Te Aka Matua o te Ture
Law Commission

Whiringa-ā-rangi | November 2021
Te Whanganui-a-Tara, Aotearoa
Wellington, New Zealand

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

Frequently Asked Questions

WHY HAS THE TE AKA MATUA O TE TURE | LAW COMMISSION REVIEWED SUCCESSION LAW?

In mid-2019, the Government referred succession law to the Commission to review. This followed on from our review of the Property (Relationships) Act 1976 (the PRA review) which considered the division of property when a couple separates. In the PRA review, we concluded that a surviving partner's relationship property entitlements could not be reviewed in isolation from the claims and entitlements of others to a deceased person's estate. We therefore recommended that the Commission review succession law so that the Government could fully consider the law relating to relationship property division. The Government accepted this recommendation.

WHY DOES TE AKA MATUA O TE TURE | LAW COMMISSION CONSIDER SUCCESSION LAW NEEDS TO CHANGE?

Many of the statutes we have reviewed were enacted in the middle of last century and have not been reviewed for decades. Societal attitudes towards family have changed significantly since then. Families are now more diverse. There is also increased recognition of te Tiriti o Waitangi | the Treaty of Waitangi and tikanga Māori as an independent source of rights and obligations in Aotearoa New Zealand. Overwhelmingly, the law we have reviewed does not adequately recognise the Crown's obligations under te Tiriti nor does it adequately recognise tikanga Māori.

WHAT ARE THE MAJOR CHANGES TO SUCCESSION LAW TE AKA MATUA O TE TURE | LAW COMMISSION HAS RECOMMENDED?

The Report recommends the repeal of several statutes and the enactment of a new Act. The new Act, the Inheritance (Claims Against Estates) Act, should be the principal source of law relating to entitlements to and claims against a deceased person's estate. The Report also covers more technical matters such as which courts should have jurisdiction over what matters, what property should be available to meet those claims and entitlements, and cross-border issues. The Report also makes recommendations to assist parties in resolving succession disputes.

We have recommended the following major changes.

Family Provision

Currently, close family members of the deceased can challenge a will by arguing that the deceased failed to fulfil their "moral duty" to provide for the family members in the will. Such a claim can also be made when there is no will and the estate is distributed under the intestacy rules. The objectives of the current law, the Family Protection Act 1955, are not sufficiently clear to satisfy modern legislative drafting standards and we have recommended that the Act be repealed. In its place, we have recommended that surviving partners and children of the deceased can apply for family provision awards. We recommended that a surviving partner should be able to claim family provision where the partner has insufficient resources to maintain a reasonable independent standard of living, having regard to the economic disadvantages arising from the relationship for the surviving partner.

We presented two options in the Report regarding family provision for children of the deceased. Under the first option, the deceased's children and grandchildren of all ages should be eligible to claim family provision if the deceased has unjustly failed to:

- provide for the child or grandchild if they are in financial need; or
- recognise the child or grandchild.

Under the second option, only the deceased's children under 25 years of age or those who are disabled would be eligible to claim. For both options, a child of the deceased would include whāngai, when this accords with the tikanga of the relevant whānau, and an "accepted child" for whom the deceased had assumed, in an enduring way, the responsibilities of a parent.

The feedback we received during consultation showed strongly divided views on when it should be appropriate to disrupt a will-maker's testamentary intentions to make further provision for family members, particularly in relation to adult children of the will-maker. Because of these conflicting opinions, we have provided the Government with these two reform options to consider.

Relationship property entitlements

We have recommended that, despite what provision is available to a surviving partner of a deceased under the deceased's will or the intestacy rules, the surviving partner should continue to be entitled to choose to divide their relationship property. They should get the same share of relationship property as they would get had the couple separated during their lives. However, to ensure the least disruption to the will-maker's wishes, we recommended that the surviving partner should first receive whatever gifts are made for them under the will and then receive a "top-up" amount to the full value of their entitlement.

Distribution of intestate estates

When a person dies without a will, their estate is distributed in accordance with the intestacy rules in the Administration Act 1969. We have concluded some of these rules are outdated. They are difficult to follow and do not respond to the increasing diversity of New Zealand families.

We have recommended the rules be rewritten in modern language and changed in several respects. The recommended changes include:

- Intestate estates should be divided in fixed proportions between family members instead of giving a surviving partner a fixed cash sum regardless of the size of the estate.
- Where a deceased is survived by their partner and children, the partner should take the whole estate when the children are from the relationship between the deceased and the surviving partner. When the deceased leaves one or more children from a different relationship to the surviving partner, the surviving partner should be entitled to half the estate and the deceased's children should share evenly in the other half.
- If there are whāngai relationships within the deceased's whānau, or the deceased themself is a whāngai, the tikanga of the relevant whānau should determine which individuals are entitled to inherit the estate.

Claims against property outside an estate

Generally, when someone claims against an estate, the law only empowers the court to make awards from the property of the estate. However, the property a person may have owned during their life may not fall into their estate when they die. For example, property the deceased owned as a joint tenant with others will accrue by survivorship to the surviving joint tenant(s) when the

deceased dies. Another example is where a person settles property on trust to benefit individuals of their choosing rather than passing property to those individuals through their will and estate.

Situations can arise where entitlements to or claims against an estate may be defeated because the deceased's property has not fallen into their estate. We have concluded this is unsatisfactory and there should be some ability for the court to recover property in certain circumstances. We have recommended that the court should have power to recover property to satisfy awards against an estate where:

- the property has been disposed of to defeat an entitlement or claim against an estate; or
- the property is a deceased's joint tenancy interest that has accrued to the surviving joint tenant(s) when the deceased has died with the effect of defeating an entitlement or claim against an estate.

In either case, the court should only recover the property necessary to satisfy the award it wished to make. The court should not order the recovery of property when the recipient received it in good faith and gave valuable consideration or received it in good faith and it is unjust to order that the property be recovered.

Te ao Māori

The Report seeks to weave new law that includes te ao Māori perspectives. We have concluded that te Tiriti o Waitangi requires the Crown to exercise kāwanatanga in a responsible manner, including facilitating the exercise of tino rangatiratanga in specific circumstances. The recommendations for the reform of succession law do this from three starting points.

First, the law should enable Māori to live according to tikanga. In the context of succession, this promotes the application of tikanga by and within whānau. Some of the Commission's recommendations, for example, require the court to consider the tikanga of the relevant whānau when exercising its powers.

Second, state succession law should weave new law that reflects tikanga Māori and other values shared by New Zealanders (a "third law"). This is a deeply important approach to law-making in Aotearoa New Zealand to support a nation grounded in the commitments of te Tiriti, to the benefit of all New Zealanders. An example of this in the Report is the reliance on aspects of tikanga relating to mana to support partners making agreements about rights in respect of their estates when they die instead of having those rights determined by the relevant statutes.

Third, kāwanatanga should recognise its own limits by not applying state law to taonga. Instead, we have recommended that tikanga Māori should continue to govern succession to taonga, and the appropriate role of state law in relation to taonga should be limited to facilitating the resolution of disputes in accordance with tikanga Māori. Taonga should not be available to meet any claim or entitlement under the new Act or the new intestacy rules, and the extent to which a disposition of taonga within a will should have effect should be determined in accordance with tikanga Māori.

HOW WILL THE REFORMS BETTER ACCOMMODATE BLENDED FAMILIES?

Families in Aotearoa New Zealand have become more diverse since many of the laws we have reviewed were enacted. One example of this is that re-partnering and blended families have become much more common. Obligations to provide for certain family members on death can

become more complex in blended families. Usually, this complexity arises from the potentially competing interests of a surviving partner and the deceased's children from a prior relationship.

We have sought to provide recommendations that respond to the increasing diversity in family arrangements. We have recommended changing how the family home is shared between partners if there is a division of relationship property. If the family home was owned by one partner before the relationship began or was received as a third-party gift or inheritance, only the increase in the value of the home during the relationship should be shared.

We have recommended a wider definition of children eligible to claim family provision awards than currently set out in the Family Protection Act. Children for whom the deceased had assumed, in an enduring way, the responsibilities of a parent would be eligible. This would allow some stepchildren to claim. Tamariki whāngai would also be eligible when that accords with the tikanga of the relevant whānau.

We have recommended repealing the prescribed amount allocated to partners in an intestacy. Instead, we have recommended having different rules depending on whether the deceased's children are of the relationship with the surviving partner. Where one or more of the deceased's children are of another relationship, we have recommended that the deceased's partner takes the household items that the couple used wholly or principally for family purposes (the family chattels) and 50 per cent of the remaining estate, and the deceased's children share evenly in the remaining 50 per cent.

WHAT HAPPENS NOW?

The Report has been presented to Parliament. When we delivered our report on the Property (Relationships) Act 1976 in 2019, the Government accepted our recommendation to refer succession law to the Commission and indicated its intention to consider the recommendations in both reports concurrently. The Government will either accept our recommendations or present a response to Parliament within 120 working days if it chooses to reject our recommendations. If the Government chooses to accept our recommendations, new legislation reflecting our recommendations in both reports will be drafted and begin their passage through Parliament in the usual way.