New Zealand Law Society
Te Kāhui Ture o Aotearoa

Review of Succession Law: Rights to a person's property on death

Law Commission Issue Paper 46

17 June 2018

Submission on Law Commission Issue Paper 46: Review of Succession Law

1 Executive Summary

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa endorses the need for a comprehensive review of succession law for contemporary Aotearoa. We support many of the Law Commission's conclusions within the Issues Paper, and in particular the motivation to develop a consolidated statute providing for good contemporary succession law.

1.2 There are some key areas where the Law Society does not agree with the Commission's conclusions. In particular, the Law Society:

(a) Encourages the Commission to undertake further work in order to identify the values and attitudes of contemporary Aotearoa, as well as the principles of a democratic society, in order to bolster the objectives of a contemporary succession law.

(b) Emphasises the importance of ensuring that a new succession law is consistent with the proposed reform for relationship property law.

(c) Disagrees with the weight placed on the succession survey as the basis for significant change to aspects of succession law, particularly in areas where the survey did not address the precise nature of some of the proposed changes. We refer here, for example, to the proposed changes around family provision claims.

(d) Supports succession law being developed so that it is consistent with the principles of Te Tiriti o Waitangi (Te Tiriti) and provides for the option of determining succession in accordance with tikanga. We support a discretionary approach that accommodates varying tikanga throughout Aotearoa.

(e) Cautions against seeking to produce an intestacy law that will determine 'what most intestate people would have done had they made a will.'

1.3 The Law Society's comments are set out below, responding in order to the questions posed by the Issues Paper. These comments have been prepared with the assistance of the Family Law and Property Law Sections.

1.4 The Law Society looks forward to ongoing engagement as the proposed reform proceeds.

2 Chapter One – Developing Good Succession Law

Question 1: What are your views on the criteria we have identified that make good succession law?

2.1 The Law Society considers that good succession law should start with the principle of testamentary freedom,[1] against which potentially competing principles must be carefully

[1] The proposed criteria do not appear to include the concept of testamentary freedom, unless it is intended to fall under "aligning with fundamental values and principles of a democratic society" and / or "sustaining property rights and expectations".

balanced. The latter have been identified by the Law Commission (the Commission), as follows:

(a) Consistency with the Treaty of Waitangi

The Commission notes the importance of context and agrees that for Aotearoa, this means concepts of succession may differ for Māori and non- Māori. Good succession law will require balancing and, where appropriate, integrating a Māori perspective and consideration of tikanga within the general law.

(b) Reflecting values and attitudes of contemporary Aotearoa

Existing succession law is now more than 50 years old and there has been profound social change in the intervening years. The Commission's reform proposals rightly reflect the imperative of establishing a bicultural framework, in the context of a multi-cultural society, where succession law will need to accommodate different cultural norms and practices.

The Commission has also identified that the increasing diversity of family arrangements is fundamental to thinking about what good succession law might look like. Modern families in Aotearoa reflect reducing rates of marriage, increasing de facto relationships, civil unions, same sex relationships, and greater mobility with respect to leaving and forming relationships. This is enhanced by increasing life expectancy, and relationships between adults and children taking on more diverse forms (for example through IVF, surrogacy, step-parenting and grandparents raising children). The former foundations of succession law — property inheritance rights and expectations based on biological familial lines — are therefore changing. (We note in passing that the paper makes assumptions, for example that what is now meant by "families" and "whānau" is understood and accepted; it would be helpful if these could be more clearly defined.)

It is not clear from the paper what "values and attitudes of contemporary Aotearoa" are being recognised by the Commission. The Commission refers to good succession law having as the objective of alignment with the fundamental values and principles of a democratic society, but there is a lack of clarity as to what is included or intended by this. The Law Society's view is that it would include values such as:

i. Testamentary freedom;

ii. A recognition of family and whānau relationships in all their evolved forms;

iii. The rights of minors and other dependants to be protected and provisioned by those who have responsibility for them;

iv. A framework that fairly balances individual rights with the public good, that it is clear and capable of being enforced, and provides predictability, certainty and a mechanism to resolve conflict.

The Law Society recommends that the Commission clarifies the values, attitudes and principles that it considers should be reflected in good succession law and supports the inclusion of (i) to (iv) above.

The Commission has relied on the Otago succession survey[2] (succession survey) to inform it of current attitudes and values regarding succession. The Commission has included as two of its criteria for good succession law "sustaining property rights and expectations" and "promoting positive outcomes for families and whanau." We agree with inclusion of these criteria but are not confident that the full extent of contemporary attitudes have been adequately captured by the succession survey.

Commonly expressed values or expectations across many cultural groups also include:

i. An expectation that on death a parent may have some obligation to provide for their children (including adult children), especially where there is need.[3]

ii. An expectation on the part of a parent of a child, that property that they had left by succession to the other parent of that child (the fruits of their relationship with that person) would in time benefit their children on the death of the survivor.

iii. A corresponding expectation on the part of children, that the law would recognise that the property of a deceased parent which passed to a surviving parent should benefit them on the death of their surviving parent.

iv. An expectation on the part of grandparents that provision to their children will flow through to their grandchildren.[4]

v. An expectation (particularly in some cultures) that children have an obligation to support parents or other family members.

These principles and values are not discussed or reflected to any significant degree in the Commission's recommendations.

The Law Society also notes there are other factors that might give rise to additional criteria relevant to succession law, including:

i. Research about changing societal conditions such as climate change, and economic conditions such as a growing generational wealth gap.[5]

ii. Research or other information about changes in cognitive function with age which fall short of testamentary incapacity but which could affect will-making.[6]

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2 Paras 1.18 to 1.21 of the paper.

3 This expectation is currently expressed in the provisions of the Family Protection Act 1955.

4 It is possible that ideas of liberal individualism may not sit so well with youth who have strongly emphasised intergenerational equity in matters such as climate change.

5 Where children may be significantly less well off than their parents, and issues such as housing affordability and student debt will affect the need of adult children for provision in a parent's will.

6 Disputes over wills often arise in circumstances where a will-maker, who has a long history of even handedness amongst beneficiaries and consistent patterns in testamentary provision over time, makes changes to their will late in life which seem capricious or out of character for the testator having regard to their past conduct in their relationships. A clear and common example is a late in life decision to cut a family member out of a will because of a perceived slight (such as the family member taking steps to stop the will-maker driving).

iii. Research or other information about elder abuse in the context of will-making.

iv. Any research or other information on how succession law might promote positive outcomes for families and whanau across the many cultural groups represented in Aotearoa or how it might be disadvantageous to them.

To illustrate those points, the practical experience of many lawyers is that they have observed:

i. Increasing financial need in many families — for example young family members owing large debts, and those who will never own their own home due to increasing property prices and the need for a sizeable deposit.

ii. Family members being aggrieved where an inter-generational inheritance passes largely to the final partner/spouse of the deceased who may have had little or no connection to those assets and may have been a feature of the deceased's life for a very short time.

iii. People who are living longer but whose mental function appears to change towards the end of their lives, affecting their relationships, decisions and sometimes making them vulnerable to abuse.

iv. Cultural groups who have property arrangements built on inter-generational financial supports and informal understandings (not contracts) about those arrangements.

Question 2: Do you agree with our proposal for a single statute that governs claims against estates?

2.2 The Law Society agrees that it is desirable to have a single statute governing claims against estates. The current position is that claims can arise from the Family Protection Act 1955, the Law Reform (Testamentary Promises) Act 1949, common law, equity, and Part 8 of the Property (Relationships) Act 1976. Multiple sources of law undermine and reduce the ability of the public to collect information and understand their legal rights.

2.3 We support the Administration Act being included in a consolidated statute dealing with succession law. Matters of estate administration should be considered at the time of estate planning, and having them in the same statute will ensure a holistic approach to succession law. The Administration Act covers the appointment of executors and trustees and/or their removal, and it is integral to family protection. The Commercial and Contracts Act 2017 is an example of consolidating similar disparate legislation into the one statute, and this has improved that area of law.

2.4 The new Act should be drafted in accessible, clear English.

3 Chapter 2 – Te Ao Māori and Succession

Question 3: In your view, what is the role of Treaty for this review? Do you agree with our approach? If not, why?

3.1 In the Law Society's view, the Te Tiriti must be a central feature of this review. Property and succession matters are important to Māori, and the Crown and Māori currently have well-understood obligations under Te Tiriti.

3.2 The issues paper contains an excellent, well-researched and balanced summary of the position regarding Te Tiriti and the relationship between the Crown and Māori. Our comments are based on the information contained in the paper.

3.3 We note that in the pursuit of greater testamentary freedom, the proposals that would reduce the rights of adult children to apply under family provision claims might not fit comfortably with tikanga Māori.

3.4 Both Māori and non-Māori need a reasonably predictable framework of what will happen to a person's property on their death, what claims may be made, and how they will be determined. To that extent, the needs are the same — but the processes and in some instances the results may be different, under the reform proposals.

3.5 Māori who are party to conflicting claims over a deceased estate, and who want it resolved in accordance with tikanga and ao Māori, should be able to do so. However, the practical difficulty in doing so may be significant. These types of claims often involve multiple parties, some of whom might not be Māori and some of whom might be Māori but not connected with their cultural heritage. Members of a culturally blended family might have competing interests in how they want the dispute to be resolved.

3.6 There are also tribal differences and differences in the practice of tikanga between the various whānau, iwi and hapū throughout the country.

3.7 There may also be non-Māori families who wish to have such succession disputes dealt with in a process that reflects values also seen in tikanga and ao Māori, but others may not. A practical balance might be achieved through:

(a) Having a judicial process (a 'gateway') to determine whether the dispute needs to be dealt with under tikanga and ao Māori; and/or

(b) Incorporating some aspects of tikanga and ao Māori in the general law applying to all.

Question 4: Do you think the application of state law to succession is a problem?

3.8 We refer to the response to Q3. There is no difficulty with incorporating aspects of tikanga and ao Māori in the general law (state law) applying to everyone, providing there is a gateway for those who prefer the dispute to be dealt with solely under tikanga and ao Māori.

3.9 The section 5 principles in the Care of Children Act 2004 and section 21J in the Property (Relationships) Act 1989 are examples of Parliament's clear intention of what must be considered when the court is determining those disputes, and the Law Society considers similar principles should be included in any new succession Act.

Question 5: Have we appropriately identified the tikanga principles relevant to succession? Are there any we have misunderstood or not included?

3.10 We refer to our response to Q6 to Q8, below.

Question 6: Should tikanga govern succession for Māori?

3.11 There may be circumstances where it is appropriate for tikanga to govern succession for Māori and particularly Māori property. However, difficulty arises in defining those situations. We refer to comments above about a proposed judicial gateway and/or a set of principles to guide the court when considering succession matters under the new Act.

3.12 It is worth noting that an important and well understood ringfencing of important Māori assets is already in place — the exclusion of Māori land and definition of taonga in the Property (Relationships) Act. This signifies the importance and significance of Māori assets.

Question 7: If so, how would you like this to happen in practice?

3.13 In addition to the suggestion above (a judicial gateway or process for considering the most appropriate pathway to resolve the dispute), consideration could be given to making provision in the new Act to "opt in" or "opt out" of a tikanga approach to succession law.

Question 8: What would the role of state law be? (Possible roles for state law are discussed further in Chapters 7, 8 and 15)?

3.14 In the Law Society's view, it is the role of state law to provide the framework within which succession disputes are to be determined. This must include:

(a) Providing a defined way for a claim to be initiated.

(b) Providing a pathway for resolution of the claim, having regard to the cultures and ethnicities of the parties.

(c) Ensuring the resolution is final and binding, and enforceable through the court system.

4 Chapter 3 – Relationship property entitlements

4.1 The Law Society agrees with the recommendations relating to relationship property claims, as set out in the Commission's 2019 report. However, there is an overlap between those recommendations and the recommendations in chapters 3 and 4 of this issues paper, in terms of family provision. Any proposals for succession law reform must be consistent with other reform, in particular the reform of relationship property law. It is essential there are no inconsistencies or, if there is overlap between law, that the spouse/partner does not have the ability to choose to apply one Act or another in order to achieve a materially different financial result.

4.2 The Law Society's two submissions on the Commission's review of the Property (Relationships) Act 1976 (PRA reforms) outlined our view that the changes would only work if the key pillars of the proposal were adopted as a package.

4.3 If the PRA reforms are adopted in their entirety, the proposals in this issues paper would mean that where Family Income Sharing Arrangements (FISAs) are in effect at death, they would continue to be payable under the PRA reforms (subject to adjustment by the court) but otherwise would not be payable under the proposed new succession law.[7]

4.4 The PRA reforms mean that one of the separating couples may retain as their separate property a significant portion of capital but with some ongoing liability to the other. The clean break principle is abandoned for living separated parties.

4.5 Under these proposed reforms, the family provision regime for claims by surviving partners on death embraces a clean break on death, by preferring lump sum payments of capital.

4.6 The criteria for the awards centres on providing a reasonable standard of living and looks at the economic consequences of the relationship or its end (through death). It may be arguable that the capital sum required to keep a partner for an indefinite number of years will need to be generous. These claims are likely to be highly contentious and, like spousal maintenance claims, heavily dependent on extensive evidence about the couple's standard of living while the deceased was alive and projections as to the future needs of the survivor.

4.7 However, the Commission expects family provision claims to be rare. This is on the basis that it is likely that either: the deceased would have made sufficient provision in their will; a division of relationship property will enable the survivor to maintain a reasonable, independent standard of living; or that the economic consequences of the relationship or its end for the surviving partner would be minimal and not justify an award.

4.8 The Law Society does not agree that family provision claims will be rare, nor that the factors set out in the paragraph above will apply so that claims are not made.

4.9 A consequence of the PRA reform will be that in some relationships there will be very little relationship property for division between a couple. This will be the case in many relationships which start later in life, near to or after the end of the parties' working lives and where the property owned by the parties had been acquired prior to the relationship. Surviving partners with a limited pool of relationship property available to claim against, will look instead to family provision and contribution-type claims against the estate.

4.10 A family provision claim presents an opportunity for a surviving partner to receive a more generous portion of the property owned by the deceased than if the parties had separated while alive. We believe as a matter of practice any party making a claim for family provision would be likely to include a contribution-type claim as part of a suite of companion claims.

4.11 The criteria for a family provision award to a partner/spouse will be met in many cases because a non-property-owning party is likely to be significantly economically disadvantaged by the end of the relationship, having benefited from the resources of the other during the relationship. It is likely that older couples will not be working. Furthermore, the property-owning party may well not have made provision for the other in their will.

4.12 As legal practitioners, we often see both relationship property claims after death and estate claims brought by spouses or partners who have entered a relationship much later in life,

[7] Para 4.32 of the paper; and see para 4.31 (Family Provision awards would be made as lump sum payments, transfers of property, periodic payments or the establishment of a trust, with lump sum payments being preferred).

after they have finished working and often where there is a significant disparity in the property that each of them owns.

4.13 Part of the Commission's rationale in recommending a change of relationship property law from a "family use" to "fruits of the relationship" approach, was feedback it received about the circumstances in which the current provisions of the PRA created injustice, particularly as it pertained to older partners and spouses. One factor considered was the age of the partners: [8]

> *The older the owning partner was when the relationship began and ended, the greater the risk of injustice. For older New Zealanders who enter a new relationship later in life, their pre-relationship property is likely to have been accumulated over a significant period of their lifetime and may in some cases represent the product of one or more previous relationships. Further, the older the owning partner, the less likely they are able to financially recover to their pre-relationship position.*

4.14 Another factor was that: [9]

> *the PRA captures a wide range of relationships and might include relationships where the partners have no expectation of sharing property or have drifted into a qualifying relationship without appreciating the property consequences. Some might think it is unjust to be required to share their property without making a deliberate decision to do so.*

4.15 Claims for family provision are likely to be the norm in cases involving older people who might not have considered themselves to be in a qualifying relationship. Therefore, the unjust result identified and addressed by the PRA reforms, would be perpetuated by the changes now proposed concerning family provision claims.

4.16 In short, during the life of the parties the PRA reforms will protect as separate property, the property which is introduced to the relationship. On death, however, that property is likely to be subject to family provision and contribution claims by surviving spouses/partners.

4.17 If adult children are unable to make family provision claims, this will give survivor partners the capacity to have recourse to most of the estate of a deceased, regardless of the source of the assets in it. No regard would be had to whether the estate might have been comprised of the relationship property of a parent which had been inherited by the deceased.

4.18 The Law Society recommends that the court should be able to take into account a wider range of factors than those currently proposed when exercising its discretion to make family provision claims in respect of partners. Additional factors could include:

(a) the origin of the property in the deceased estate;

(b) the deceased's plans for provision for other parties including adult children; and

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[8] Para 3.24(e) of the New Zealand Law Commission, Report 143 – Review of the Property (Relationships) Act 1976 – Te Arotake i te Property (Relationships) Act 1976.

[9] Para 3.24(c) supra.

(c) other family provision/contribution claims (noting that the Law Society does not support removing the ability for adult children to make family provision/recognition claims).

Question 9: Do you agree with the issues we have identified?

4.19 Yes.

Question 10: Are there other issues with the law that we have not identified:

4.20 No.

Question 11: What are your views on the proposals for reform?

4.21 As noted above, the succession law reform proposals must be consistent with the proposed new property relationship law. It is essential there are no inconsistencies or if there is overlap that the spouse/partner does not have the ability to choose to apply one Act or another to achieve a materially different financial result. Subject to those comments, the Law Society believes the current reform recommendations are sound.

Question 12: Do you have any other suggestions for reform?

4.22 No.

5 Chapter 4 – Family Provision Claims

Question 13: Do you agree with the issues we have identified?

5.1 The Law Society does not agree with the Commission's identification of the issues. We consider that the history of the Family Protection Act 1955 must be considered.

5.2 Originally, in the Testator's Family Maintenance Act 1900, potential claimants were the surviving spouse and children of the deceased. Parents of the deceased were added later, and grandchildren were given a claim as of right from 1967. Throughout the history of the Act and its predecessors, the relevant statutory provision, currently section 4(1) of the Family Protection Act 1955, has allowed for a broad discretion and in our view that should continue.

5.3 The Law Society does not agree with the proposition that the views of our current population are so different now that we should dispense with claims by able bodied adult children whether for maintenance or financial support, or recognition, and certainly not in relation to grandchildren.

5.4 The Otago succession survey did not inquire about the interests of adult grandchildren, who can currently claim as of right. In the Law Society's view, the "accepted children" concept in para 4.40 will not cover common scenarios in relation to grandchildren. For example, no consideration has been given to a scenario where the will-maker leaves several children, but the will makes no provision for one of those children predeceasing and leaving children of their own.

5.5 The Law Society takes no issue with the idea of stepping away from the term "moral duty", which dates back to 1910,[10] and supports a change of terminology to the current concepts of

[10] *Allardice* (1910) 20 NZLR 959 (Court of Appeal)

maintenance or "financial support", and "family recognition." These two concepts are consistent with the evolution of case law in this area. They are simple and may be more easily understood, and appear to be less subjective / contentious for the public.

5.6 Clarifying the pathways for claims may reduce the scope for the sort of derogatory evidence that often appears in family protection cases where family members are critical of others and dredge up unpleasant family history. In our view, the tests for valid claims should be made clearer and categorising them as maintenance or financial support, on the one hand, and recognition on the other, would be helpful.

5.7 The Law Society disagrees with the Commission's preliminary view at para 4.17, that the law relating to family provisions should be consistent with legal duties that apply during the will-maker's lifetime. The Law Society considers that the survey results do not support that preliminary view.

5.8 The Commission further suggests[11] that having only options 1 and 2 would reduce the amount of litigation in this area. While we agree that it would reduce litigation by reducing the scope of those who can claim, we do not think that being unable to claim would have positive implications for family relationships. The Otago succession survey used a scenario where an estate was left to one child, excluding another child. The responses from the survey were in favour of the excluded child being able to make a claim. If that child cannot claim because of the limits of option 2, it will not improve the family relationship. While the Law Society accepts that litigation may not improve the relationship, a compromise and settlement of the dispute might improve the relationship. If there is no scope to claim, there may be no inducement to compromise.

5.9 In the Law Society's view, there is also potential for reducing the scope for the evidence in family provision cases by amending the wording of the current section 4 of the Family Protection Act 1955.

Question 14: Are there other issues with the law that we have not identified?

5.10 As noted above, the Law Society considers that the Commission has not fully considered the position of grandchildren (especially where a will-maker makes no provision for substitutionary gifts if one or more of their children predecease).

5.11 It would assist to have clarification of the position of grandchildren, especially as it is not uncommon for grandchildren to be cared for by grandparents as their primary care providers. In such circumstances a grandchild (minor or disabled) should have the ability to claim for maintenance under the family provision awards or for a recognition award.

5.12 The position of grandchildren where their parent has predeceased the grandparent should also be considered and confirmed. It is suggested that these grandchildren should be able to apply for a provision award if there are insufficient funds from other sources (the surviving parent's or deceased parent's estate) to maintain the grandchild to a reasonable standard. The grandchild should also be able to seek a recognition award.

Question 15: What are your views on the proposals for reform?

5.13 As discussed above, the Law Society considers the proposal to remove claims by able-bodied adult children goes too far (and is not supported by the succession survey).

[11] Para 4.18.

5.14 The proposals do not address the position of grandchildren. In our view the succession survey did not contain adequate consideration of the current position in relation to grandchildren and the survey results do not support the removal of claims by grandchildren.

5.15 In any event, the Law Society considers that the succession survey alone is not a sufficient basis on which to premise such significant change.

Question 16: Do you have any other suggestions for reform?

5.16 If the provisions of the Family Protection Act 1955 are to be imported into a new succession Act, the Law Society suggests the following:

(a) Family provision claims could be framed under two heads, maintenance or financial support, and recognition. Those heads would cover the Commission's proposals and options two to four.

(b) The recognised principles that currently apply to Family Protection Act claims be incorporated into a new succession Act. For example, there is no presumption of equality or fairness; that the will-maker's reasons must be taken into account; and that a court must give reasons if it is not going to follow the will-maker's directions.

(c) Potential claimants should be the deceased's surviving spouse/partner, children and grandchildren and the Commission's "accepted children," with some modification.

6 Chapter 5 – Contribution Claims

Question 17: Do you agree with the issues we have identified?

6.1 Yes.

Question 18: Are there any other issues with the law we have not identified?

6.2 There are no other issues that the Law Society has identified in the timeframe allowed to prepare this submission. We draw the Commission's attention to our response to Q19.

Question 19: What are your views on the proposal for reform?

6.3 In principle, the Law Society supports option one. [12] However, we have had insufficient time to consider whether the Commission's proposal incorporates the scope of current equitable law and common law claims. On the one hand, it may be too complicated and may be preferable to leave equitable claims to one side. On the other hand, there would be benefit in having a clear limitation period for bringing all claims against deceased estates.

6.4 The Law Society does not agree with including claims for contributions to the deceased's estate after the deceased's death. Those claims should proceed as they do now, with tracing available if allowed. Otherwise, a distribution of the estate is likely to be delayed.

Question 20: Do you have any other suggestions for reform?

6.5 No.

[12] Para 5.18 to 5.31.

7 Chapter 6 – Intestacy

Question 21: Do you agree with the issues we have identified?

7.1 The Law Society agrees with the issues identified by the Commission but does not entirely agree with the associated commentary.

7.2 In the Law Society's view, the well-entrenched default hierarchy is founded in common sense and based on the importance of family connections. While it may need improving, we do not agree that it requires radical change just because it has been the default for so long. We agree with the Commission that such improvement could include the narrowing of those who are included (such as parents).

7.3 The Law Society does not believe the intestacy provisions require amendment. The default provisions can still be seen as appropriate even with contemporary blended families, and the importance of an automatic default provision in favour of children is paramount. We do agree that the definition of children could be expanded.

7.4 While it is important to provide an automatic default provision in favour of spouses and partners, that context is now changed with their rights under the Property (Relationships) Act. The Law Society agrees that there must be default provisions and that spouses/partners ought to retain existing property rights, particularly under the Property (Relationships) Act.

7.5 The Law Society does not believe that it is possible for an Act to determine "what most intestate people would have done had they made a will". Human behaviour and choices are not always predictable Rather, provision for intestacies should involve what the state considers to be the fairest default provisions, in the absence of testamentary directions. The state, through this review process, distils from various sources what are the appropriate values, rather than second guessing what most intestate people would have done.

Question 22: Are there other issues with the law we have not identified?

7.6 No.

Question 23: What are your views on the proposals for reform?

7.7 The new provisions should conform with modern drafting standards. This includes plain English, defined terms, and consistency with the Property (Relationships) Act.

7.8 The Law Society agrees that the definition of "children" needs further consideration and that the existing term "issue" is now inappropriate.[13] While the Law Society considers that "descendants" could be an appropriate replacement, we see no compelling reason not to use the word "children" – a term that is even more common and better understood.

7.9 The definition of children can then be better defined to encompass stepchildren, whāngai, and children out of fertility processes and posthumous reproduction: all areas which the Law Society suggest should be treated liberally.

7.10 The Law Society agrees that the definitions of chattels and qualifying relationships should be amended to accord with the Property (Relationships) Act. It would then follow that taonga and heirlooms would be expressly excluded from the definition of chattels.

[13] Para 6.25.

7.11 The Law Society also agrees with the Commission's proposal to repeal the "prescribed sum" for spouses and partners. This specifically relates to the rights that they now have under the Property (Relationships) Act.

7.12 The Law Society agrees with the reduction in the classes of people who are able to compete against a surviving partner/spouse. We agree with the Commission[14] that where the deceased is survived by a partner and no descendants, the partner should take the entire estate, rather than the deceased's parents receiving a share.

7.13 Of the options presented where the deceased is survived by a partner and descendants, the Law Society supports option one. The Law Society agrees that where the deceased is survived by no partner but descendants, the current law that the children share the estate should remain.

7.14 In considering wider family members where there are no surviving partner/spouse, children or parents, the Law Society supports the law remaining as it is.

7.15 The Law Society agrees that the Crown should have a wider discretion to distribute bona vacantia estates.

7.16 In the Law Society's view, minor beneficiaries should continue to take a vested interest held on trust until they reach 18 years of age.

7.17 The Law Society agrees that the intestacy regime should not take account of property that does not fall into the estate.[15]

Question 24: Do you have any other suggestions for reform?

7.18 No.

8 Chapter 7: Succession and Taonga

Question 25: Will the recent changes to Te Ture Whenua Māori Act resolve issues in relation to family homes built on Māori land?

8.1 Under the recent changes to the Act, it is no longer possible to leave a life interest in Māori freehold land to a partner. Instead, rights to occupy the principal family home on the land and to receive any income or grants from the interest may be left to a partner. In the Law Society's view, it is premature to have any certainty as to whether these changes resolve the entirety of the issues raised in the Commission's paper, given that the changes only came into effect on 6 February 2021.

Question 26: Is Taonga an appropriate description of items that might be excluded from general succession law? If not, is there a more appropriate kupu Māori to use?

8.2 The Law Society considers that taonga is the correct word to use when describing items. In the Law Society's view, the definition of taonga cannot be prescriptive as its meaning would need to be fluid and dictated by the tikanga of the relevant whānau or hapū.

[14] Para 6.51.
[15] Para 6.86.

8.3 Professor Jacinta Ruru suggested the following definition in 2004: a "valued possession held in accordance with tikanga Māori and highly prized by the whānau, hapū or iwi."[16] This definition is a good starting point to further consider the issue. However, there needs to be significant consultation with Māori on the definition of taonga.

Question 27: Should taonga be excluded from general succession law?

8.4 The Law Society agrees that taonga should be excluded from general succession law and governed by the tikanga of the whānau, hapū or iwi to which it belongs.

Questions 28 and 29: should taonga, and the definition of taonga, be subject to tikanga Māori? If so, should the relevant tikanga be that of the relevant whānau, hapū or iwi?

8.5 The Law Society agrees that tikanga should determine how taonga is succeeded to and how it is defined. As is clear from the commentary on the definition of taonga, tikanga is at the forefront of determining what is a taonga and what is not. Therefore, it should follow that it is up to the individual whānau, hapū or iwi to determine how taonga is to be succeeded.

Question 30: Should taonga, or some other appropriate kupu, be limited to items that are connected to Māori culture?

8.6 As set out in the Commission's paper, "taonga" is a Māori word that encapsulates a Māori perspective. In the Law Society's view, taonga should be limited to items that are connected to Māori culture. While there has been case law in the Family Court where a broad interpretation of taonga was taken to include items that were non-Māori, this in effect takes away the central element of the tikanga associated with taonga.

8.7 Professor Ruru has commented that:

> *… what constitutes taonga is an unsettled area of law. The early precedents developed suggested that it is possible for items namely artwork to be taonga even though they are not specifically owned or held by a Māori person, made by a Māori person, or have any obvious Māori association or content.*
>
> *… it might be beneficial for the legislative to provide a definition, clearly indicating taonga as a Māori concept (and making a call as to whether it can extend to real property). For example, the Act could be amended to include a definition such as "taonga means for the purposes of this act an object held in accordance with tikanga Māori.*[17]

8.8 There may be divergent views within Māoridom and there should be wide consultation with Māori on this issue.

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[16] Jacinta Ruru "Taonga and family chattels" [2004] NZLJ 297 at 298.

[17] Jacinta Ruru "Kua tutū te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds) Family Law Policy in New Zealand (4th ed, LexisNexis, Wellington, 2013) page 91.

9 Chapter 8 – Weaving New Law

Question 31: What value is placed on testamentary freedom in tikanga, and how might this be appropriately recognised in state law?

9.1 As set out in the Commission's paper, the Law Society agrees that Māori value testamentary freedom and should have autonomy.

Question 32: Should ōhakī be recognised in state law as a will or an alternative but equally valid form of testamentary disposition? What would be appropriate requirements to evidence ōhakī?

9.2 The Law Society agrees that ōhakī should be recognised in state law as a will.

9.3 Dr Pita Sharples in his speech to Parliament on 10 October 2006 said the process of the "performed will" or "ōhākī", is clearly relevant in understanding how tangata whenua view the execution of wills. He then used the example of the ascension of the second Māori King, Tawhiao:

> *Moments before his ascension, senior Tainui kaumatua Tui Adams turned to the people and asked, whether Tuheitia should be King. He Kingi?: "Ae," they replied . He Kingi?: "Ae," they repeated. "He Kingi?: "Ae,". And so it was to be. And with that, the will of the people, the declaration confirming the transfer of political leadership, was complete. It was a formalized and highly public ritual which enabled effect to be given to the intention of the will maker, the late Queen, Te Atairangaikaahu, in a language which is plain, and which simplifies the process. It provides an excellent precedent in which to understand the reform of the Wills Act 1837.*

9.4 Dr Sharples then went on to say:

> *Whilst the Wills Act 1837 from the United Kingdom remains the foundation of New Zealand's law of wills, for Māori, the ōhākī, or dying declaration of the will maker, has established a robust model which could assist New Zealand law-making. It is a tradition which has been carefully passed down through generations. For example, in the days leading up to his death in 1894, Tawhiao, the second Māori King, announced his successor with these words: "Papa te whaitiri, ka puta Uenuku, ka puta Matariki, Ko Mahuta te kingi". The thunder crashes, Uenuku (the rainbow god) appears, the constellation of Matariki heralding the start of the new year is present; and in its midst, we welcome Mahuta the new King. Tawhiao's dying declaration performed the function of a written will. His intentions are manifest in a public performance, in which there are sufficient witnesses to both confirm the event; as well as gain tribal support.*

9.5 In terms of what would be required to evidence ōhākī, significant consideration will need to be given to the formal requirements. In the Law Society's view, as a minimum there would need to be corroborative evidence from at least two witnesses present when the ōhākī was made.

Question 33: Do written wills also provide a valuable opportunity for Māori to express testamentary freedom?

9.6 The Law Society agrees that written wills also provide a valuable opportunity for Māori to express testamentary freedom, just as with other cultures. A person regardless of whether they identify as Māori should have the ability to decide how they wish to express their testamentary freedom, whether that is through tikanga practices such as ōhākī or through executing a will.

Questions 34, 35, 36, 37, 38 and 39

9.7 These questions are very specific. If a tikanga approach is to be taken, then it is accepted that tikanga regarding how matters are dealt with varies significantly within individual whānau, hapū or iwi. It is important to note that there is no "one size fits all" approach. It therefore follows that there cannot be one prescribed "tikanga approach" to intestacy — a discretionary approach is required.

Questions 40, 42, 43 and 44

9.8 The issue of customary Māori marriage and the obligations to surviving partners is complicated. Professor Ruru explains that when the Marriage Act was passed in 1955, many Māori resented the way it denied legality to marriage established according to tikanga Māori and made both the establishment and dissolution of legal marriages difficult and costly.

9.9 After the Act came into force, social workers pressured many Māori couples with children into legal marriages, in order to ensure the legitimacy of children and access to the family benefit. In the years since, Māori resentment has moderated and the consequences have been muted, as changes in general societal practices have resulted in the elimination of illegitimacy by the Status of Children Act 1969 and acceptance of de facto unions as marriages for many purposes. [18]

9.10 In the Law Society's view, there must be wider consultation with Māori on whether in 2021, customary Māori marriage in accordance with tikanga should be provided for in the law.

Question 45: What does tikanga have to say about the rights of whanau members to challenge a deceased's testamentary wishes?

9.11 As already noted above, tikanga varies between whānau, hapū or iwi. Tikanga may help inform these bases or recognise different bases altogether for providing for family members. Tikanga may also have something to say about which family members should be provided for in this way.

Question 47: How should whāngai be treated in this context?

9.12 Whāngai need to be recognised and accepted in succession laws and it is accepted that the right of whāngai to succeed should be done so in accordance with the tikanga of the whānau, hapū or iwi.

[18] Jacinta Ruru "Kua tutū te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds) Family Law Policy in New Zealand (4th ed, LexisNexis, Wellington, 2013) page 71.

Questions 48, 49, 50 and 51

9.13 If a tikanga approach is to be taken, then it must be acknowledged that tikanga varies significantly within individual whānau, hapū or iwi. As noted above, there is no "one size fits all" approach and there cannot be one prescribed "tikanga approach" to intestacy. A discretionary approach is required.

10 Chapter 9 – Awards, Priorities, and Anti-avoidance

Question 52: Do you agree with the issues we have identified?

10.1 The Law Society agrees with the issues that have been identified.

10.2 However, we note that the issues and proposals discussed under this chapter stimulated considerable discussion, and this was considered one of the more controversial areas where reform is proposed. This area, more than any other area in the paper, has the potential to increase litigation and increase uncertainty. In our view, it does not therefore meet the objective of "promoting positive outcomes".

10.3 Good law-making should promote a reasonable predictability of the effect of decisions made and transactions entered into, rather than increasing uncertainty which may have unintended consequences.

Question 53: Are there other issues with the law we have not identified?

10.4 No.

Question 54: What are your views on the proposals for reform?

10.5 The Law Commission's summary of proposals for reform lists out the property available to make awards as:

(a) Relationship property awards should be made from the parts of the estate comprising relationship property.

(b) Family provision awards should fall rateably across the whole estate.

(c) Contribution awards that are monetary awards should fall rateably across the whole estate, although the court should have power to order that the award be made in relation to specific items of property.

(d) For all claims, the court should have discretion to order that the award be sourced only from particular parts of the estate.

(e) The intestacy provisions should apply only to the distribution of property of the estate.

10.6 The Law Society agrees with the list of property which is available to make awards, however, the proposal that "the intestacy provision should apply only to the distribution of the property of the estate" is not clear and needs further clarification. In our view, there needs to be a clear demarcation for the property that would be available to the court to make an award. For example, it is unclear whether the "property of the estate" might include property that the executor has a right to collect, such as a relationship property division.

Priorities

10.7 The Law Society agrees with the proposal regarding priorities. However, we note that in terms of "priorities", there is the conceptual difference between a proprietary interest recognised by the court under a constructive trust or similar, and other contribution awards. Presumably, the proprietary interest will always be given priority, and the other interests will be subject to a judicial discretion. This needs further clarification.

10.8 Where the court has discretion, there should be considerable caution about a result which makes the estate insolvent. There should be respect for conventional property principles that debts are to be paid unless and until there is an insolvency, in which case the insolvency regime contained in the Insolvency Act 2006 should prevail as to distribution. However, it seems appropriate that the surviving partner can claim a protected interest (as at present) if the necessary preconditions are met.

Clawback and anti-avoidance mechanisms

10.9 In the Law Society's view, the Commission's proposal of a "clawback", other than the adjustment sections under the Property (Relationships) Act, creates uncertainty and should not be included in a new succession Act. If the objective of the new Act is to "promote positive outcomes, efficient estate administration and dispute resolution", the prospect of clawback claims going back over several years would very much detract from this objective. In addition, there seems to be a tension between increasing testamentary freedom (reducing the claims of adult children) on the one hand and increasing avenues for attacking inter vivos transactions on the other.

10.10 The Law Society acknowledges that sections 44 and 44C of the Property (Relationships) Act will need to be imported into a new succession Act. Consideration needs to be given to providing some limitation on the attack of inter vivos transactions by setting out a clear set of criteria and/or circumstances.

10.11 Joint tenancies are often used as a deliberate estate planning measure. They are often used to protect a spouse or partner, particularly where people have re-partnered following separation, by ring-fencing certain property. Contracting out agreements are used in the same context. These measures should not be set aside lightly or removed by litigation and should be maintained in any new succession legislation.

10.12 The use of inter vivos trusts is often consistent rather than inconsistent with a person making plans for their property and their family members. Great care needs to be taken before effectively dismantling this mechanism through the ease of attacking dispositions to such trusts, and even short of dismantling them, making the longer-term effects uncertain.

10.13 Therefore, the Law Society fully supports option one, which maintains the status quo in terms of the anti-avoidance mechanisms.

10.14 In terms of option two, we consider it requires further thought and consultation. It would be far too radical a change to have a long or indefinite period of time during which a person could not enter into a transaction even with the intent to defeat an entitlement or claim. Even within five years of their death, there are many dispositions that a person could enter into which may have the effect of reducing what a claimant might be able to obtain.

10.15 The unintended effects of clawback include stress and even insolvency on the part of the often innocent and unknowing donees from whom the clawback is sought. There would also be a marked increase in the burden on executors, particularly so if they are family members and related to the donor. We believe the proposal would create a great deal of uncertainty and unhappiness.

10.16 The Supreme Court decision in *Regal Castings*[19] gave a creditor power to challenge a disposition made at any time which had the effect of defeating the creditors interest. In our view, option two would provide a claimant the same power under any of the possible avenues of claim.

10.17 The Law Society does not support option three. In our view, the change is too radical and without adequate cause, and beyond what most people would expect the law to provide. It moves away from fundamental property principles including the freedom for a person to do what they want with their property during their lifetime.

10.18 It is unclear from the Commission's paper who would have to contract with whom in terms of the proposed contracting-out of provisions within the new succession legislation. In addition, it is unclear whether under the option two and three proposals whether there is the ability to contract out.

Question 55: Do you have any other suggestions for reform?

10.19 In the Law Society's view, a court exercising jurisdiction in this area should have the express power to award specific items of property. We note that the court currently has such powers under the existing statutes that encompass "succession law" and consider that it should be clarified in any new succession Act.

11 Chapter 10 – Use and occupation orders

11.1 The proposals arising from this chapter reflect, and in many ways mirror, the provisions in the Property (Relationships) Act 1976. They also reflect the Commission's recommendations from its evaluation of relationship property law, which have not yet been incorporated into legislation.

11.2 The proposals in this chapter must be integrated with the Property (Relationships) Act 1976, whether in its current form or an amended version of the legislation. To do otherwise runs the risk of an undesirable disconnection between the provisions of the two proposed statutes (both as to the substance and the underlying principles).

11.3 The Law Society agrees that it is important the court has adequate powers to ensure that partners (and dependent children) do not suffer hardship when relationships end by the death of a partner/parent. The Law Society supports the underlying principle that orders which would be available to a party under the Property (Relationship) Act 1976 during the party's lifetime should also be available on the death of party.

11.4 However, we also note that the use and occupation orders proposed will run the risk of delay in the distribution of an estate, impact other beneficiaries in the estate, and increase the likelihood of additional costs being incurred in relation to the administration of the estate. The Law Society assume that the provisions proposed will be available on a

[19] *Regal Castings Limited v GM and GN Lightbody and ors*, [2008] NZSC 87

temporary or time-limited basis only and would not envisage such orders as creating longstanding rights.

11.5 To that extent, the Law Society is not persuaded that the balancing of the advantages and disadvantages which has led the Commission to formulate its proposals has been achieved.

11.6 The Law Society does not support the suggestion that a "presumption" should operate in favour of granting "temporary orders" to the primary caregiver of a child "for the benefit of a child". We regard the promulgation of a "presumption" as unnecessarily and inappropriately fettering the discretion which should otherwise vest in the court.

11.7 In the Law Society's view, these proposals require additional consideration.

12 Chapter 11 – Contracting out and Settlement Agreements

12.1 The Law Society agrees that there should be the broad ability to contract out of a new succession Act, as proposed. As well as contracting out of relationship property and family provision claims, partners or those contemplating entering relationships should be able to contract out of potential contribution claims, where the contributions might be made by one or both of the contracting parties. It appears that is the Law Commission's intention (11.29).

12.2 The Law Society also agrees that the procedural requirements for contracting out between partners or those contemplating entering into relationships should not apply to contracts for services by others (11.29). We also agree with the proposals in respect of settlement agreements.

12.3 The Law Society does not agree with making the best interests of children a factor for setting aside an agreement (11.25).

Question 60: Do you agree with the issues we have identified?

12.4 The Law Society agrees with the issues identified, except for the Commission's reference to the best interests of children[20] in relation to the court setting aside an agreement. (In the Commission's papers on the review of relationship property, the interests of children in respect of relationship property division was elevated. The Law Society disagreed with this proposal because relationship property agreements and matters are between adult parties).

Question 61: Are there any other issues with the law that we have not identified?

12.5 No.

Question 62: What are your views on the proposals for reform?

12.6 The Law Society agrees with the proposals for reform, except those in relation to the best interests of children.

Question 63: Do you have any other suggestions for reform?

12.7 No. In the Law society's view, the proposals put forward by the Commission are extensive.

[20] Para 11.25.

13 Chapter 12 – Jurisdiction of the Courts

13.1 The Law Society agrees with the Commission's proposal that the Family Court and the High Court should have concurrent first instance jurisdiction to hear claims under the proposed new succession Act. There should be a provision that the Family Court may order (on an application by the parties or on its own motion) any proceedings commenced in that jurisdiction to be transferred to the High Court if the judge is satisfied that because of its complexity or the complexity of any question in issue in the proceedings it is expedient to do so. There are several similar provisions to be found in current legislation. [21]

13.2 The High Court (alone) should continue to hold jurisdiction for issues concerning the administration and distribution of an intestate estate.

13.3 Appeals against any decision to make or refuse to make an order (whether on an interlocutory matter or not), to dismiss proceedings, or to otherwise determine the proceedings finally, should lie as of right. [22]

13.4 The Law Society does not agree with the limitation of rights of appeal in respect of interlocutory matters to those which have "a significant impact on the parties' rights and obligations". [23] We regard the distinction between those interlocutory matters which have "a significant impact on the parties' rights and obligations" and other interlocutory matters as unnecessary.

14 Chapter 13: Resolving Disputes in Court

14.1 The summary of proposals for reform are set out at p 191 of the issues paper. They are not numbered, so we set them out below for convenience:

(a) Personal representatives should continue to be protected against personal liability from claimants under the new Act, where the personal representatives distribute any part of the estate in the circumstances prescribed in section 47 of the Administration Act.

(b) No change is recommended to the time limits for surviving partners to choose whether to divide relationship property, but the court should have greater flexibility when deciding whether to set aside a choice of option.

(c) Proceedings for all claims under the new Act should be commenced within 12 months from the grant of administration in Aotearoa. If the estate does not require formal administration this should be the later of 12 months from the date of the deceased's death or 12 months from the grant of administration in Aotearoa (if the grant is made within six months of the deceased's death).

(d) Courts should retain their discretion to grant extensions of time where the application is made before final distribution of the estate. A final distribution should be defined in the new Act for these purposes to mean the point in time when all estate assets are transferred to those beneficially entitled.

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[21] See section 14, Family Court Act 1980; section 38A Property (Relationships) Act 1976; section 3A(3) Family Protection Act 1955; and section 5(3) Law Reform (Testamentary Promises) Act 1949.

[22] See section of the 39(1) Property (Relationships) Act 1976, distinguishing from section 143(1) of the Care of Children Act 2004.

[23] Para 12.24.

(e) The new Act should expressly require personal representatives to place before the court relevant information in their knowledge or possession.

(f) In respect of relationship property claims, the new Act should expressly require that surviving partners and personal representatives have a duty to disclose each partner's assets and liabilities.

(g) Updated affidavit forms should be created for proceedings under the new Act.

(h) Affidavit evidence should be preferred for all claims under the new Act irrespective of whether they are commenced in the Family Court or the High Court.

(i) The court should appoint a representative for any minor child, person lacking capacity or unascertained party that wishes to claim or may be affected by a claim under the new Act.

(j) Section 4(4) of the FPA should be repealed, and in its place there should be a requirement that personal representatives notify potential claimants of relevant information related to their rights under the new Act.

(k) The court should continue to have discretion to make cost orders as it thinks fit.

(l) The new Act should expressly refer to the court's ability to impose costs for non-compliance with procedural requirements.

(m) Consideration is also given to whether claims under the new Act would justify a separate scale of costs.

(n) Any Rules Committee established as recommended in the PRA review should consider whether to develop rules in respect of claims under the new Act.

14.2 The Law Society agrees with proposals (a) to (f), and (h) to (l), inclusive.

Proposal 7 – Updated affidavit forms should be created for proceedings under the new Act

14.3 The Law Society does not support this proposal, as we do not consider that "template" forms for affidavits are useful.

14.4 In this regard, we draw on our experience with the now discontinued forms brought into force following the 2014 changes to the Care of Children Act 2004. The forms were lengthy and confusing and merged the information that should have been contained in an affidavit, an application and a cover sheet as per the Family Court Rules 2002, into essentially one form. In our experience, "form of agreement" in section 21E of the Property (Relationships) Act 1976 is largely ignored.

Proposal 13 - Consideration is also given to whether claims under the new Act would justify a separate scale of costs

14.5 In its 2018 submission responding to the Law Commission's Preferred Approach paper in the Relationship Property Review, the Law Society agreed with the Commission's proposal that a separate scale of costs for PRA cases should be established. The Law Society's view was that it would be unsatisfactory to import the current District Courts scale of costs for PRA cases.

14.6 Appropriately scaled costs set out in the Family Court Rules should be established. However, discretion should be maintained so as to recognise that cases between ex-partners under the PRA are not akin to ordinary civil litigation and that often there is benefit to both parties in achieving resolution. Generally speaking, costs ought not to be imposed unless one party has taken an unreasonable approach. In the Law Society's view, the separate scale of costs recommended for PRA cases, should also be available for succession law. What works for the PRA should also work for succession claims.

Proposal 14 - Any Rules Committee established as recommended in the PRA review should consider whether to develop rules in respect of claims under the new Act

14.7 The Law Society, in principle, supports the establishment of a rules committee. That committee should have its own terms of reference in respect of its role and in terms of what rules might be needed for a new succession Act (i.e., whether they will be both High Court and Family Court rules, dependent on the proposal for concurrent jurisdiction). We also note the Ministry of Justice is to determine shortly whether a Family Court Rules Committee will be established to undertake a wholesale review of the Family Court Rules 2002, as recommended by the independent panel that evaluated the 2014 changes to the family justice system.

15 Chapter 14 – Resolving Disputes Out of Court

15.1 This part of the submission should be read in conjunction with the Law Society's submission of 13 December 2018 in relation to the Relationship Property Review. [24]

15.2 The Law Society agrees with the principle of encouraging parties to resolve disputes out of court, utilising available alternative dispute resolution (ADR) options (which can range from facilitated negotiation, mediation, arbitration, and collaborative law), but we do not consider that a provision similar to section 143 of the Trusts Act 2019 is necessary. We do not think the reasoning articulated at paragraph 14.14 of the paper is persuasive.

15.3 Measures can, and should, be taken to support "out of court" resolutions. This could include the provision of information about the common issues arising and the various options for resolution outside of the court structure.

15.4 In the Law Society's view, the prescriptive regime suggested at paragraph 14.6 of the paper is unnecessary. We do not support the imposition of an obligation upon the parties to "follow pre-action procedures," [25] as resort to ADR should remain voluntary and optional.

15.5 Where there are issues about the "legality" of out of court settlements (see para 14.7 of the paper) we agree that the new succession Act should address, and clarify, such matters. The Law Society notes the provisions of section 144 of the Trusts Act 2019 that require any ADR settlement to be approved by the court in respect of beneficiaries who are unascertained or lack capacity. A similar provision could be adapted for the purpose of the new succession Act.

15.6 We do not consider the proposals in paragraph 14.20 of the paper are likely to be helpful or offer a path to the expeditious despatch of proceedings.

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[24] Note 35 above, at pp 17 – 19.

[25] Please note that the Law Society's submission of 13 December 2018, in respect of the Property (Relationships) Act 1976 supported the pre-action procedures proposed in that context, as it related to matters of disclosure.

16 Chapter 15 – Tikanga Māori and Resolution of Succession Disputes

Question 78: Is it important to make the general courts more accessible and attractive for Māori?

16.1 It is necessary to make the general courts accessible and welcoming for Māori. The starting point is the inclusion and commitment to Te Tiriti in relevant legislation. Having a consistent approach across family law reform is essential and in the Law Society's view is long overdue. With the inclusion of Te Tiriti in all family law reform, it follows that key concepts such as tikanga must be considered.

16.2 The independent panel evaluating the 2014 changes to the family justice system recommended that an express commitment to Te Tiriti be included in the Care of Children Act 2004. [26] The panel's report specifically noted that the family justice system was monocultural and alienating for many Māori. [27]

16.3 Professor Ruru has noted that:

> *In the field of family law one of the challenges to the legal system and its practices is how to formulate and administer family law so that it guarantees all citizens equal consideration and respect for their cultural views and practices, given the special status of Māori people as signatories of the Treaty of Waitangi on the one hand, and the imbalance in access of Māori and non- Māori to political power.*[28]

16.4 Whilst in the context of reviewing care and protection issues in the Family Court, the report Te Taniwha I Te Ao Ture-Ā-Whānau provides some helpful suggestions on how to make court more accessible to Māori. The report notes that:[29]

> *Every court date is an opportunity to engage with whānau, hapū and iwi to support change. Whānau, hapū and iwi must be respected at all points of engagement, and culturally appropriate models of engagement must be understood and enacted by the judiciary. It must be agreed that the attainment of a sound knowledge of tikanga and te reo Māori is non-negotiable for professionals working in the Family Court. Furthermore, respecting mana, whakapapa and whanaungatanga, together with acts of kindness and inclusion towards whānau, are behaviours that should be a common standard for all that work in the Family Court.*

17 Chapter 16 – Role of Personal Representatives

Question 81: Do you agree with the issues we have identified?

17.1 The Law Society agrees with the issues the Commission has identified, except for the limits on the giving of notice to potential claimants.

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[26] See recommendation 5 of Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms, 2019.

[27] Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms, paragraph 47.

[28] Jacinta Ruru "Kua tutū te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds) Family Law Policy in New Zealand (4th ed, LexisNexis, Wellington, 2013) pages 57 at 58.

[29] Te Taniwha I Te Ao Ture-Ā-Whānau - Whānau Experience of Care and Protection in the Family Court 2020, page 20.

17.2 As noted above, the Law Society disagrees with the proposals to limit family provision claims by adult children and grandchildren (minor and adult) set out in chapter 4 of the paper. Accordingly, the Law Society disagrees with limiting the scope of those entitled to notice as set out in paras 16.20 and 16.21.

17.3 It may also assist to have a set timeframe for notice to be achieved, and a template notice with the prescribed information that must be included for notice to be valid.

Question 82: Are there any other issues with the law we have not identified?

17.4 No.

Question 83: What are your views on the proposals for reform?

17.5 The Law Society supports the proposals except as set out above in response to Q81.

Question 84: Do you have any other suggestions for reform?

17.6 The Law Society suggests that there should be a simple pathway for personal representatives to apply to the court for directions where there is uncertainty about giving notice.

18 Chapter 17 – Cross-border Issues

Question 85: Do you agree with the issues we have identified?

18.1 The Law Society agrees that all issues have been fully addressed in this chapter.

18.2 We also agree that cross-border issues are significant, particularly as between Australia and Aotearoa, and also with the increase in migration to Aotearoa and the ownership of assets in more than one jurisdiction.

18.3 In particular, the distinction between moveable and immoveable property creates ongoing problems both under the Property (Relationships) Act, as identified in the review, and on death.

Question 86: Are there other issues with the law we have not identified?

18.4 No.

Question 87: What are your views on the proposals for reform?

18.5 In respect of the summary of proposals for reform, the Commission submits that habitual residence is the most appropriate connecting factor. While domicile may have resonated historically in New Zealand law, increasingly the concept of habitual residence is being utilised across jurisdictions. For civil law jurisdictions domicile is not a familiar concept and even in the countries that utilise the concept, domicile can have a range of interpretation options.

18.6 Habitual residence seems to be a more contemporary and universally applicable connecting factor. The Law Society agrees that a definition that leads to a finding of a close and stable connection will be helpful and outlining a range of factors as identified in the paper will also be useful. It may be helpful to cross-reference to the habitual residence jurisprudence from

the child abduction cases where factors such as a settled intention and linking stability to "an appreciable period of time" in the country have been discussed and applied.

18.7 Of the two options identified in the paper, the Law Society agrees that the Commission has correctly captured the arguments in relation to each. However, we believe option 2 has the benefit of codifying the choice of law rule. This would streamline the process and create consistency. This is the Law Society's preliminary view and is something that would require further consideration and testing based on some agreed common scenarios.

18.8 In all other respects we agree that:

(a) A rule of adaptation should be included.

(b) Partners should be entitled to agree that the law of another country should apply subject to validity requirements being met and the public policy exception. Such agreements could be extended to determining that the law of another country should apply to any potential claims the surviving partner may have against the deceased partner's estate.

(c) The court should have the broad powers described in the summary and should be able to make orders in respect of property overseas, take into account the value of the overseas property, or order the transfer to the other party.

(d) In respect of the application of Renvoi, we are conscious that this is a rarely used doctrine and more comprehensively addressed by the conflicts specialists referred to in the paper. We are aware there are strong arguments advanced, against the application of this doctrine, which can involve applying the conflicts rules of the foreign country in preference to our own. However, as identified in the paper, Dr Hook and Mr Waas suggest it remains a potentially useful tool, particularly with respect to the issue of enforcement. We therefore agree that retaining it as an option may be beneficial and achieve a more just result in some cases.

(e) The Moçambique rule has no application in matters covered by the proposed legislation in the paper.

Question 88: Do you have any other suggestions for reform?

18.9 No.

19 Chapter 18 – Other Reform Issues

The need for further education about the law relating to succession

19.1 The Law Society agrees that education for the public and professional advisors is needed on matters such as:

(a) The importance of having a will and the way an intestate estate will be distributed;

(b) The consequences of holding property in such a way that it does not fall into an estate, such as jointly owned assets of property settled on trust; and

(c) How to make or resolve claims against estates.

Sections 18 and 19 of the Wills Act 2007

Section 18

19.2 The Commission proposes the repeal of section 18 of the Wills Act, for the reason that a marriage or civil union does not necessarily represent a point in time when most will-makers would wish to change who should or should not benefit under their will.

19.3 The Law Society agrees with this proposal and considers that section 18 is now anomalous.

Section 19

19.4 The Commission proposes two amendments to section 19. First, that it should apply to the end of all relationship types and secondly, that it should apply two years after the point when the partners in any relation type ceased to live together.

19.5 The Law Society agrees with these proposals.

19.6 However, it should be noted that deciding when a couple "ceased to live together in a relationship" is likely to create difficulties in the absence of an agreement recording the date of separation. The existing section 19 is clear on when it applies, and we agree that it should be extended to de facto relationships.

19.7 One property law practitioner suggested an alternative perspective to the proposals for ss 18 and 19, and this view is set out in Appendix One to this submission.

Power to validate wills

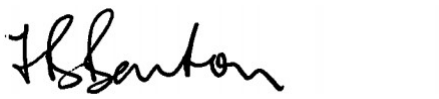
19.8 The Law Society agrees that government should consider the power to validate wills further, and in particular whether this should be included in a new succession Act.

Multi-partner relationships

19.9 The Law Society agrees that the government should undertake further research in this area to support any future law reform relating to multi-partner relationships.

Family Protection Act and Social Security

19.10 The Law Society agrees that section 203 of the Society Security Act 2018 should be repealed.



Frazer Barton
Vice President
17 June 2021

Appendix 1: Alternative perspective on ss 18 and 19 of the Wills Act 2007

A1.1 We should be very cautious in throwing the "formal legal relationship" baby out with the bathwater, where recent legislative and social history demonstrate that formal legal partnership (whether marriage or civil union) is still of great significance to many people, and represents a conscious choice, now open to all (subject of course to only being in one marriage or civil union at a time).

A1.2 Section 18 of the Wills Act as it applies to formal legal relationships, then remains largely appropriate (with one possible amendment, discussed below). However, it would be concerning to see the "price" of its retention being the inclusion of entry into a de facto relationship (potentially broadly defined, if reformed, as suggested in the paper in relation to section 19). This is because the choices of adults not to enter formal legal partnerships should be respected, and de facto relationships should not be permitted to disturb considered testamentary arrangements, particularly where the existence of their start and end points may be uncertain or not contemplated by the parties during one or both of their lifetimes.

A1.3 Further, the proposed amendment to section 19 may not be necessary or desirable, because of the difficulties of certainty and establishing what the "(dis)qualifying period" should be, as discussed in the paper (and the master draft), and again, because of the desirability of respecting the different choices made by couples who have chosen to formally and legally partner, and those who have not. In this regard, one might suggest that someone who has chosen to include their de facto partner in their testamentary arrangements is more likely than not to have the knowledge/inclination to amend those arrangements following the end of their de facto relationship, if and as they see fit, and without further legal intervention in a relationship that they have chosen not to legally formalise.

A1.4 There may be room for a middle ground, that would better recognise and address the modern reality that people frequently do live in de facto relationships before they marry. This would be an addition to sections 18(3)(a) and 18(3)(b) so that, in addition to the existing "saving" provisions, marriage or civil union will not revoke a will if the will either expressly or by circumstance contemplates the parties' de facto relationship immediately preceding their marriage or civil union. This, perhaps, accommodates the "typical" relationship pattern better than the current provision, without either leaving "uncontemplated" bereaved spouses/civil union partners without the potential benefit of the intestacy regime (leaving aside their relationship property rights) or giving rise to unnecessary statutory intervention in testamentary freedom.