** is defined so as to exclude services provided without significant expenditure of time, effort or money (*section 8*, para C19). Even where it is a significant benefit, the contributor will not succeed if the benefit was conferred on the understanding that nothing is to be paid for it, or if the contributor intends the benefit as a gift (*subsection (2)*).
- C132 The contributor must then establish that the claim is “just”. This is a matter for the court to decide. But there are three situations in which, according to *subsection (3)*, the court may find the claim is just, without further inquiry:
- the contributor hopes for or expects a provision, and the will-maker knows of that hope (eg, the daughter who is a contributor frequently refers to the fact that her mother had done the same for her grandfather, and her mother had received something under the grandfather’s will); or
 - the contributor has a strong moral or social obligation to confer the benefit (eg, an unmarried daughter living in the same town as her aged parent feels that both the parent and her brothers and sisters expect her to look after the parent); or
 - the will-maker needs to be provided with the benefit, and no-one else might reasonably be expected to provide it (eg, a person in an advanced state of dementia is placed in a rest-home, and her brother – her sole close relative – cleans up her house and arranges to sell it, meets her expenses until the house is sold, and generally looks after her welfare during her last illness).

(Section 35 commentary continues overleaf)

(Section 35 continued)

- C133 If none of those three criteria are met, the court may still look to the particular circumstances of the case to find a justification for a contribution award (*subsection (3)(d)*).
- C134 The meaning of the terms retained and retention is important for those contribution claims where the claimant alleges that a benefit has been conferred on the will-maker and it is unjust for the estate to retain that benefit. It will not be necessary for the claimant to point to any particular asset the estate still owns, or any particular way in which the estate remains the richer as a result of that benefit. Continuing enrichment will be presumed unless the estate can show that the circumstances of the deceased or the deceased's estate have so changed since the benefit was provided, that it is inequitable for the estate to be made to pay for the benefit (*subsection (4)*). This is a recognised method of dealing with the question used as well in other New Zealand statutes: eg, Administration Act 1969, ss 49–51; Insolvency Act 1967 s 58 (see *A New Property Law Act* (nzlc r29, 1994), 76, 297–299).

36 Assessment of contribution award

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

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

37 Illegal benefits

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

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

Origin: *Illegal Contracts Act 1970* ss 7(2)–(3)

Section 36

- C135 This section sets out the normal approach to fixing the amount of a contribution award. If there is an express promise, the amount awarded will be the value of the thing promised (*subsection (1)*). The promised provision may be worth more or less than the benefit given by the contributor. But if there is no express promise, the amount awarded will be the value of the benefit conferred (*subsection (2)*). These amounts can be varied, by the court having regard to the criteria set out in *subsection (3)*.
- C136 Under *subsection (4)* the award may take the form of an order to pay a specified sum of money, or else an order that a particular item of property be transferred to the contributor.

Section 37

- C137 If arrangements are unlawful, the courts have in the past refused to give the parties who have entered into them any relief under the common law at all. In the case of illegal contracts, however, courts are now empowered by the Illegal Contracts Act 1970 to validate the contract (if appropriate), or to make orders by way of restitution or compensation. It is not at present possible to apply these provisions to all claims against an estate. While some contribution claims are based on contracts, others are not. The purpose of this section is to extend the remedial provisions of the Illegal Contracts Act 1970 to all arrangements which are the subject of contribution claims.

38 Contractual claims by contributors

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

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

Section 38

- C138 The purpose of this section is to ensure that all contribution claims are dealt with in accordance with appropriate procedures. Contributors will in many cases be family members and others with a close personal association with the will-maker. If they claim a sizeable amount from the estate, it is especially important to treat the matter as a family one. Other members of the family should be drawn into discussions; mediation or other non-court resolution of the matter should be encouraged; and the claim should be understood in the context of the general family background.
- C139 As has already been pointed out (paras 37–38), some contribution claims relate to agreements which could be enforced as contracts. But these are not like the great majority of contractual claims against the estate. Most ordinary creditors will not accept arrangements under which they are unlikely to be paid until the will-maker dies. Of course, when the will-maker dies some current commercial liabilities need to be met. This section does not apply to them (*subsection (3)*).
- C140 With respect to contribution claims generally, however, the court will be able to order that any contractual aspects be dealt with in accordance with the procedures under the Act (*subsection (1)*). The claimant may be asked to institute a contribution claim. If the contractual claim has been brought in the District Court, or in the High Court, it may be transferred to the Family Court (*subsection (2)*).
- C141 It will be for the administrators, in the first instance, to decide whether to treat the claim as an ordinary contractual one and pay it (*subsection (4)*). If there are grounds for defending the claim, they may concur in proceedings brought by the claimant in the District Court or High Court. They may, on the other hand, resist that form of procedure and ask the court in which proceedings are brought to transfer them to the Family Court.

39 Contribution claim codifies restitution claims

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

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

Section 39

- C142 The Act codifies the law of restitutionary claims that can be made on the ground that the claimant conferred a benefit expecting remuneration out of a will-maker's estate (*subsection (1)*). This means that claims based on the relevant common law and equitable principles can no longer be sustained. Reference is made, in *subsection (2)*, to traditional actions based on *quantum meruit* (for services rendered), *quantum valebat* (for goods supplied), and to claims for beneficial interests under constructive trusts and proprietary estoppel.
- C143 Not all restitutionary claims are codified, however. For example, actions based on duress or mistake will still be brought at common law or in equity. Only those claims where the plaintiff asserts that he or she has conferred a benefit on the will-maker, in anticipation of being remunerated for that benefit, are brought within the draft Act.
- C144 *Subsection (3)* exempts commercial transactions between the will-maker and those with whom the will-maker had no close personal association. These too may be brought and determined in the High Court or District Court, and the principles of general law will apply. However, the court in which the proceedings are brought must give special leave to allow the action to proceed.

PART 5
JURISDICTION, AWARDS, AND PRIORITIES

Subpart 1 – Jurisdiction

40 Jurisdiction of New Zealand courts

- (1) In the case of claims and applications under Part 2, New Zealand courts have jurisdiction if
 - (a) the deceased partner was domiciled in New Zealand when he or she died; or
 - (b) both partners were resident in New Zealand when the deceased partner died; or
 - (c) the partners agreed that issues of property division or support between them should be governed by this Act or the *Matrimonial Property Act 1976* and that agreement subsisted at the time the deceased partner died.
- (2) In the case of claims under Part 3, New Zealand courts have jurisdiction if
 - (a) the deceased person was domiciled or resident in New Zealand when he or she died; or
 - (b) the claimant is domiciled or resident in New Zealand and the deceased person was at any time domiciled or resident in New Zealand.
- (3) In the case of claims under Part 4, New Zealand courts have jurisdiction if
 - (a) the deceased was domiciled or resident in New Zealand when he or she died; or
 - (b) the claimant and the deceased agreed that claims under this Act should be decided by a New Zealand court or in accordance with New Zealand law; or
 - (c) the claim is based on the promise of a benefit consisting of the assignment of immovable property in New Zealand or movable property that was situate in New Zealand at the time of the promise.

Section 40 continues overleaf

Section 40

- C145 Often a deceased person owned property not only in New Zealand, but elsewhere. This section provides for the cases in which New Zealand courts would apply the draft Act to property in New Zealand and elsewhere, whether that property is movable or immovable.
- C146 For financial support claims and property divisions by partners (see *Part 2*), New Zealand courts may apply the draft Act (*subsection (1)*) only if:
- *paragraph (a)* – when he or she died the deceased partner was domiciled in New Zealand (see the Domicile Act 1976); or
 - *paragraph (b)* – when the deceased partner died both partners resided in New Zealand; or
 - *paragraph (c)* – the partners agreed (and the agreement stood when the deceased partner died) that questions between them of property division and financial support should be decided under this Act or the Matrimonial Property Act 1976.
- C147 For financial support claims by children of a deceased person (see *Part 3*), New Zealand courts may apply the draft Act (*subsection (2)*) only if:
- *paragraph (a)* – when he or she died the deceased person was domiciled or resident in New Zealand; or
 - *paragraph (b)* – the child is domiciled or resident in New Zealand and the deceased person was at any time domiciled or resident in New Zealand.
- C148 For claims by contributors (see *Part 4*), New Zealand courts would apply the draft Act (*subsection (3)*) only if:
- *paragraph (a)* – when he or she died the deceased was domiciled or resident in New Zealand; or
 - *paragraph (b)* – the contributor and the deceased agreed that claims should be decided by a New Zealand court or in accordance with New Zealand law; or
 - *paragraph (c)* – the claim is based on the deceased, in return for the benefit, having promised expressly to make provision for the contributor out of immovable property in New Zealand or movable property situate in New Zealand when the promise was made.

(Section 40 commentary continues overleaf)

- (4) In determining a claim or application under this Act, the court may take into account the existence, value and disposition of any movable or immovable assets of the deceased that are situate outside New Zealand in a jurisdiction where their disposition would not be affected by a decision of a New Zealand court.
- (5) Notwithstanding any other provision of this Act, the court may decline to make an award or order under this Act if a proceeding has been commenced in a jurisdiction outside New Zealand in which the law of that jurisdiction is applied and the New Zealand court is of the opinion that there is insufficient connection between the deceased and New Zealand to make it just that the claim or application should be determined by New Zealand law other than the law of that other jurisdiction.

Definitions: **award**, **benefit**, **court**, **partner**, s 8

(Section 40 continued)

- C149 Sometimes a deceased person disposes of movable or immovable property outside New Zealand and this disposition would be unaffected by a decision of a New Zealand court. *Subsection (4)* provides that in these cases New Zealand courts may take into account the existence and disposition of this property in making orders in respect of any property that would be affected by the decision. This would change the existing law: see, for example, *Walker v Walker* [1983] NZLR 560; *Samarawickrema v Samarawickrema* [1995] 1 NZLR 14, [1994] NZFLR 913, (1994) 12 FRNZ 482).
- C150 Despite the rules in *subsections (1) to (4)*, a New Zealand court may (*subsection (5)*) decline to make an award or order under the Act if:
- proceedings have been started against the deceased's estate in another jurisdiction in which the court of that jurisdiction is applying the law of that jurisdiction; and
 - the New Zealand court considers that the deceased was insufficiently connected with New Zealand for justice to require that New Zealand law (rather than the law of that jurisdiction) should apply.

Broadly similar discretions also conferred by statute can be seen in s 5(6) of the Domicile and Matrimonial Proceedings Act 1973 (UK) and in paragraph 9 of Schedule I to that Act: for discussion see *de Dampierre v de Dampierre* [1988] AC 92, and, more recently, *Butler v Butler* [1997] 2 All ER 822.

41 Jurisdiction of Family Court and High Court

- (1) Subject to subsections (2) to (4), the High Court and a Family Court each have jurisdiction in respect of proceedings under this Act, other than proceedings in respect of memento claims.
- (2) A Family Court does not have jurisdiction in respect of an application under this Act if, when the application is filed, a proceeding relating to the same matter has been commenced in the High Court.
- (3) The High Court may, on the application of a party to a proceeding under this Act or of its own initiative, order a proceeding to be removed
 - (a) from a Family Court into the High Court if it is satisfied that the proceeding would be more appropriately dealt with in the High Court; or
 - (b) from the High Court to a Family Court if it is satisfied that the proceeding would be more appropriately dealt with in a Family Court.
- (4) A Family Court Judge may, on the application of a party to a proceeding under this Act or of his or her own initiative, order a proceeding to be removed from a Family Court into the High Court if satisfied that the proceeding would be more appropriately dealt with in the High Court.

Definitions: **memento claim**, s 8

Origin: *Matrimonial Property Act 1976* s 22; *Family Protection Act 1955* s 3A; *Law Reform (Testamentary Promises) Act 1949* s 5

Section 41

C151 The Family Court and the High Court will have concurrent jurisdiction to deal with claims under the Act. As with claims under the Matrimonial Property Act 1976, there will be no monetary limit on the Family Court's jurisdiction (*subsection (1)*). But the Family Court does not have jurisdiction if proceedings have been filed first with the High Court (*subsection (2)*). Further, the High Court may order that a proceeding commenced in the Family Court be transferred into its own jurisdiction, or if a proceeding is commenced in the High Court, then the High Court may order that the proceeding be transferred into the Family Court (*subsection (3)*). Similarly a Family Court judge, either on the application of a party to a proceeding or of his or her own initiative, may order that a proceeding commenced in the Family Court be removed into the High Court (*subsection (4)*).

42 Right of appeal

- (1) If a Family Court has made or refused to make an award or property division order in a proceeding under this Act, or has otherwise finally determined or dismissed a proceeding under this Act, a party to the proceeding or any other person prejudicially affected may, within 28 days after the making of the award, order or decision or, within such further time as the court may allow in accordance with section 73(1) of the *District Courts Act 1947*, appeal to the High Court in accordance with Part V of that Act (except subsections (1), (3), and (5) of section 71A) and those provisions apply with any necessary modifications.
- (2) The court appealed from may, on the ex parte application of the appellant, order that security under section 73(2) of the *District Courts Act 1947* is not required to be given under that section.
- (3) The provisions of the *Judicature Act 1908* relating to appeals to the Court of Appeal against decisions of the High Court apply with respect to any order or decision of the High Court under this section.
- (4) Subject to the rules governing appeals to Her Majesty in Council against a decision of the Court of Appeal or of the High Court, such an appeal may be made in a proceeding under this Act to Her Majesty in Council.
- (5) The High Court or the Court of Appeal may rehear the whole or any part of the evidence, or may receive further evidence, if it thinks that the interests of justice so require.

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

Origin: *Family Protection Act 1955* s 15; *Law Reform (Testamentary Promises) Act 1949* s 5A

Section 42

- C152 This section applies the usual appeal provisions. Some slight modifications of the general rules for appeals from decisions of Family Courts have been made for proceedings under the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949. These are not applied consistently to the Matrimonial Property Act 1963. This section carries forward these modifications and applies them to all claims and applications under the draft Act.
- C153 It is expected that new court rules will be needed to simplify the present procedures used under the three Acts. The Commission intends at an appropriate time to raise these matters with the Chief Justice, the Principal Family Court Judge, and the Rules Committees.

*Subpart 2 – Awards and orders***43 Kinds and effect of awards and orders**

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

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

44 Interest on sums awarded

Notwithstanding section 87 of the *Judicature Act 1908*, rule 538 of the *High Court Rules 1985*, and sections 62B and 65A of the *District Courts Act 1947*, an award carries interest for any period before the award is made until the time the award is satisfied only if the court making the award so orders and, if the court does so order, carries interest to the extent and in the manner that the court making the award orders.

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

Section 43

C154 *Subsection (1)* introduces a series of provisions dealing with the form of the orders and awards that courts may make under the draft Act. The principal forms are

- lump sum (*section 45*),
- periodic payments (*section 45*),
- transfer of specific assets (*section 47*), and
- establishment of a trust (*section 50*).

C155 While awards have effect as if they were provisions in the will-maker's will, property division orders have effect as if they were orders partitioning partners' property (*subsection (2)*).

Section 44

C156 Support awards and contribution awards have effect as if they were a provision in a will of the deceased (see *section 43(2)*). For this reason it might be argued that once an administrator of a deceased person's estate has had a period of grace to realise the assets of the deceased's estate and to satisfy an award (for example, the so-called "executor's year"), interest on that award should become payable. If interest is granted automatically on an award the grant of interest may have the unintended effect of altering a claimant's entitlement at the expense of others' interests in the estate. *Section 44* provides therefore that interest is payable on support awards and contribution awards, for a period that may begin before or after judgment, only if a court orders that interest is payable on those awards.

C157 *Section 44* in no way detracts from responses the general law allows a person interested in the estate of a deceased to make to wrongful delay by an administrator. *Section 44* also does not compensate partners for delayed receipt of property the subject of a property division order. This is done instead:

- in respect of periods before a property division order is made, by *section 18(2)*, which provides that partnership property is valued as at the date of a hearing, so that increases in value between the date of the death of the deceased and the date of hearing are included as partnership property for division (see para C61); and
- in respect of periods after a property division order is made, by the present general law (see Judicature Act 1908 s 87, High Court Rule 538; District Courts Act 1947 ss 62B and 65A, and compare Matrimonial Property Act 1976 s 33(4)).

In this special context *section 44* is thought more appropriate than the scheme recommended generally for *The Award of Interest on Money Claims* (nzlc r28, 1994), see especially para 202, and the Draft Interest on Money Claims Act 199 s 13.

45 Lump sum and periodic payments

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

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

Origin: *Family Protection Act 1955* s 5(2)

46 Retrospective support awards

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

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

Section 45

- C158 *Subsection (1)* provides that on a support award a court may order either a lump sum payment, or periodic payments, or both. (By contrast an adult children's needs awards will almost always take the form of periodic payments, see *section 29(2)(c)* and para C107.) Normally a partner's property division entitlement will be a lump sum, representing the value of his or her share or contribution. A support award too may take that form. A sum can be calculated or estimated which (with interest) will provide the appropriate level of support for the period covered by the claim, and which will then be exhausted.
- C159 Under *subsection (2)*, the court may make a partner's property division order in the form of periodic payments, or as an interest in a trust, where for example the claimant asked for this to be done or the claimant and the will-maker agreed arrangements consistent with an order in this form. There is no reason, for example, why a widow or widower could not take a property division entitlement in the form of a life interest over all, or the balance of, the matrimonial property, if they so wish and the other claimants and beneficiaries have no serious ground of objection.
- C160 Unlike the present law (Law Reform (Testamentary Promises) Act 1949 s 3(4)), *section 45* does not give courts specific power to make an order for periodic payments under a contribution award (see *section 36(4)*, para C136).
- C161 *Subsection (3)* deals with the case where the estate of a dead partner makes a claim against the surviving partner. It assumes that the surviving partner owns the greater share of the partnership property, and that the partnership property needs to be equalised (subject to any support claim the survivor may wish to bring). An order in favour of the estate may take the form of either a lump sum, or periodic payments, or both a lump sum and periodic payments. In these cases further orders may be made under *section 48*.

Section 46

- C162 Support awards may be made retrospective to the will-maker's death.

47 Order for transfer of property

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

claimant includes a person who initiates a property division under this Act; and

property includes the proceeds of the sale or exchange of property.

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

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

48 Property division orders in favour of administrators

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

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

Section 47

- C163 When making a property division or contribution award, the court may order that specific assets in the will-maker's estate be handed over to the claimant (*subsections (1) and (3)*). An obvious example would be the house the partners have been living in, or the property which a contributor has improved in anticipation of receiving it under a will provision. The court must of course ensure that the value transferred to the claimant is within the general guidelines laid down in *Part 2* (partners) and *section 36* (contributors). In most ordinary cases, this will simply be a matter of convenience, since the estate would normally sell the assets, or pass them on to beneficiaries who want them. But there may be cases where a beneficiary and a claimant want the same asset. The court will have to settle that dispute. This is generally provided for in *subsection (3)*.
- C164 In certain situations the problem becomes one of right rather than convenience. This is where the estate is insufficient to meet all the claims made against it, especially those of claimants and contributors. An award of a specific asset may disturb the normal priorities between these two groups. A specific award may still be appropriate, as long as the conditions in *subsection (1)* are complied with. The will-maker may have expressly promised to convey the property in return for the benefit. Or the property in question may represent in substance the benefit the contributor has conferred on the will-maker. In these cases, *subsection (2)* then permits the court to make an order which will take precedence over creditors and other claimants, as regards the asset in question. (Similar orders can at present be made under the general law.) See also *sections 52 and 53* (non-probate assets).

Section 48

- C165 *Section 48* deals with the unusual situation where the administrator of a deceased partner makes an application for a property division award against the surviving partner. For example, the deceased may have left his or her property to his or her children by an earlier marriage. If the application is successful, the powers already conferred on the court by the draft Act are inappropriate, since they are all directed at the administrator of an estate. In this case, the general powers available under the Matrimonial Property Act 1976 will be needed. The relevant powers are found in ss 25, 27–33, and 43–45 of that Act.

49 Payment of awards to children

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

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

50 Provision for trusts

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

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

Origin: *Family Protection Act 1955* s 6

Section 49

- C166 There are some legal difficulties where children who are under the age of 20 have rights in a will or an estate. At common law, these children could not give a receipt, so if they received a distribution from the estate during minority they may have been able to claim the same sum a second time. But it is now recognised in law that children have different capacities, depending on what they are called upon to do (see Age of Majority Act 1970). Particularly if a payment relates to immediate support needs, there seems no reason to withhold the money from the child, or to go to the expense of appointing a trustee.
- C167 *Section 49* allows the court, in appropriate cases, to order that payments under a child's award be paid direct to the child, or to a custodian of the child for the child's benefit.

Section 50

- C168 *Section 50* empowers the court to make an award which establishes a trust and gives the claimant an interest in it. What the claimant receives under the trust may vary according to future events. This flexibility is useful where there are several potential beneficiaries, who may in the future have differing needs.
- C169 For example, a sum could be set aside for the education and training of three children until they reach 25. If one of them becomes a paid apprentice, another undertakes full-time study at a university or polytechnic, and the third undertakes work for which no period of training is necessary, their respective needs will be very different in their early twenties. A discretionary trust, established years before, would allow the court to distribute the fund in accordance with those needs.
- C170 Similarly, a trust fund might be set up which is available in full to a surviving spouse, if that spouse needs the fund while the couple's children are living with him or her, but part of which is separated off and paid to the children when they leave home for training or education.

(Section 50 commentary continues overleaf)

(Section 50 continued)

- C171 *Section 50* is designed to give the court that flexibility in making awards. *Subsection (1)* authorises the creation of a trust. *Subsection (2)* allows both claimants and existing beneficiaries to be included, with the respective interests specified by the court. *Subsection (2)* also provides for a trust that may be discretionary, with the trustee making decisions for example as to which of the beneficiaries will receive benefits and to what extent. *Subsection (3)* allows the trust to continue even if only one potential beneficiary remains alive. *Subsection (4)* provides for the appointment of a trustee, either at the time of creating the trust or subsequently.
- C172 The section is based on section 6 of the Family Protection Act 1955. However, that section is limited to funds for claimants who together form a single class of people, for example children or grandchildren. The present section allows both claimants and beneficiaries, and people of different classes (eg, a parent and a child) to be joined in the same trust fund. The court's power to create such a trust has necessary limits. The value of each person's expectancy in the trust when it is created should correspond approximately to the value of their respective claims, as ascertained under *Parts 2, 3 and 4* of the Act. But the total amount of money available to meet their needs will be applied flexibly over a period of time. Additional flexibility is given, in *subsection (5)*, by reference to provisions in the Trustee Act 1956 allowing variation of the administrative arrangements under a trust. See also *section 51* (paras C173–C175).

51 Power to vary support or needs awards

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

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

Origin: *Family Protection Act 1955* s 12

Subpart 3 – Funds available to meet claims

52 Availability of certain assets to meet claims

- (1) Subject to section 55, the non-probate assets of a deceased person are to be available to satisfy property division orders and claims under this Act, but no award or order is to be made in relation to any non-probate asset unless the holder of that asset has been joined as a party to the claim or application.
- (2) For the purposes of this Subpart, the **non-probate assets** of a deceased consist of all property passing on the death of the deceased by reason of any of the following transactions:
 - (a) contracts to make or not to revoke a will; and
 - (b) contracts with a bank or other financial institution providing for the property in an account or policy to pass to a co-owner or nominated beneficiary on the death of the deceased; and
 - (c) gifts that the deceased made in contemplation of death (*donationes mortis causa*); and
 - (d) trusts settled by the deceased that were revocable by the deceased in his or her lifetime; and
 - (e) beneficial powers of appointment that were exercisable by the deceased in his or her lifetime; and
 - (f) joint tenancies held by the deceased and any other person.
- (3) Property is to be regarded as a non-probate asset for the purposes of this Subpart only if that property was or could have been (if the deceased had so desired or requested) available to the deceased immediately before his or her death.
- (4) If property needs to be valued for the purposes of this Act, the valuation is to be carried out as if the deceased had made the property available to himself or herself immediately before death.

Definitions: **administrator, award**, s 8

Section 51

- C173 This provision dealing with variation of earlier awards has been brought forward from the Family Protection Act 1955 s 12.
- C174 *Subsection (1)* applies to support awards made in the form of periodic payments or a trust. These may be varied by later court order, if they prove to be too generous or insufficient. In the latter case, it may be necessary to recover further property from the beneficiaries, unless funds have already been set aside from the estate, or are available in the trust, for that purpose. Applications to vary periodic payments are not often encountered in current practice.
- C175 *Subsection (2)* applies where there has been an award, or a series of awards, and then someone who has not been a party to the earlier proceedings brings a successful claim. Again, this is unusual, since every effort will be made in the earlier proceedings to ensure that all potential claimants are before the court (see *section 66*, paras C225–C228). Where all potential claims have not been brought in, and another claim is brought later, the court may have to vary its previous orders.

Section 52

- C176 The provisions of this Subpart enlarge the estate which will be available to claimants in the event of a successful claim. The term “estate” normally includes only the property which will be assembled by the administrator after obtaining probate, or other authority granted by the court to administer the estate. The property is used first to pay the debts of the deceased person. The balance of the estate is passed on to the beneficiaries under a will, or the statutory successors on an intestacy. But, for the purposes of meeting claims and orders, the estate will now include
- the **non-probate assets**, and
 - property comprised in certain transactions entered into by the will-maker before death.
- C177 This section deals with what the draft Act calls the non-probate assets of the will-maker. The non-probate assets are that part of the will-maker’s property which he or she owns at the date of death, and which pass to another person otherwise than by will. Property of this kind is listed in *subsection (2)*. It includes joint property (where the will-maker’s interest passes automatically to the other joint tenant), nominated bank accounts and insurances (the rights pass to the person named in the bank account or insurance contract), and gifts made in contemplation of death (the gifted property passes to the donee).

(Section 52 commentary continues overleaf)

(Section 52 continued)

- C178 In nearly all cases, the will-maker could at any time during his or her lifetime have reclaimed the property. It would then have come back into the estate and been available to meet claims or applications against the estate when the will-maker dies. It would also, in many cases, have been matrimonial property available for division under the Matrimonial Property Act 1976. The section allows non-probate assets to be made available to help meet the burden of the claim. If the administrator fails to take this step, any party to the proceeding may apply to have this done: *sections 53(3)–(4)*, paras C181–C182.
- C179 At present, property comprised in a gift in contemplation of death (*donatio mortis causa*) may be the only part of the non-probate estate which is available under the Family Protection Act 1955 (see s 2(5) of that Act). Nominated account arrangements are limited to amounts not exceeding \$6000 (see Administration Act 1969, Part IA), and may, at least for the purposes of the 1955 Act, also be included in the estate: *Re McDonough* [1968] NZLR 615; Contracts and Commercial Law Reform Committee (New Zealand), *Nominations in Respect of Savings Bank Accounts* (Report 11, 1971), 6, 8. Similarly, in *In Re Kensington (Deceased)*, property subject to a general power of appointment that a will-maker could exercise was ruled part of the will-maker's "estate" for the Family Protection Act 1908 s 33(1) when by his will the will-maker treated the property as part of his estate: [1949] NZLR 382. (Compare Stout CJ's decision in *Nosworthy v Nosworthy* (1907) 9 GLR 303, 303: that the Testator's Family Maintenance Act 1906 gave no power to deal with property subject to a special power of appointment that the will-maker exercised.) But in principle, all non-probate assets should be available to claimants, even though technically they no longer form part of the estate when the will-maker dies. This is required in fairness to claimants, since the will-maker's obligations apply irrespective of the technical arrangements used to dispose of property upon death. It is also required in fairness to the will or intestate beneficiaries, who may otherwise bear a disproportionate burden which cannot be passed on to the successors to the non-probate assets.

53 Recovery of non-probate assets

- (1) A person who commences a proceeding for a property division order or an award against the estate of a deceased person must, if that person is aware that the determination of the proceeding is likely to involve recourse to non-probate assets, disclose that fact when applying to the court for directions.
- (2) Following a disclosure to the court under subsection (1), a copy of the application or claim must be served on the holders of non-probate assets and those owners must be joined as parties to the proceeding.
- (3) An administrator who is aware that the determination of the proceeding is likely to involve recourse to non-probate assets must apply to join the holders of those assets as parties to the proceeding.
- (4) If at any time before the determination of a proceeding it becomes apparent to any party to the proceeding or to the court that the determination of the proceeding is likely to involve recourse to non-probate assets, that party may apply to the court for the holders of the non-probate assets to be joined as a party or the court may join those holders on its own initiative.
- (5) If the holder of a non-probate asset has been joined as a party to the proceeding, the court may order that the holder in favour of whom the transaction was made, or that person's personal representative, or any person claiming through that person
 - (a) must transfer to the administrator the property, or any part of it or interest in it retained by that person;
 - (b) must pay to the administrator such sum, not exceeding the value of the property as the court thinks proper,and the powers in sections 49 and 50 of the *Administration Act 1969* are available to and may be exercised by the court subject to any necessary modifications.
- (6) The court may make any further order that it thinks necessary in order to give effect to an order made under subsection (5).

Definitions: **administrator**, **award**, **court**, **estate**, **property division order**, s 8; **non-probate assets**, s 52(2)

Origin: *Insolvency Act 1962* s 58

Section 53

- C180 This section lays down the procedures to be used for recovering non-probate assets. Claimants, if aware that satisfaction of their award or property division order is likely to involve recourse to non-probate assets, must notify the court of this fact when applying for directions (*subsection (1)*). After notice under *subsection (1)* a copy of the application or claim must be served on holders of non-probate assets and those holders joined as parties to the proceeding (*subsection (2)*). Holders of non-probate assets served with copies of applications or claims will have been put on notice of their potential liability. If they do spend or dispose of the assets they have received, they will still be liable to repay the equivalent sum – the change of circumstance defence provided for in *section 55* will not be available because they knew of the pending claim or application.
- C181 Administrators aware that satisfaction of successful property divisions or support or contribution claims is likely to involve recourse to non-probate assets must apply to join holders of non-probate assets as parties to the proceeding (*subsection (3)*). Others who are interested in the estate (eg, through a will of the deceased, the intestacy provisions, or through a prior transaction) should have been served with the proceedings and will therefore be able to protect their position by participating in proceedings as they consider this necessary.
- C182 At any time before a proceeding is finally determined a party to a proceeding or a person interested in an estate or non-probate assets may, if he or she considers that resolving the proceeding is likely to require recourse to non-probate assets, apply to the court to have non-probate asset holders joined as parties. Alternatively the court may of its own initiative join holders of non-probate assets as parties to the proceedings (*subsection (4)*).
- C183 A court may order a holder of non-probate assets who is joined as a party to a proceeding (or the holder's personal representatives, or people claiming through the holder, whether or not these people are also joined as parties) to transfer to the administrator all or part of the non-probate assets, or to pay to the administrator a sum that is no more than their value. For these purposes the court may exercise the powers in the Administration Act 1969 ss 49–50 and make any further orders it thinks necessary (*subsections (5)–(6)*).

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

- (1) A person who has commenced a proceeding to initiate a property division or to claim an award against the estate of a deceased person may apply to the court in the course of that proceeding for an order under this section and the court may make such an order if the court is satisfied that the exercise of the powers conferred by this section would facilitate the making of appropriate orders or awards under this Act which cannot otherwise be made equitably from the estate of the deceased and if further satisfied
 - (a) that there are non-probate assets of the deceased which have not been called in under section 53; or
 - (b) that the deceased, with the intention of removing property from the reach of proceedings under this Act or otherwise with an intention of prejudicing the interests of persons claiming awards or initiating a property division under this Act, made a disposition of property; or
 - (c) that less than 3 years before the death of the deceased, the deceased, made a disposition of property and that full valuable consideration for that disposition was not given by the person to whom the disposition was made ("the donee") or by any other person.
- (2) On an application under this section, the powers conferred by sections 49 to 51 of the *Administration Act 1969* are available to and may be exercised by the court subject to any necessary modifications.
- (3) If the court makes an order under subsection (1), the court may give such consequential directions as it thinks appropriate for giving effect to the order or for the fair adjustment of the rights of the persons affected by the order.
- (4) In deciding whether and how to exercise its powers under this section, the court must have regard to the circumstances in which any disposition was made and any valuable consideration which was given for it, the relationship (if any) of the donee to the deceased, the conduct and financial resources of the donee, the availability of other assets within the estate of the deceased to meet claims and orders under this Act, and all the other circumstances of the case.

Definitions: *award*, court, s 8; *non-probate assets*, s 52(2)

Section 54

- C184 This section confers on claimants rights (like those beneficiaries enjoy at present) to have non-probate assets made available to satisfy a successful claim. But it goes further and allows claimants to bring in property comprised in transactions made by the will-maker before death. In most cases these transactions will be made within a short period before death, but if there is fraudulent intent, there is no time limit. These transactions diminish the estate and tend to defeat claims or applications against the estate. The same considerations of fairness discussed in respect of *section 52* apply here too.
- C185 *Subsection (1)* provides that property passing under the following transactions can be recovered in order to meet claims or applications against the estate:
- gifts and other transactions for less than full consideration, made within 3 years before the will-maker died; and
 - transactions entered into with a view to prejudicing the rights of testamentary claimants and having that effect as regards the particular claim.
- There is no time limit on the second class of case, except that long-standing transactions are unlikely to “prejudice” claimants of more recent standing.
- C186 Again, a donee or other person benefiting from any such transaction would (*subsection (2)*) have the same defences as a beneficiary to whom property had been distributed under the will.
- C187 If a successful application is made, the relevant property or a sum representing its value can (*subsection (2)*) be brought back into the estate. To avoid any unfair or unequal results appropriate adjustments (*subsections (3) and (4)*) can be made. It is not necessarily a bar to recovery that the person who received property from the will-maker gave value, but (*subsection (4)*) this is a matter which the court may take into account.

55 Denial of recovery

- (1) The court must not make an order under section 53 or 54 against a person if that person proves that he or she
 - (a) acquired the property for valuable consideration and in good faith without knowledge of the fact that the property is subject to a claim or application under this Act; or
 - (b) acquired the property through a person who acquired it in the manner described in paragraph (a).
- (2) The court may decline to make an order under section 53 or 54, or may make such an order subject to conditions or with limited effect, against a person if that person proves that
 - (a) he or she received the property in good faith without knowledge of the fact that the property is subject to a claim or application under this Act; and
 - (b) his or her circumstances have so changed since the receipt of the property that it is unjust to order that the property be transferred or compensation paid.

Definitions: **court**, s 8

Origin: *Insolvency Act 1967* s 58(5)–(6)

Subpart 4 – Priorities of awards as against creditors' claims

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

- (1) If the estate of a deceased person has insufficient assets to fully satisfy all the liabilities of the deceased and the awards made in respect of contribution claims and other claims by creditors against the estate, the assets of the estate are to be applied so that an award on a contribution claim ranks equally with unsecured liabilities of the deceased.
- (2) Despite subsection (1), the court may permit a contributor to make a proprietary or tracing claim against specific property formerly owned by the deceased and may confer priority over claims and creditors in accordance with section 47(2).

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

Section 55

C188 This section provides protection for those who have received non-probate assets or property which have been transferred under a prior transaction which can be attacked under *section 52*. It protects:

- *subsection (1)* – bona fide purchasers of the property; and
- *subsection (2)* – those whose circumstances have so changed, as a result of receiving the property, that it is inequitable to make them return it or pay compensation for it.

C189 *Subsection (2)* does not follow the statutory form of change of circumstance previously used in, for example, the Judicature Act 1908 s 94B (inserted by the Judicature Amendment Act 1958 s 2). On the difficulties which have been encountered with the wording in this earlier legislation, see *Contract Statutes Review* (nzlc r25, 1993), chapter 4.

Section 56

C190 This section is the first of a series of sections dealing with priority of claims. The present law has no express or consistent system for ranking claims. In practice, the courts take into account the fact that there are other claims in settling the size of each award. This approach is satisfactory where the courts are given no clear objectives in settling how large an award should be, although it is unsystematic and may lead to unpredictable results. With the draft Act, however, it is assumed that the size of an award can usually be ascertained independently of the existence of other claims. It is therefore necessary to provide for the priority of claims, both as regards each other, and as regards the will-maker's general creditors. (For an overview of the earlier tentative proposals and an example of how they would operate, see *Succession Law: Testamentary Claims* (nzlc pp24, 1996), appendix B.)

C191 *Section 56* deals with the first category of priority, unsecured creditors' and contributors' claims. *Subsection (1)* provides that each ranks equally with the other. However, it sometimes happens (*subsection (2)*) that a contributor is entitled to an order for the transfer of specific property (see *section 47*). In practical terms, such an order may have the effect of promoting the contributor, as regards that particular asset, to the status of secured creditor.

57 Ranking of property division orders as against creditors' claims

- (1) Except as otherwise expressly provided in this Act, the right to bring a property division proceeding does not
 - (a) affect the title of any person other than a partner to any property, or affect the power of either partner to acquire, deal with, or dispose of any property or to enter into any contract or other legal transaction as if this Act had not been passed; or
 - (b) limit or affect the operation of any mortgage, charge, or other security for the repayment of a debt given by either partner over property owned by that partner and every such instrument has the same effect as if this Act had not been passed.
- (2) Subject to subsection (3), if the estate of a deceased person has insufficient assets to fully satisfy all the liabilities of the deceased and property division orders
 - (a) secured and unsecured creditors of a partner have the same rights against that partner and against the property owned by the partner as if this Act had not been passed; and
 - (b) all property that would have passed to the administrator of an insolvent deceased person appointed under section 159 of the *Insolvency Act 1967* if this Act had not been passed (and no other property) shall so pass.
- (3) Despite subsections (1) and (2), the court may permit a partner to make a proprietary or tracing claim against specific property formerly owned by the deceased and may confer priority over claims and creditors in accordance with section 47(2).
- (4) If a property division order is made against the estate of a deceased partner, the surviving partner may take priority because of a protected interest in the partnership home which interest is
 - (a) if section 12(1) or (2) applies, to the extent of the specified sum or one half of the equity of the partners in the partnership home, whichever is the lesser; or
 - (b) if section 12(3) or 13 applies, to the extent of the specified sum or one half of the property or money shared under the section, whichever is the lesser.
- (5) A protected interest is not liable for the unsecured personal debts of the deceased partner.
- (6) In this section, **specified sum** means \$82 000 or such greater sum as the Governor-General may prescribe by regulation as the specified sum for the purposes of this section.

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

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

Section 57

- C192 *Section 57* deals with the second category of priority: property division orders. Where, during the partners' lifetimes, there is competition between the will-maker's partner and the will-maker's creditors, the Matrimonial Property Act 1976 s 20 applies (as between married couples). The principles in that section have been adopted in the draft Act. They will apply both to married partners and to de facto partners.
- C193 The first principle is that New Zealand law recognises only deferred matrimonial property rights. That is to say, until the event occurs which triggers a general division of property, the partners can hold property in their own names and each is expected to meet debts out of the property which he or she owns. This is reflected in *subsection (1)*, of which *paragraph (a)* provides that each partner may legally transfer or mortgage their own property. Similarly, *paragraph (b)* provides that a security given to a creditor over the partner's own property is not prejudiced when the other partner institutes division of the partnership property.
- C194 Of particular importance is *paragraph (a)* in *subsection 2* which gives precedence to the partner's own unsecured debts in any distribution of property that partner owns. The practical effect is that, if a partner is insolvent, all that partner's property will be applied to meet his or her debts. In the event of bankruptcy all that property passes to the Official Assignee (*paragraph (b)*). These are rules which, in any review of the Matrimonial Property Act 1976, may require careful consideration. But this Act is not the place to propose changes.
- C195 A significant qualification to the general rule is found in *subsection (2)*, which follows section 20 of the Matrimonial Property Act 1976. The rights of the creditors or Official Assignee take effect "as if this Act had not been passed". Husbands, wives and de facto partners, under the general law, can make claims to specific property, based on their contribution to that property. As in the case of contributors' claims (see paras C136 and C164), this right may confer priority over unsecured creditors. Admittedly the provisions of the Act (especially *section 6*) take those rights away from a husband and wife in their relations with each other. But the words quoted reinstate them for the purpose of meeting creditors' claims, so the non-debtor partner can rely on their general law right to specific property which is legally owned by the debtor partner.

(Section 57 commentary continues overleaf)

(Section 57 continued)

- C196 A partner who institutes a property division may (*subsection (3)*) be able to assert priority over creditors if under *section 47(2)* an order is made in respect of specific property. This follows on from *subsection (2)*.
- C197 *Subsection (4)* contains an additional qualification drawn from the Matrimonial Property Act 1976. It relates to the non-debtor partner's protected right to one half of the equity in the partnership home. This is protected against the other partner's personal debts. The "equity" is what is left after deduction of any amounts charged on the property. There is (*subsection (6)*) a maximum protected sum (from 1 August 1996 of \$82 000: see SR 1996/176/2).
- C198 It will be noted that the protection applies to partnership homes and homesteads. It may even apply where there is no matrimonial home. The court may set aside part of the other matrimonial property for the same purpose. The protected interest applies only to personal debts of the other partner. Personal debts of the claimant partner, and matrimonial debts of both partners, can be enforced against the protected interest (*subsection (5)*).

58 Ranking of support awards as against creditors' claims

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

Definitions: estate, support award, s 8

*Subpart 5 – Priority of awards amongst claimants***59 Ranking of awards and orders on property division and contribution and support claims**

- (1) If the estate of a deceased person has insufficient assets available after satisfaction of liabilities to fully satisfy property division orders and contribution and support awards, the assets of the estate are to be applied so that every contribution award
 - (a) ranks equally with any other contribution award, but subject to section 47(2);
 - (b) takes priority over any property division order, but subject to section 47(2);
 - (c) takes priority over any support award.
- (2) If the estate of a deceased has insufficient assets available after satisfaction of liabilities to fully satisfy property division orders and support awards, the assets of the estate are to be applied so that
 - (a) in the case of successive partnerships, property division orders take priority in accordance with the chronological sequence of the partnerships;
 - (b) in the case of contemporaneous partnerships, a property division order is to be satisfied from that part of the estate of the deceased person as the court is able to attribute to the partnership concerned and, to the extent that such attribution is not practical, the court is to make an order that is proportionate to the contribution of each partnership to the acquisition of the assets;
 - (c) every property division order takes priority over any support award.
- (3) If the estate of a deceased person has insufficient assets available after satisfaction of liabilities to fully satisfy support awards, the assets of the estate are to be applied so that every support award ranks proportionately with any other support award.

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

Section 58

C199 Support claims always cede priority to creditors' claims.

Section 59

C200 This section deals with the priority of awards and orders as between themselves. *Subsection (1)(a)* provides that contribution awards rank equally with each other and ahead of property division entitlements and support claims. This priority may be affected if an order is made in respect of specific property under *section 47(2)*.

C201 *Subsection 1(b)* provides that property division orders rank second in priority, again subject to the possibility of an order in relation to specific property under *section 47(2)*.

C202 Competition may occur within the group of partnership awards and orders. This can occur even under the present law, where a marriage relationship ends, and one of the partners marries again, or enters a de facto relationship. If that too ends before the property division of the earlier marriage is settled, the assets owned by the common partner will be claimed by the two other partners. This is complicated further with the recognition of the property rights of de facto partners. Under the draft Act, it will be possible for one person to live in two contemporaneous partnerships. Both of the other partners will now have property division entitlements against the common partner.

C203 *Subsection (2)* contains two rules to deal with this situation. First, where the partnerships are one after the other, priority is determined in accordance with time. Second, where partnerships exist at the same time, property which is attributable to each partnership is first separated out. The balance is distributed between the two partnerships in proportion to the extent to which each contributed towards its acquisition, maintenance and improvement.

C204 The first rule is not as arbitrary as it may at first sight appear. The first partnership will stop accumulating partnership property when the couple cease living together. The common partner can take into the second partnership, only that part of the matrimonial assets which is not claimable by the first partner. So it is sensible to determine the first partner's claim first, before determining what balance is available to the second partner's claim.

(Section 59 commentary continues overleaf)

(Section 59 continued)

- C205 The second rule is inconsistent with the well-established presumption of equal sharing, and with the principle that the courts generally assess contributions to the partnership, and not exclusively to the property the partners acquire while the partnership exists. But these two principles cannot apply where there are two partnerships. The fact that two partners are assumed to contribute equally as between themselves tells the court very little about how much each partnership contributes to the overall well-being of the three people concerned. One may be an indolent, childless partnership, the other a hard-working business and family partnership. And in any event, any comparison of the worth of the two partnerships in an abstract sense would be invidious. It is simpler and safer to enquire only into their respective contributions to asset formation and maintenance.
- C206 The third priority group is support claims. *Subsection (3)* provides that these rank below the other two classes of claim and equally with each other.

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

- (1) Subject to subsection (2), the incidence of support awards is to fall rateably upon the residue of the estate of the deceased or, in cases where a decision of the court does not or would not affect the whole of that residue, then to so much of it as is or would be affected by a decision of the court.
- (2) The court has power to exonerate any part of the deceased's estate from the incidence of any support award
 - (a) if the person entitled to that part is eligible to make a support claim; or
 - (b) if that part is the subject of a specific disposition, whether a disposition of money or of specific property other than money, and the monetary value of that part of the residue as an approximate proportion of the monetary value of the whole residue is, in the opinion of the court, so small that that part should be exonerated.
- (3) In this section, **residue of the estate**
 - (a) includes non-probate assets that have been called in under section 52 or 53; and
 - (b) includes property the subject of prior transactions that has been called in under section 54; and
 - (c) excludes assets that are necessary to fully satisfy property division orders and contribution awards.
- (4) For the purposes of carrying this section into effect, the court may, on the application of the administrator or of any person interested, make such orders as it thinks appropriate with respect to the administration of the estate of the deceased and may make such order to facilitate the sale and for the sale of property and the vesting of the property in the administrator or the appointment of a receiver of the rents, profits or income of property as it thinks appropriate.
- (5) If property is sold under such an order, the court may make an order vesting the property in the purchaser.
- (6) Every such vesting order has the same effect as if all persons entitled to the property had been free from all disability, and had duly executed all property conveyances, transfers, and assignment of the property for such estate or interest as is specified in the order, and the purchaser's title may be registered in any relevant register as if it were a conveyance, transfer, or assignment by an owner or a registered owner.

Definitions: **administrator**, **award**, **court**, **estate**, **property division order**, s 8, **non-probate assets**, s 52(2)

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

Section 60

- C207 The lowest priority group is that of beneficiaries. Assuming the appropriate procedural steps are taken, beneficiaries may because of *sections 52–54* include (see *subsections (3)(a)–(b)*) persons who have acquired the will-maker’s non-probate assets or property that was the subject of prior transactions.
- C208 Beneficiaries will share first the burden of satisfying in full contribution awards and property division orders (*subsection (3)(c)*). The way in which the beneficiaries will share this burden is determined by the general law on secured and unsecured liabilities, including *section 47(2)*.
- C209 Once contribution awards and property division orders have been met, the burden of any support award will usually (*subsection (1)*) be shared between the beneficiaries rateably. But in two cases (*subsection (2)*) the court has power to exonerate parts of the residue of the estate from the burden of support awards. The first (*paragraph (a)*) is where a beneficiary of a part of the residue is eligible to claim a support award. The second (*paragraph (b)*) is where the monetary value of the part of the estate it is proposed to exonerate, if that part is money or other property specifically disposed of by the deceased, is in the opinion of the court small enough to warrant exoneration.
- C210 The section clarifies the existing law, under which the court has a wide discretion to allocate the burden of claims amongst individual beneficiaries (see Matrimonial Property Act 1963 s 8A; Matrimonial Property Act 1976 s 48; Family Protection Act 1955 s 7; Law Reform (Testamentary Promises) Act 1949 s 3(6)).
- C211 The court may make appropriate orders to achieve its purposes, including orders directing the sale of property and vesting the property in a purchaser. These powers are contained in *subsections (4) and (5)*.

PART 6
MAKING AND SETTLING CLAIMS AND APPLICATIONS

61 Duties of administrators as to property division

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

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

62 Time limits

- (1) An application for an award or property division order against the estate of a deceased person must be made to the court within 18 months after the death of that person or within 12 months after the grant in New Zealand of administration in the estate of that person, whichever period expires first.
- (2) The court may extend the time for making an application for an award or property division order against the estate of a deceased person for a further period after hearing such of the persons affected as the court thinks necessary and may order such an extension whether or not the time for making an application under this Act has expired.
- (3) Notwithstanding subsection (2), the court cannot grant an extension of time unless the application for extension is made before the final distribution of the estate.
- (4) No distribution of any part of the deceased's estate made before the administrator receives notice that the application for extension has been made to the court and after every notice (if any) of an intention to make an application has lapsed in accordance with section 64 can be disturbed because of the application or any order made on it. No action lies against an administrator who has made any such distribution.

Definitions: **administrator**, **award**, **court**, **distribution**, **estate**, **property division order**, s 8; **month**, *Acts Interpretation Act 1924* s 4

Origin: *Matrimonial Property Act 1963* s 5A; *Family Protection Act 1955* s 9; *Law Reform (Testamentary Promises) Act 1949* s 6

Section 61

C212 Administrators of a will-maker's estate need initiate a property division against the will-maker's surviving partner only when requested and sufficiently indemnified by a beneficiary of the will-maker's estate.

Section 62

C213 Claims and applications must (*subsection (1)*) usually be made within the first to expire of two time periods, this period must be either

- the period that begins with the death of the deceased person, and ends 18 months later, or
- the period that begins with the grant in New Zealand of administration in the estate of the deceased person, and ends 12 months later.

C214 If this usual time limit has expired or is about to expire, the court may (*subsection (2)*) extend the time for applying for an award or a property division. Applications to the court for an extension of time may (*subsection (2)*) be made even though the usual time limit has expired. In considering whether or not to grant an extension the court may hear any person affected it considers necessary.

C215 This section replaces the existing provisions on the time within which awards and orders must be applied for. The present time limit is usually one year (but sometimes two years where a claimant is a minor or under a disability: see Matrimonial Property Act 1963 s 5A; Family Protection Act 1955 s 9; Law Reform (Testamentary Promises) Act 1949 s 6). *Subsection (3)* continues the only mandatory limit under the present law: no extension can be sought after all of the estate has been distributed.

C216 In the special context of applications under this Act the Commission recommends a time limitation regime that departs from the period of three years, and the pattern of extensions of time limits, recommended generally for *Limitation Defences in Civil Proceedings* (nzlc r6, 1988).

C217 If an administrator distributes any part of a deceased person's estate

- before the administrator has received a notice of an application for extension, and
- after every notice (if any) of an intention to make an application under the Act has lapsed (see *section 64* and paras C220–C222), then (*subsection (4)*) that distribution cannot
- be later disturbed, or
- be the subject of an action against the administrator.

Other distributions by administrators may also be protected by the draft Act from actions (see *section 63*, C218–C219).

63 Protection of administrators

- (1) No action lies against the administrator of the estate of a deceased person by reason of having distributed any part of the estate, and no application or award or property distribution order under this Act is to disturb the distribution if it is properly made by the administrator for the purpose of providing for the maintenance, support, or education of any person who was totally or partially dependent on the deceased immediately before the death of the deceased, whether or not the administrator had notice at the time of the distribution of any application or intention to make an application under this Act that would affect the estate.
- (2) No person who has made or is entitled to make an application under this Act is entitled to bring an action against the administrator by reason of having distributed any part of the estate if the distribution was properly made by the administrator after the person (being of full legal capacity) has advised the administrator in writing or acknowledged in any document that the person either
 - (a) consents to the distribution; or
 - (b) does not intend to make any application under this Act that would affect the proposed distribution.
- (3) No action lies against the administrator by reason of having distributed any part of the estate if the distribution was properly made by the administrator after the expiration of 3 months from the date of the grant in New Zealand of administration in the estate of the deceased and before service on the administrator of any application and without notice in writing of any application or intention to make an application under this Act that would affect the estate.

Definitions: **administration**, **administrator**, **award**, **estate**, **property distribution order**, s 8; **month**, *Acts Interpretation Act 1924* s 4

Origin: *Administration Act 1969* s 48

Section 63

C218 *Section 63* protects administrators from any action for properly made distributions of three kinds:

- *Subsection (1)* – Distributions made at any time to help maintain, support or educate a person who just before the deceased died was totally or partially dependent on the deceased. The administrator is protected whether or not when these distributions were made he or she had notice that someone intended to make an application under the Act that could affect the estate (property comprised in distributions of this kind is also unaffected by any application under the Act).
- *Subsection (2)* – Distributions made at any time that are challenged by a person (or usually, unless that person indemnifies the administrator for claims that might be made by all other applicants, all persons) who could apply under the Act who (having had full legal capacity to do so) advised the administrator in writing or acknowledged in any document that he or she (or they) either consented to the distribution or did not intend to make any application under this Act that would affect the proposed distribution.
- *Subsection (3)* – Distributions made after 3 months from the date of grant in New Zealand of the estate of the deceased, and made when the administrator had not been served with any application or written notice of a person's application or intention to apply (on notices of intention to apply see *section 64*).

C219 Administrators may be liable for distributions that *section 64* (or *section 62(4)*) does not protect. The 3-month period mentioned in *subsection (3)* should allow claimants adequate time to decide whether or not to apply for an order or award under the Act.

64 Notices and distributions

If within 3 months from the date that the administrator receives written notice of a person's intention to make an application for a property division or an award under this Act the administrator is not served with a copy of the application filed in the court, the administrator may

- (a) give to the person from whom that notice of intention was received one month's notice of the administrator's intention to make a distribution unless an application is filed in the court and a copy is served on the administrator within that month; and
- (b) distribute any part of the estate if no copy of an application filed in the court is served on the administrator within that month.

Definitions: **administrator**, **award**, **distribution**, **estate**, s 8; **month**, *Acts Interpretation Act 1924* s 4

Section 64

- C220 As under the present law, if an application is made under the Act and served on an administrator, or notice is given to an administrator that an application under the Act has been filed in court, the only protected distributions an administrator can make are those under *subsections 63(1)–(2)* or any necessary to satisfy a court order.
- C221 Intending applicants may prevent an administrator distributing estate property by giving written notice to the administrator of an intention to make an application under the Act. A notice of intention to apply usually prevents the administrator distributing any estate property for 3 months. But the notice cannot be renewed. If within 3 months of receiving the notice the administrator has not therefore been given at least notice of an application (or, preferably, served with an application that has been filed in court), the administrator may proceed to distribute as if no notice had been given.
- C222 But under the present law delays may sometimes arise and persist between the time that an administrator is given notice of an application and the time that the administrator is served with that application once it has been filed in the court. *Section 64* is intended to discourage these delays. If within 3 months of having received notice of an intention to apply, an administrator has not been served with an application filed in court, the administrator may give one month's notice that he or she will distribute. If that month expires without the administrator having been served with an application that has been filed in the court, then the administrator may distribute.

65 Administrator to assist court

When an application is made for an award or property division order against the estate of a deceased person and notice of the application is served on the administrator, that notice is to have the same effect (subject to necessary modifications) as an order for discovery and the administrator must place before the court all relevant information in the administrator's possession concerning details of members of the deceased's family, the financial affairs of the estate, persons who may be claimants under the Act, and the deceased's reasons for making the testamentary dispositions made by the deceased and for not making provision or further provision for any person.

Definitions: **administrator**, **award**, **court**, **estate**, **property division order**, **provision**, s 8

Origin: *Family Protection Act 1955* s 11A

Section 65

- C223 If the proceedings are to be heard by the court, it is important to ensure as far as possible that all persons who have an interest in the estate are formally notified, and that any other claims are heard at the same time. Under *section 65*, the administrator will have the responsibility of providing the court with information in his or her possession relating to the assets and administration of the estate, the beneficiaries and possible claimants, and the will-maker's reasons for the provisions in the will. That information will be used as part of the factual basis for the claim, and will inform the court who should be served with a notice of proceedings.
- C224 On receiving an order under *section 65*, an administrator may decline to provide certain information on the ground of privilege. If any of the beneficiaries or claimants wish to dispute a claim of privilege they will do so according to the usual process (for discussion see *Evidence Law: Privilege* (nzlc pp23, 1994), chapter 6; draft Evidence Code s 14). When enacted in 1959 the proviso to s 11A of the Family Protection Act 1955 extended the privileges normally available to administrators. But the provisions of the Commission's proposed draft Evidence Code on privilege (Parts II and III; ss 3, 5 and 11), and the present general breach of confidence provision (Evidence Amendment Act (No 2) 1980 s 35) now cover the same ground. *Section 65* does not therefore include a provision like the proviso to s 11A of the Family Protection Act.

66 Application treated as made by all possible applicants

- (1) The court may treat an application for an award or a property division order filed by a person as an application on behalf of all persons who might apply for an award or order.
- (2) An application is to be treated for the purposes of section 62 as an application on behalf of all persons on whom the application is served and all persons whom the court directs should be represented by persons on whom the application is served.
- (3) A person who is entitled to apply for an award need not be served with an application or provision made for that person to be represented on an application unless the court considers that the person should be served or represented.

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

Origin: *Family Protection Act 1955* s 4(2)

67 Applications by administrators

- (1) An administrator of the estate of a deceased person may
 - (a) apply for an award or property division on behalf of a person who is not of full age or mental capacity in any case where that person might apply; or
 - (b) apply to the court for advice or directions whether the administrator should so apply.
- (2) The court may treat an application for advice or directions as an application on behalf of a person for the purpose of avoiding the effect of the time limitation in section 62.

Definitions: **administrator, award, court, estate, property division order**, s 8

Origin: *Family Protection Act 1955* s 4(4)

68 Evidence

In any proceeding under this Act, whether at first instance or on an appeal, the court may receive any evidence that it thinks appropriate, whether the evidence would be otherwise admissible in a court or not.

Definitions: **court**, s 8

Origin: *Matrimonial Property Act 1976* s 36

Section 66

- C225 This section ensures that, as far as possible, all claims are brought in the single set of proceedings, and are disposed of at the same time. It follows corresponding provisions in s 4 of the Family Protection Act 1955.
- C226 *Subsection (1)* provides that an application by one person may be treated as an application by all people who may apply under the draft Act. However, only those who are served with proceedings, and those whom the court directs should be represented, will be bound by any award the court makes.
- C227 For the purposes of time limitations on bringing claims, the date of the first application is treated (*subsection (2)*) as the date when all applications are brought. Time limitation periods stop then. This is useful because, when the first application is made, it may be necessary for beneficiaries in the estate to respond with their own claim. But for the application they might have been content with the provision made for them in the will. That provision may be reduced as a result of the award the applicant seeks. So the beneficiary should not be time-barred from responding with their own claim, as long as the initial claim is in time.
- C228 *Subsection (3)* makes it clear that it is for the court to decide who is to be served or represented. Until an order is made for service, it is sufficient for the applicant to serve notice of the application on the administrator.

Section 67

- C229 If a person is not of full age or capacity, the administrator may (*subsection (1)*) apply on their behalf, or apply to the court for directions about what is to be done. If either of these applications is made, the time limitation period on bringing claims in *section 62* will (*subsection (2)*) stop running.

Section 68

- C230 Courts which hear applications under the draft Act are not bound by the normal rules of evidence. This section follows a similar provision in s 36 of the Matrimonial Property Act 1976. In relation to appeals see also *section 42(5)*.

69 Costs

- (1) A court is not obliged to order that the estate pay its own costs or the costs of any party to a proceeding under this Act but may order that costs are paid by the party who does not succeed in the proceeding.
- (2) A court is not obliged to order that an unsuccessful claimant or applicant pay the costs of any other party or parties if that claimant or applicant had sufficient and reasonable grounds to make a claim or initiate a property division having regard to his or her knowledge or means of knowledge of relevant facts.
- (3) A court may take into account any unreasonable failure of a claimant, applicant or beneficiary to settle a claim or reduce the scope, length or complexity of the proceeding when considering the matter of costs.

Definitions: **court**, s 8

Section 69

- C231 The courts generally have power to decide whether any party should be ordered to pay or contribute to the costs of the proceedings. In proceedings under the Family Protection Act 1955, the courts have tended to order that costs be met out of the estate, even where a party is unsuccessful. This section is designed to alter that emphasis, without abrogating the general principle that costs are in the court's discretion.
- C232 *Subsection (1)* provides that whenever a party brings or defends proceedings unsuccessfully, consideration must be given to whether that party should be ordered to pay the costs of the estate and the other parties.
- C233 *Subsection (2)* qualifies that rule for cases where the claimant had reasonable grounds to bring proceedings, having regard to what he or she knew of the facts.
- C234 *Subsection (3)* allows the court to take into account any unreasonable failure to settle an application, or reduce its length and complexity, when making an order as to costs. This section might apply, for example, if a party refuses unjustifiably to submit an application to the processes of mediation. It can be invoked against either the successful or the unsuccessful party.

70 Waiver, compromise and agreement

- (1) A person may at any time before or after the death of the deceased person agree
 - (a) to waive or compromise any claim for an award or property division order of any kind that the person has or might have against the estate of the deceased;
 - (b) on the status, ownership or division of any property (or future property) which might be affected by a proceeding under this Act.
- (2) An agreement under this Act is enforceable if it
 - (a) is in writing; and
 - (b) is signed by each party and the signature of each party is witnessed; and
 - (c) contains or has attached a certificate signed by a solicitor certifying that the solicitor has given independent advice to the applicant or potential applicant who appears to the solicitor to understand clearly the effect and implications of the agreement.
- (3) A court may enforce an agreement under this section although the agreement does not comply with subsection (2) if the court is satisfied that the agreement
 - (a) was made and represents the true intent of the parties to the agreement; and
 - (b) is not vitiated by undue influence.
- (4) Despite subsections (2) and (3), a court may refuse to enforce an agreement to waive or compromise a claim or property division made before the death of the deceased person if the court considers it would be unjust to enforce it after considering
 - (a) whether the agreement was fair and reasonable when it was made; and
 - (b) the time that has elapsed since the agreement was made; and
 - (c) whether the agreement is fair and reasonable in the light of any changes in the circumstances since it was made.
- (5) An agreement to waive or compromise an application for a property division that relates to all or a substantial part of partnership property is to be taken, unless the agreement provides or implies otherwise, to constitute a waiver or compromise of a partner's claim to support.
- (6) This section does not apply to a support claim of a child under 25 years of age.

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

Origin: *Matrimonial Property Act 1976* s 21(1)–(10)

Section 70

- C235 With the exception of one class of claim, any claim or entitlement may (*subsection (1)*) be waived or compromised, either before or after the will-maker's death. This is a change from the present law under the Family Protection Act 1955. It is consistent, however, with s 21 of the Matrimonial Property Act 1976.
- C236 *Subsection (2)* adopts the formal requirements laid down in the Matrimonial Property Act 1976 for matrimonial property agreements. The agreement must be in writing, signed by both parties, and contain a certificate signed by a solicitor certifying that the claimant has been given independent advice on the effect and implications of the document.
- C237 *Subsection (4)* provides that a court may refuse to enforce an agreement, even an agreement that complies with the formal requirements, after considering
- whether it was fair and reasonable when made,
 - the time that has elapsed since it was made, and
 - whether it is still fair and reasonable in the light of any new circumstances.
- This provision too follows the Matrimonial Property Act 1976 (see s 21(10) of that Act).
- C238 *Subsection (3)* provides that where the formal requirements are not met, the agreement may still be enforced if the court is satisfied that the agreement was in fact made and represents the true agreement of both parties, and is not vitiated by undue influence. This approach is more favourable to informal agreements than the corresponding provision in s 21(4) of the Matrimonial Property Act 1976. That section allows enforcement if non-compliance has not "materially prejudiced the interests of any party to the agreement".

(Section 70 commentary continues overleaf)

(Section 70 continued)

- C239 The “prejudice” test is too strict for disputes arising after death. First, in making arrangements which principally affect their children and other relatives, partners often see no need to get separate solicitors. Secondly, lack of writing will almost inevitably make finding out the truth harder for the successors of a claimant than it would for the claimant themselves. Yet an agreement fairly entered into is likely to be a better basis for determining the successors’ rights than the principles set out in the draft Act. The cost of ascertaining it is therefore justified. Thirdly, it is doubtful whether successors should be able to repudiate such agreements simply because they might have worked out badly for one of the partners had both lived. “Prejudice” as between two domestic partners is often irrelevant to the issues which arise between one partner and the estate of the other.
- C240 The class of claim which is excepted from the general rule permitting waiver and compromise is (*subsection (6)*) the support claim of the child under 25 years of age. This exception is based on considerations of public policy relating to the support of children, and also the risk of undue influence as between parents and adolescent children.

PART 7
MISCELLANEOUS

71 Regulations

The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:

- (a) prescribing the nature and extent of the information required to be provided in respect of a claim or application under this Act;
- (b) prescribing the procedure for the recovery by administrators of non-probate assets under sections 52 and 53;
- (c) providing for such matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for its due administration.

Definitions: **non-probate assets**, s 52(2)

Origin: *Matrimonial Property Act 1976* s 53

Section 71

C241 This section provides for the making of regulations.

72 Proceedings not determined before death of a party

- (1) Where a proceeding has been brought by a spouse under the *Matrimonial Property Act 1976* and that proceeding has not been determined before the death of one of the spouses, the proceeding is to be continued as if the proceeding were an application for a property division order under this Act.
- (2) In the case of a proceeding continued under subsection (1) as an application for a property division order by the administrator of the estate of a deceased spouse against a surviving spouse, the court may make any order that it might have made under the *Matrimonial Property Act 1976* if the spouse had not died.
- (3) Where a proceeding has been brought by a de facto partner by virtue of a constructive trust, a contract, or a restitutionary claim in respect of a matter that could have been brought as a property division application if one partner had died before the proceeding was commenced, the proceeding is to be continued after the coming into force of this Act as if the proceeding were an application for a property division order under this Act.
- (4) Where a proceeding has been brought for maintenance under the *Family Proceedings Act 1980* on or after the dissolution of a marriage and that proceeding has not been determined before the death of one of the spouses, the proceeding can be continued after the coming into force of this Act as if the proceeding were a support claim under this Act.
- (5) Where a proceeding has been brought under the law of contract in respect of a benefit provided by a person to another person or under the law of restitution (unjust enrichment) by a person who anticipates provision for benefits conferred and that proceeding has not been determined before the death of one of the parties, the proceeding can be continued as if the proceeding were a contribution claim under this Act.
- (6) Subsection (5) applies subject to sections 38(3) and 39(3).

Definitions: **administrator**, **contribution claim**, **court**, **partner**, **property division order**, **support claim**, s 8; **de facto partner**, s 9

73 Repeals and consequential amendments

- (1) The *Law Reform (Testamentary Promises) Act 1949* [1949, No. 33] and the *Family Protection Act 1955* [1955, No. 88] are repealed.
- (2) The enactments specified in Schedule 2 are amended in the manner indicated in that schedule.

Section 72

C242 This section concerns cases where proceedings are brought by a claimant during the lifetime of the parties, and one party dies before the proceedings are disposed of. At that point in these proceedings, the draft Act should apply. This may arise in proceedings brought by spouses under the Matrimonial Property Act 1976 or Family Proceedings Act 1980, by de facto partners under the general law, and by contributors. The proceedings will be transferred to the appropriate jurisdiction under the draft Act.

Section 73

C243 The draft Act replaces the Law Reform (Testamentary Promises) Act 1949, the Family Protection Act 1955, and the Matrimonial Property Act 1963 (as preserved by s 57(4) of the Matrimonial Property Act 1976). It also redefines the relationship between succession adjustment and the provision of welfare benefits and subsidies under the Social Security Act 1964. *Schedule 2* amends consequentially various provisions relating to the administration of estates. At present, *Schedule 2* does not provide for all necessary consequential amendments.

SCHEDULE 1
PRIVITY OF PROMISE PROVISIONS

See section 34

1 Definitions

In this Schedule, in relation to a promise to which section 34 applies, **beneficiary** means a person (other than the promisor or promisee) on whom the promise confers, or purports to confer, a benefit;

promisee means a contributor to whom the promise is made;

promisor means a recipient of a benefit by whom the promise is made.

2 Application of the Contracts (Privity) Act 1982

Where a claim is brought by a beneficiary in respect of a promise to which section 34 applies, the provisions of the *Contracts (Privity) Act 1982* apply to the extent that the promise is

- (a) enforceable as a contract made between the deceased and the promisee; and
- (b) enforced by the promisee
 - (i) before the death of the deceased; or
 - (ii) against the estate of the deceased under section 39(3).

3 Availability of defences

In a claim brought by a beneficiary in respect of a promise to which section 34 applies, other than a claim to which clause 2 applies, the administrator of the deceased's estate may advance

- (a) any defence which would have been available against the promisee;
- (b) any accord and satisfaction, or contract of settlement made by the promisee in relation to the obligation;
- (c) any set-off or counterclaim arising out of or in connection with the promise,

as if the promise had been made for the benefit of the promisee and the promisee had subsequently brought a proceeding to enforce the promise.

4 Enforcement of promise

Despite clause 3, the court may order that such provision be made as appears just in respect of a promise to which section 34 applies if the beneficiary satisfies the court that

- (a) the beneficiary, or a person acting in the interests of the beneficiary, was aware of the promise; and
- (b) the beneficiary's circumstances have so changed, since the promise was made and knowledge of the promise was acquired, that it would be inequitable not to make provision in respect of the promise.

- 5 Restricted application of clauses 3 and 4**
 Clauses 3 and 4 do not apply to actions taken or defences or set-offs arising after
- (a) the beneficiary has begun a proceeding against the deceased's estate to enforce the promise; or
 - (b) the parties have submitted to arbitration any matter relating to the promise.
- 6 Availability of defences**
 This schedule does not affect any defence, set-off or counterclaim that might be available at law or in equity as between the beneficiary and the deceased's estate.

SCHEDULE 2
 ENACTMENTS AMENDED

See section 73(2)

Social Security Act 1964 (1964/136)

section 69F

Insert subsections (3A) to (3D)

- “(3A) The Director-General may include in the financial means assessment of a person to whom this section applies an additional sum calculated in accordance with the formula
- $$a - b - c - d$$
- where a, b, c, and d represent the following
- a half the property owned by that person and that person's spouse immediately before the death of that person's spouse,
 - b the property owned by that person immediately before the death of that person's spouse,
 - c the property that person received from that person's spouse by reason of the death of that person's spouse,
 - d the amount or value received by that person as a result of claims made against the estate of that person's spouse;
- and valuations are to be made (except in the case of item d)
- (a) as at the day immediately after the death of the person's spouse; and
 - (b) deducting all debts and other valid claims (other than claims and entitlements under the *Succession (Adjustment) Act 199-* and claims by that person or his or her spouse against each other or each other's estate) outstanding on that day.

- (3B) An amount included in the financial means assessment under subsection (3A) is to be reduced to the extent that the person who is the subject of the assessment proves to the satisfaction of the Director-General
- (a) that there is good reason to believe that, if the person had made a claim against the estate of the deceased spouse immediately after that spouse's death, it would not have been successful or would have resulted in a lesser award than the sum calculated under subsection (3A); or
 - (b) that it would be unreasonable at the date of the assessment to expect the person to bring a claim for an award equivalent to the amount calculated under subsection (3A) because of one or more of the following
 - (i) the time that has elapsed since the death of that person's spouse; or
 - (ii) the extent that any remedies open to the person have become exhausted by the expiry of any relevant limitation period; or
 - (iii) the actual disposition of the deceased spouse's estate and the reasons why that disposition ought not to be disturbed; or
 - (iv) the benefits that the person received from the estate or from the deceased spouse during the deceased spouse's lifetime; or
 - (v) any other relevant factors.
- (3C) No amount is to be included under subsection (3A) in the financial means assessment of a person
- (a) while that person is pursuing diligently a proceeding against the estate of that person's spouse for an amount equivalent to the sum calculated under that subsection; or
 - (b) if all claims which that person could have made against that person's spouse have been determined by a court or settled by way of a compromise in good faith.
- (3D) The Director-General may include in the financial means assessment of a person to whom this section applies a further additional sum being an amount of interest which in the opinion of the Director-General would have been earned on any amount included under subsection (3A) or (3B) calculated from the later of
- (a) the date of death of that person's spouse; or
 - (b) the date of the financial means assessment."

section 73

Repeal the whole section

Substitute:

"73 Limitation where applicant entitled to claim under Succession (Adjustment) Act 199–

- (1) Notwithstanding anything to the contrary in this Part of this Act, the Director-General may, in the Director-General's discretion, refuse to grant any benefit (other than New Zealand superannuation, or a veteran's pension, not subject to an income test) or may grant any such benefit at a reduced rate or may cancel any such benefit already granted, in any case where any person, being a relative of the applicant, has died and the applicant has, in the opinion of the Director-General failed without good and sufficient reason to begin a proceeding under the *Succession (Adjustment) Act 199–* against the estate of the relative for an award or order under that Act and to prosecute with all due diligence any proceeding so begun by that person or on that person's behalf or treated as if made on that person's behalf.
- (2) In any such proceeding, the Director-General is entitled to appear and show cause why an award or provision or further provision should be made for the applicant from the estate of the relative.
- (3) In this section **relative** means a person out of whose estate the applicant is entitled to make a claim for an award or order under the *Succession (Adjustment) Act 199–*.
- (4) In this section a reference to a proceeding under the *Succession (Adjustment) Act 199–* does not include an application for a support award
 - (a) by a surviving partner of the relative under section 22, except to the extent of the difference between 50% of the combined assets of the relative and the surviving partner, and (if it is a lesser sum) the surviving partner's property division entitlement; and
 - (b) by a child of the relative under paragraph (c) of section 25 of that Act."

Estate and Gift Duties Act 1968 (1968/35)

section 31A

Insert after "Act 1976"

"or a property division order under the *Succession (Adjustment) Act 199–*"

Administration Act 1969 (1969/52)

section 47 (1)

Repeal paragraphs (a), (b), (ca) and (d)

section 49 (1)

Insert in paragraph (a), (b), and (c) after "section 47 of this Act applies," in each paragraph"or any order to which the *Succession (Adjustment) Act 199-* applies,"

section 49 (3)(a)

Delete "for an order under the Family Protection Act 1955 or the Law Reform (Testamentary Promises) Act 1949"**Substitute** "*the Succession (Adjustment) Act 199-*";**Delete** in the second place where it occurs "for an order under the Family Protection Act 1955"**Substitute** "or the *Succession (Adjustment) Act 199-*"

section 49 (4)

Insert after "section 47 of this Act applies""or any order to which the *Succession (Adjustment) Act 199-* applies"*Stamp and Cheque Duties Act 1971 (1971/51)*

section 11

Insert in subsection (2) after paragraph (o)"(oa) The *Succession (Adjustment) Act 199-*";**Insert** after subsection (2)

"(3) No stamp duty shall be payable on any instrument in so far as that instrument waives or compromises a claim under the *Succession (Adjustment) Act 199-* nor on any disposition made in accordance with such an instrument."

Matrimonial Property Act 1976 (1976/166)

section 57

Repeal subsection (4)

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