

# Review of Succession Law

---

## Practitioner Survey



# Review of Succession Law

---

1. The Law Commission is reviewing aspects of succession law.
2. The review follows the Law Commission's recent review of the Property (Relationships) Act 1976. In that review we concluded that relationship property entitlements on a person's death could not be considered in isolation from other competing claims to provision from their estate. We recommended that Part 8 of the Act be reviewed as part of a wider review of succession law.
3. This review of succession law focuses on entitlements to a deceased's property. We will examine who should be entitled to further provision despite the terms of the deceased's will and the policy justifications for those entitlements. We will also look at entitlements in intestacies. In addition, we will look at ancillary and procedural aspects of the law and cross-border issues.
4. The review will address areas which may be of particular concern to Māori. Although the review will not include succession to Māori land under Te Ture Whenua Māori Act 1993, we will consider questions relating to succession generally that may be of particular concern to Māori. In doing so, the Law Commission may comment on aspects of Te Ture Whenua Māori Act 1993.
5. The main statutes under review are:
  - a. Property (Relationships) Act 1976
  - b. Family Protection Act 1955
  - c. Law Reform (Testamentary Promises) Act 1949
  - d. the intestacy rules in the Administration Act 1969.
6. We plan to deliver our recommendations to the Minister Responsible for the Law Commission by the end of 2021.

## WE WANT YOUR FEEDBACK

7. In this first stage of the project, we are asking for feedback to help us identify the main issues with the current law. We will hold a wider public consultation later in the project when there will be an opportunity for further input and comment on options for reform.
8. This paper is aimed at lawyers and those with a good understanding of succession law. In this paper we ask a series of questions. You can respond to any or all of these questions and raise any issues we have not covered.

Please email your feedback to [sul@lawcom.govt.nz](mailto:sul@lawcom.govt.nz) by 31 May 2020.

We recognise that it may be difficult to provide feedback during the Covid-19 restrictions. We can schedule a phone discussion instead of, or in addition to, receiving written feedback. Please email [sul@lawcom.govt.nz](mailto:sul@lawcom.govt.nz) if you wish to schedule a discussion.

## WHAT HAPPENS TO YOUR FEEDBACK?

We will use responses from this paper to inform our review. If you respond, we may refer to your feedback in our publications.

Information supplied to the Law Commission is subject to the Official Information Act 1982. If someone requests a copy of your feedback, the Law Commission must consider whether it is required to release it.

You may want your feedback, or parts of it, to be treated in confidence by the Law Commission. If you do not want the Law Commission to release all or part of your feedback or for it to be referred to in any Commission publication, please explain in your response which parts should be withheld and the reasons. The Law Commission will take your views into account:

- in deciding whether to withhold or release any information requested under the Official Information Act;
- in deciding if, and how, to refer to your feedback in our publications.

If the Law Commission considers that a privacy interest or issue of confidentiality arises (regardless of whether you have sought confidentiality in advance), the Commission will endeavour to consult you before deciding whether to release the response (if the Commission has contact details for you).

The Law Commission complies with the Privacy Act 1993, which governs how it collects, holds, uses and discloses personal information you provide. You have the right to access and correct your personal information. For access and correction requests please email [sul@lawcom.govt.nz](mailto:sul@lawcom.govt.nz).

# Te Ao Māori

---

## THE IMPORTANCE OF SUCCESSION LAW TO MĀORI

9. We recognise the importance of this project to Māori. We are considering how succession law should address issues that may be of particular concern to Māori. We will consult specifically on these issues during the project. At this stage, we welcome any preliminary comments.

# Property (Relationships) Act 1976

---

10. When a person in a qualifying relationship dies, Part 8 of the Property (Relationships) Act 1976 provides the surviving partner with the right to divide the couple's property under the Act instead of receiving the benefits under the deceased partner's will or the intestacy rules. The Act is based on the principle that a surviving partner should not be in a worse position on their partner's death than if the couple had hypothetically separated. If a surviving partner elects a division of the couple's relationship property under the Act, gifts for that partner under the deceased's will are to be treated as revoked unless the will says otherwise. The court retains a power to order that the surviving partner receives all or any of the gifts.
11. Part 8 also enables the deceased partner's personal representative to apply to the court for leave to divide the couple's property. The purpose of such an application is most often to enlarge the deceased's estate in order to meet claims under Family Protection Act 1955.
12. Part 8 gives rise to several issues, including its lack of key details about how the Act applies when a personal representative initiates a division of the couple's property.

## QUESTIONS

**Q1**

Should a surviving partner to a qualifying relationship in principle be entitled to, at a minimum, an equal share of the couple's relationship property, regardless of what the deceased's will provides?

**Q2**

A surviving partner must choose between a division of property under the Act or the gifts under the deceased's will, although the surviving partner may take both if that is stated in the will or ordered by the court. Is this approach satisfactory? If not, what is the better alternative and why?

**Q3**

Is the current approach of allowing the personal representative to apply for division under the Act the best way of ensuring that the deceased's estate has sufficient property to meet other claims? If not, what is the better alternative?

**Q4**

Part 8 alters some of the property division rules that apply when couples separate. For example, all the property the deceased owned at the date of death is presumed to be relationship property, and the equal sharing rules apply automatically to marriages and civil unions of less than three years (although not de facto relationships of less than three years). Are these modifications appropriate? Should other rules be modified or not apply when a partner dies?

**Q5**

Should partners be able to agree how their property will be divided through a contracting out agreement, if either should die? Are there issues with contracting out agreements when relationships end on death?

**Q6**

The deceased may have jointly owned property with a third party. If the deceased's share in the property passes by survivorship to the third party, should the surviving partner be able to claim their relationship property interest in the deceased's share from the third party? Are there other ways relationship property can pass to third parties without falling into the estate, and should they also be claimable by the surviving partner?

**Q7**

Section 18 of the Wills Act 2007 provides that a will is revoked if the will-maker marries or enters a civil union. Does section 18 require reform?

**Q8**

Are there any further issues about Part 8 of the Property (Relationships) Act 1976 the Law Commission should consider?

## RECOMMENDATIONS IN THE LAW COMMISSION'S REVIEW OF THE PROPERTY (RELATIONSHIPS) ACT 1976

13. In our final report *Review of the Property (Relationships) Act 1976; Te Arotake i te Property (Relationships) Act 1976*,<sup>1</sup> we made recommendations for the reform of the Act. Several of those recommendations may have implications for how relationship property is divided when a partner dies.
14. We recommended changes to the way property is classified as relationship property. We said that property owned by either or both partners should be relationship property if it:
  - a. was acquired for the partners' common use or common benefit;
  - b. was acquired during the relationship other than as a third party gift or inheritance; or
  - c. is a family chattel.
15. We recommended that when a partner brings a family home into the relationship, it should remain separate property, but any increase in the value of the home occurring during the relationship should be divided as relationship property. If the family home is replaced during the relationship, the newly acquired home should be relationship property.
16. We recommended broadening the remedy in section 44C to enable a court to provide a just division of property when a trust holds wealth that was produced, preserved or enhanced by the relationship. In these circumstances, the court would have broad powers but must be satisfied interference with the trust is just, having regard to several matters.
17. We also recommended changes to how economic disparities between the partners resulting from their division of functions are addressed. We recommended replacing section 15 and the adult maintenance regime with a limited entitlement to share family income through a

<sup>1</sup> Law Commission *Review of the Property (Relationships) Act 1976; Te Arotake i te Property (Relationships) Act 1976* (NZLC, R143, 2019).

Family Income Sharing Arrangement or FISA. The objective of a FISA would be to share the economic disadvantages a partner (Partner A) suffers or the economic advantages a partner (Partner B) gains arising from a relationship or its end.

18. We said Partner A should be entitled to a FISA when:
- a. the partners have a child together;
  - b. the relationship was 10 years or longer; or
  - c. during the relationship:
    - i. Partner A stopped, reduced or did not ever undertake paid work, took a lesser paying job or declined a promotion or other career advancement opportunity in order to make contributions to the relationship; or
    - ii. Partner B was enabled to undertake training, education and/or other career sustaining or advancing opportunities due to the contributions of Partner A to the relationship.
19. The total amount payable under a FISA should usually be determined by a statutory formula that shares the family income for a period of time that is approximately half the length of the relationship up to a maximum of five years. The family income should be calculated based on what the partners earned in the period before separation.

## QUESTIONS

Q9

Should these recommendations for the reform of the Property (Relationships) Act 1976 apply to relationships ended by death?

# Family Protection Act 1955

---

20. The Family Protection Act 1955 allows certain family members of the deceased to apply to the court to seek further provision from an estate if the deceased failed to provide for their proper maintenance and support. The law is based on a will-maker's "moral duty" to provide for their family members. It places a restriction on testamentary freedom. Family members, such as independent adult children, can claim if they feel they have not been recognised in the will, even if they have no immediate financial need.

## QUESTIONS

**Q10**

The Family Protection Act 1955 has traditionally been justified on several grounds. They include will-makers' duties to provide for their families' financial needs and to ensure they are not a burden on the state. They also include will-makers' "moral duties" to provide support to family members by recognising them in their will. Are these policy objectives appropriate for contemporary New Zealand? If not, what should the policy objectives be in relation to provision for family members?

**Q11**

Given your answer to Q10, are there classes of persons that should or should not be eligible to make a claim under the Act?

**Q12**

The court has wide discretion to determine what provision to award. Are there issues with the factors the courts take into account or the types of awards the courts make? Should the court's discretion be curtailed or removed altogether in favour of a system of forced heirship?

**Q13**

The court may only award further provision from the estate. If, for example, the deceased has disposed of their property during their lifetime, or it has passed by survivorship, that property cannot be the subject of an order under the Act. Are there issues with this position?

**Q14**

To what extent should parties be able to contract out of the Family Protection Act 1955 either:

- a) during the life of the will-maker; or
- b) after the death of the will-maker?

What should be necessary to make the agreements binding?

**Q15**

Are there any further issues about the Family Protection Act 1955 that the Law Commission should consider?



# Law Reform (Testamentary Promises) Act 1949

---

21. The Law Reform (Testamentary Promises) Act 1949 enables any person who rendered services or performed work for a deceased person to make a claim against the deceased's estate where the deceased promised to reward them for those services by making some testamentary provision but failed to do so. The promise may be express or implied and need not be an enforceable contract under the general law. A claim can only be brought to the extent that the deceased failed to make the promised provision or otherwise remunerate the claimant. When making an award, the court must consider all the circumstances of the case. In particular:
- the circumstances in which the promise was made and the services were rendered or work was performed;
  - the value of the services or work;
  - the value of the testamentary provision promised;
  - the amount of the estate; and
  - the nature and amounts of other claims in respect of the estate.
22. The Act is unique to New Zealand. It has been in force for over 70 years. Since that time the law has developed several other remedies to address unremunerated contributions to another's property and broken promises such as estoppel, constructive trusts and restitution.
23. The Act is difficult to read and does not conform to contemporary drafting standards.

## QUESTIONS

**Q16**

Does the Act continue to serve a useful purpose in contemporary New Zealand?

**Q17**

The Act does not define "services". The courts have adopted a broad definition but one that does not include the natural incidents and consequences of a close family relationship. Is this judicial interpretation of "services" appropriate?

**Q18**

Section 3(1) of the Act lists various factors for a court to consider when making an award. Are these factors appropriate? How could they be improved?

**Q19**

Are there other issues with the courts' approach to making awards?

**Q20**

The Act only applies when the deceased promised to reward the claimant in their will. Is this too narrow? Should the Act allow claims when the deceased made any form of promised reward?

**Q21**

The court may only make awards from the estate. If, for example, the deceased has disposed of their property during their lifetime, or it has passed by survivorship, that property cannot be the subject of an order under the Act. Are there issues with this position?

**Q22**

Are there any further issues about the Law Reform (Testamentary Promises) Act 1949 the Law Commission should consider?

# The intestacy regime

---

24. The intestacy regime is set out in the Administration Act 1969. It has remained largely unchanged for the past 75 years.
25. The policy objective of the regime is to provide a way of distributing the intestate's property consistently with what is thought most intestate people would have done if they had made a will. Given the regime was formulated so long ago, it is unclear whether its rules reflect contemporary attitudes and expectations.
26. A surviving partner takes the deceased's personal chattels, a "prescribed amount" currently set at \$155,000, and one third of the residue. The deceased's issue are entitled to the remaining two-thirds of the residue. When there are no issue, the surviving partner takes the whole estate. Where there is no surviving partner, the issue take the whole estate. Where there is neither a surviving partner nor issue, the deceased's parents or siblings may take the estate. When no one takes an absolute interest in the estate, it belongs to the Crown as unowned property (*bona vacantia*).
27. The provisions of the Administration Act 1969 are drafted in archaic and inaccessible language. They do not conform to contemporary drafting standards.

## QUESTIONS

**Q23**

Should the policy objective of intestate distribution continue to be based on what is thought most intestate people would have done if they had made a will? Are there other principles on which the law should be based?

**Q24**

Do the current intestacy rules reflect contemporary attitudes and expectations about who should receive what property? What are the particular problem areas?

**Q25**

Do the intestacy rules adequately address diverse family arrangements, particularly when the deceased leaves a surviving partner as well as children from a prior relationship?

**Q26**

Is it an issue that the intestacy rules take no account of the property that has passed to family members by survivorship or by some provision the deceased made to family members during their lifetime?

**Q27**

Are there any other issues with the intestacy rules that the Law Commission should consider?

# Priorities, jurisdiction and orders

## PRIORITIES

28. A person's entitlements to property under the Property (Relationships) Act 1976 are generally subject to the rights of creditors in respect of that property. The main exception is a partner's protected interest in the family home. Awards under the Family Protection Act 1955 are made from the net estate after creditor claims are satisfied. Awards under the Law Reform (Testamentary Promises) Act 1949 are made from the gross estate, although when making an award the court may have regard to the nature and amounts of other claims.
29. The various statutes do not prescribe an order of priority except that the Property (Relationships) Act 1976 provides that a surviving partner's rights under the Act take priority over orders made under the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949.

**Q28**

Are there issues regarding the order of priorities between creditors, claims under the Property (Relationships) Act 1976, claims under the Family Protection Act 1955 and claims under the Law Reform (Testamentary Promises) Act 1949?

## JURISDICTION

30. Every application under the Property (Relationships) Act 1976 must be heard by the Family Court, subject to the Family Court's power to transfer proceedings to the High Court. Under the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949, the Family Court and High Court have concurrent jurisdiction. Under all three statutes proceedings can be transferred from the Family Court to the High Court.

**Q29**

Is the current allocation of jurisdiction between the Family Court and High Court to hear and determine claims against estates appropriate?

**Q30**

Are there other issues regarding the courts' jurisdiction?

## ORDERS

31. Under the Property (Relationships) Act 1976, the court has various ancillary powers to implement a division of property in the most appropriate way. In addition, it may make orders for the occupation of the family home, orders settling relationship property for the benefit of children of the relationship, and orders to postpone the division when it would cause undue hardship for the principal caregiver of children.
32. Although the court does not have the same ancillary powers under the Family Protection Act 1955 and Law Reform (Testamentary Promises) Act 1949, it may attach conditions to orders, or exonerate parts of the estate from orders.
33. Often proceedings against estates require the court to deal with other matters, such as replacing personal representatives. In such cases, the court would have to rely on its powers under the Administration Act 1969, the Trusts Act 2019 or its inherent jurisdiction.

**Q31**

Are there issues with the types of orders the court can make when claims are made against estates?

# Procedure and dispute resolution

---

## DISCLOSURE OF INFORMATION

35. In proceedings against estates, it is important that all relevant information is disclosed. The deceased's personal representative has a duty to put all information about the estate's financial affairs before the court. A claimant must disclose their own financial positions, although the same duty does not always apply to beneficiaries. There must be sufficient information to enable a determination of the full extent of the couple's relationship property.

**Q32**

Do parties experience issues accessing the information they need to effectively and efficiently resolve disputes regarding estates? If so, what can be done to improve access to information?

## THE ROLE OF PERSONAL REPRESENTATIVES

36. The quick and efficient resolution of claims is a key criterion for good succession law. It is important that the law makes clear to those administering estates what is to be done with property, what claims might be properly admitted, and what approach they should take in proceedings against the estate.

**Q33**

What role should a personal representative take when claims are made against estates? Does the current law adequately set out their duties?

**Q34**

What, if any, obligation should a personal representative have to notify potential claimants of the deceased's death and their rights to claim against the estate?

**Q35**

What issues might arise if the personal representative is either a beneficiary of the estate or a potential claimant?

## TIME LIMITS

37. Generally, proceedings under the Property (Relationships) Act 1976, the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949 must be brought within 12 months from the grant of administration. A two year period applies if the application is made under the Family Protection Act 1955 by a personal representative on behalf of a person who is not of full age or mental capacity. The court may extend the time limits in some circumstances, although an application for an extension cannot be made after the final distribution of the estate. Other than the Family Protection Act 1955, the statutes do not define what is meant by a final distribution. Case law has established it means the point where the personal representative has completed administration of the estate and becomes the trustee for the beneficiaries of those assets, even if those assets have not actually been distributed.
38. A surviving partner has six months in which to make election under the Property (Relationships) Act 1976 whether to accept whatever provision is made for them under the deceased's will or to seek division under the Act.
39. The rules under the Administration Act 1969 generally provide that personal representatives may distribute an estate after six months from the grant of administration if they have received no written notice of an application against the estate.

**Q36**

Are there issues with the time limits relating to making claims and the distribution of estates? If there are issues, what should the time limits be?

## COSTS

40. Awards of costs are at the discretion of the court in proceedings against estates. Costs often follow the event with reference to the complexity of the proceedings and the parties' conduct. In some cases, the court will take a different approach to reflect the family context of the proceedings, such as that costs be paid from the estate or the parties bear their own costs.

**Q37**

Are there issues with how costs are awarded in proceedings involving claims against estates?

## RESOLVING DISPUTES OUT OF COURT

41. Resolving disputes without going to court may help parties save cost and time. They may also be particularly appropriate in family conflicts.

**Q38**

Other than going to court, what dispute resolution procedures work well for claims against estates?

**Q39**

Are there any issues that prevent these procedures from operating efficiently and effectively?

## OTHER ISSUES

**Q40**

Are there any further issues regarding jurisdiction, procedure and dispute resolution the Law Commission should consider?



# Cross-border issues

---

42. Succession matters may include a link to another country. In such cases, there will be questions about whether the law of New Zealand or another country's law applies, which court will apply that law, and whether any decision can be enforced in New Zealand or overseas.

## Q41

Do the current rules regarding cross-border issues work well? Are there any particular problem areas? For example, is the distinction between movable and immovable property problematic?

Please email your feedback to [sul@lawcom.govt.nz](mailto:sul@lawcom.govt.nz) by 31 May 2020. You can also contact us at the same address to schedule a phone discussion.

For further information about the project, please see the Law Commission's website:

[www.lawcom.govt.nz/our-projects/review-succession-law](http://www.lawcom.govt.nz/our-projects/review-succession-law)  
or contact us at [sul@lawcom.govt.nz](mailto:sul@lawcom.govt.nz)