

Issues Paper | He Puka Kaupapa 46

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

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



Te Aka Matua o te Ture | Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of Aotearoa New Zealand. Its purpose is to help achieve law that is just, principled and accessible and that reflects the values and aspirations of the people of Aotearoa New Zealand.

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

Kia whanake ngā ture o Aotearoa mā te arotake motuhake

Better law for Aotearoa New Zealand through independent review

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Foreword

For most of us, the way we want our property to be distributed when we die is important. Succession of property can express aroha, love and affection, recognise who we consider to be family, support those who we think need to be provided for, and provide benefits for the public good.

An ao Māori perspective emphasises the importance of whānau and whanaungatanga. It is underpinned by whakapapa connections to whenua, whānau, tūpuna and atua. It is concerned with upholding the mana of both the deceased and the collective.

Te Aka Matua o te Ture | Law Commission is reviewing aspects of the law governing succession. The review focuses on claims against estates and the distribution of intestate estates. It calls us to engage with the tikanga and values that should underpin good succession law.

We have benefited in this review from the Commission's work on succession law undertaken in the 1990s. Its recommendations from that review were partially implemented, including through the enactment of the Wills Act 2007. However, statutes like the Family Protection Act 1955, the Law Reform (Testamentary Promises) Act 1949 and the Administration Act 1969 have continued without reform. Consequently, the law in this area is founded on the attitudes and values from generations ago.

This Issues Paper asks afresh what Aotearoa New Zealand's succession law should be.

The review engages the guarantee of tino rangatiratanga and the Crown's kāwanatanga responsibilities under te Tiriti o Waitangi | the Treaty of Waitangi. The review raises too the centrality of tikanga as a source of law. This Issues Paper considers crucial questions about the facilitation of tino rangatiratanga and the contribution of tikanga to the development of law in relation to succession.

We encourage all New Zealanders to have their say. The feedback from the submissions we receive on this Issues Paper will influence the final recommendations we will make later this year in our final report.



Amokura Kawharu

Tumu Whakarae | President

Have your say

We want to know what you think about the issues and proposals set out in this paper. Do you agree or disagree with the way the issues have been articulated? Are there additional issues you think should be considered? What do you think about the proposals for reform?

Submissions on our Issues Paper should be received by **10 June 2021**.

You can email your submission to sul@lawcom.govt.nz.

You can post your submission to

Review of Succession Law
Law Commission
PO Box 2590
Wellington 6140

WHAT HAPPENS TO YOUR SUBMISSION?

Te Aka Matua o te Ture | Law Commission will use your submission to inform our review and we may refer to your submission in our publications. We will also keep all submissions as part of our official records. Information supplied to the Commission is subject to the Official Information Act 1982.

We will publish the submissions we receive on our website once we have published our final report. Your submission and your name will be publicly available. We will remove your contact details from your submission before publishing it on the website.

If you do not want us to release identifying information or any other part of your submission, or do not want your submission to be referred to in our publications, please explain in your submission which parts should be withheld and the reasons. We will take your views into account in deciding:

- whether to withhold or release any information requested under the Official Information Act
- if and how to make your submission publicly available on our website; and
- if and how to refer to your submission in our publications.

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Acknowledgements

Te Aka Matua o te Ture | Law Commission gratefully acknowledges the contributions of the people and organisations that have shaped our Issues Paper.

We acknowledge the generous contribution and expertise from our Expert Advisory Group:

- Bill Patterson, Patterson Hopkins
- Greg Kelly, Greg Kelly Law
- Mānia Hope, Barrister
- Professor Nicola Peart, University of Otago
- Theresa Donnelly, Perpetual Guardian

We are also grateful for the support and guidance of the Māori Liaison Committee to Te Aka Matua o te Ture | Law Commission.

We have been further assisted by many individuals and organisations who kindly shared their expertise and experiences with us in the preliminary engagement stage of this review. We thank all the practitioners who responded to our Practitioner Survey. We acknowledge the input we received from Auckland Disability Law, Commission for Financial Capability, Manaakitia a Tātou Tamariki | Office of the Children's Commissioner, members of the judiciary, Ngā Pou Whakawhirinaki o Aotearoa | Citizens Advice Bureau, Professors Christine Stephens and Fiona Alpass of Te Kunenga Ki Pūrehuroa | Massey University, Public Trust, Tāhū o te Ture | Ministry of Justice, Tataurangi Aotearoa | Stats NZ, Te Manatū Whakahiato Ora | Ministry of Social Development, Te Tari Taake | Inland Revenue, and Toitū te whenua | Land Information New Zealand. We are grateful for the contributions of Dr Maria Hook and Jack Wass to the discussion of cross-border issues in this Issues Paper.

We acknowledge individuals who have engaged with us to share an ao Māori perspective on succession. We have received valuable assistance from Te Amokura Consultants Limited. We are grateful to those tikanga and legal experts who attended and contributed to the wānanga on the tikanga relevant to succession. We acknowledge the insights provided by Te Puni Kōkiri, Te Tumu Paeroa | Māori Trustee, Te Puni Kōkiri, Te Kooti Whenua Māori | the Māori Land Court, and Te Rōpū Whakamana i te Tiriti o Waitangi | the Waitangi Tribunal. Finally, we thank those individuals and groups who have shared their views and experiences with us.

We emphasise nevertheless that the views expressed in this Issues Paper are those of Te Aka Matua o te Ture | Law Commission and not necessarily those of the people who have helped us.

We acknowledge with thanks the work of Te Tari Tohutohu Pāremata | Parliamentary Counsel Office in preparing draft legislative provisions for inclusion in this Issues Paper.

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

The Commissioner responsible for this project is Helen McQueen. The legal and policy advisers who have worked on this Issues Paper are John-Luke Day, Tāneora Fraser and Susan Paul. The clerks who have worked on this Issues Paper are Oliver Frederickson, Rhianna Morar and Tom White.

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Introduction

1. Te Aka Matua o te Ture | Law Commission (the Commission) is reviewing aspects of succession law. Succession law is the system of rules that determine who receives people's property when they die. This review focuses on rights to a deceased person's property whether the deceased left a will or died intestate.
2. Important questions arise. To what extent should a person be able to dispose of their property as they choose? Should family members have rights to protect them against disinheritance? How should the law provide for diversity of family arrangements and values across Aotearoa New Zealand?
3. Succession is a significant subject for Māori. How can the law support Māori to resolve succession matters in the way Māori wish?
4. The purpose of this Issues Paper is to ask for your views on the issues with the current law and what changes are needed.
5. The feedback we receive will help us decide how succession law can be better for all New Zealanders. We plan to publish our final report by the end of 2021.

WHY IS THE COMMISSION REVIEWING SUCCESSION LAW?

6. Many parts of Aotearoa New Zealand's succession law have not been comprehensively reviewed in decades. Much of the key legislation was drafted in the mid-20th century. Since that time, Aotearoa New Zealand has undergone significant social change, affecting the relationships we enter and what we think family means. The need for law-making to properly consider the Crown's obligations under te Tiriti o Waitangi | Treaty of Waitangi is also better recognised by the Crown. The law may not have kept pace with these changes or the reasonable expectations of New Zealanders.
7. This review of succession law follows our review of the Property (Relationships) Act 1976, which concluded in 2019. In our final report *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976*, we recommended that the Act's provisions that apply when someone in a relationship dies should be considered in a broader review of succession law.¹ The Government accepted the recommendation. In July 2019, the Minister Responsible for the Law Commission included a review of succession law in our work programme.

¹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R6.

TERMS OF REFERENCE

8. The terms of reference for the review of succession law were published in December 2019. They require us to consider who should be entitled to claim property from a deceased person's estate, with a particular focus on the deceased's partner and other members of the family.
9. The particular statutes under review are the:
 - (a) Property (Relationships) Act 1976;
 - (b) Family Protection Act 1955;
 - (c) Law Reform (Testamentary Promises) Act 1949; and
 - (d) Administration Act 1969.
10. The terms of reference require us to consider how succession law should address areas of particular concern to Māori. We are not reviewing the regime for succession to Māori land under Te Ture Whenua Maori Act 1993 but are considering questions relating to succession generally that may be of particular concern to Māori. In doing so, we may comment on aspects of Te Ture Whenua Maori Act.

THE WORK WE HAVE UNDERTAKEN

11. To identify issues and develop proposals for reform as set out in this Issues Paper we have reviewed the relevant case law and commentary. We have examined the law in comparable jurisdictions, with a particular focus on Australia, Canada, England and Wales, Scotland, Ireland and some European civil law jurisdictions. We have obtained data relating to will-making and court applications (to the extent that it is available). In addition, we have met with several leading experts, lawyers and judges to hear their preliminary views. We have looked at relevant demographic information about the increasing diversity of New Zealanders and their families.
12. In April 2020, we issued a survey to lawyers who work in succession law (the Practitioner Survey). We received 23 responses to the Practitioner Survey, including feedback given at meetings with the Auckland District Law Society Trusts and Estates Committee and the New Zealand Law Society Trusts and Estates Committees for Canterbury-Westland and Wellington. The responses have informed our understanding of the issues and reform options.
13. We have drawn heavily on the Commission's work when it reviewed succession law in the 1990s.² We have been guided too by the recommendations from the review of the Property (Relationships) Act.³
14. We have worked to inform ourselves of the interests of Māori in this area and appreciate from Māori the nature and cultural dimensions of succession within te ao Māori. We have

² Te Aka Matua o te Ture | Law Commission *Succession Law: Testamentary Claims* (NZLC PP24, 1996); and Te Aka Matua o te Ture | Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997).

³ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019).

drawn on the work the Commission undertook in the 1990s.⁴ The Commission's Māori Liaison Committee has guided us on our approach to this work. We held a wānanga with tikanga and legal experts to consider the tikanga relevant to succession. We have had preliminary meetings with representatives of several Māori institutions⁵ and held “zui” with various groups, including whānau members and Māori Land Court staff. We have engaged Te Amokura Consultants Ltd to facilitate our engagement with Māori throughout the project.

15. We met with our Expert Advisory Group to seek the Group's feedback on our proposed approach to the Issues Paper and took into account the feedback we received.

THE SUCCESSION SURVEY

16. The University of Otago, funded through the Michael and Suzanne Borrin Foundation, has surveyed public attitudes and values towards succession issues (the Succession Survey). The Succession Survey involved interviews with a nationwide, statistically representative sample of the population, with “booster” targets for Māori, Pacific peoples and Asian populations. Interviewees were asked for their views on matters such as:
 - (a) the importance of testamentary freedom;
 - (b) the rights of family members, particularly financially independent adult children, to challenge the deceased's will;
 - (c) who should inherit in an intestacy and in what proportions; and
 - (d) attitudes towards relationship property rights on death.
17. The results of the Succession Survey are critical to the issues and reform proposals we present in the Issues Paper. We refer to the results throughout this Issues Paper.⁶

TERMS USED IN THIS DOCUMENT

18. Throughout this Issues Paper, we use several abbreviated or defined terms:
 - (a) PRA — Property (Relationships) Act 1976
 - (b) FPA — Family Protection Act 1955
 - (c) TPA — Law Reform (Testamentary Promises) Act 1949
 - (d) TTWMA — Te Ture Whenua Maori Act 1993
 - (e) PRA review — the Commission's review of the PRA concluding in the final report *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976*

⁴ Including Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) and notes from various hui the Commission attended during its work in the 1990s.

⁵ Including Te Tumu Paeroa | The Māori Trustee, Te Puni Kōkiri, Te Kooti Whenua Māori | the Māori Land Court, and Te Rōpū Whakamana i te Tiriti o Waitangi | the Waitangi Tribunal.

⁶ Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021).

- (f) Intestacy regime — the regime for the distribution of wholly or partially intestate estates under Part 3 of the Administration Act 1969
 - (g) Personal representatives — we use this term to refer to both executors, who are appointed under a will to carry out the terms of the will, and administrators, who have been granted letters of administration in respect of deceased estates
 - (h) Partner — a person in a qualifying relationship under the PRA, including a spouse, civil union partner or partner to a de facto relationship
 - (i) 1990s succession review — the Commission’s review of aspects of succession law, carried out over 1996–1997
 - (j) Succession Survey – the survey of public attitudes and values towards succession issues carried out by the University of Otago
 - (k) New Act — the new, comprehensive single statute we suggest should govern claims against estates in place of the PRA, FPA and TPA and related common law and equitable causes of action.
19. When discussing te Tiriti o Waitangi | the Treaty of Waitangi in this Issues Paper, we use “the Treaty” as a generic term that is intended to capture both the Māori text (te Tiriti o Waitangi) and the English text (the Treaty of Waitangi). When we are referring to the Māori text only, we either use the term “te Tiriti”, refer to “the Māori text” or make this clear in the context. When we are referring to the English text only, we refer to the “English text” or make this clear in the context. To the extent that the principles of the Treaty, which have developed through jurisprudence, substantively reflect the rights and obligations arising from the texts, the principles may also be captured by the term “the Treaty”. Otherwise, we specifically refer to “the principles of the Treaty” or to specific principles. The Treaty and key Māori terms and concepts used in this Issues Paper are described in Chapter 2.

STRUCTURE OF THIS ISSUES PAPER

20. This Issues Paper is organised into three parts:
- (a) **Part One** examines the basis for good succession law in contemporary Aotearoa New Zealand.
 - (b) **Part Two** addresses the entitlements to and claims against estates.
 - (c) **Part Three** considers making and resolving claims.

Part One

21. Part One considers both a conventional state law approach to succession law and an ao Māori approach to succession. Chapters 1 and 2 address each approach separately. The purpose of this is to allow consideration of an ao Māori perspective without assuming that it is appropriate for state law to determine succession matters for Māori rather than tikanga (the option of creating better state law for all is discussed in Chapter 8 below). However, we anticipate that the feedback we receive will allow us to draw together these separate threads in our report and will influence our recommendations.
22. In Chapter 1, we examine the changing demographics in Aotearoa New Zealand. We identify criteria that we have used when developing the proposals presented in this Issues Paper. We conclude the chapter by presenting our proposal that there should be a single, comprehensive statute that governs claims against estates (the new Act).

23. Chapter 2 lays out our framework for developing good succession law from an ao Māori perspective. We acknowledge the significance of succession in te ao Māori. We explore the tikanga relevant to succession. We explain how this tikanga is an independent source of rights and obligations in te ao Māori and the first law of Aotearoa. We recognise that this review engages te Tiriti guarantee of tino rangatiratanga and how that requires Māori to retain control over tikanga.

Part Two

24. In Chapter 3, we address a surviving partner's relationship property entitlements. We propose that a surviving partner of the deceased should continue to have the right to choose to divide the couple's relationship property or to take only what is provided to them under the deceased's will or in an intestacy.
25. In Chapter 4, we propose the repeal of the FPA. In its place, we propose the new Act provide for certain family members to claim "family provision" from the estate. We present options for the surviving partner, children under a prescribed age and disabled children of the deceased. We also present an option for all children of the deceased to claim family provision in the form of a "recognition award", although for reasons given in Chapter 4, we do not favour this option.
26. Chapter 5 examines the law that applies when a person claims against an estate in respect of the contributions they have made towards the deceased or their estate. We propose a new statutory cause of action to be contained in the new Act to codify the law in this area.
27. Chapter 6 addresses the intestacy regime and whether it reflects the way most intestate people in contemporary Aotearoa New Zealand would want their estate distributed when they die. We propose options for which family members should succeed to intestate estates, in what shares and in what priority.
28. In Chapter 7, we focus on succession to taonga. We consider whether the succession to taonga should be excluded from state law and instead be governed by tikanga Māori.
29. Chapter 8 suggests that responsible kāwanangatanga involves recognising and providing for Māori perspectives. We ask how tikanga Māori might recognise and respond to various aspects of succession. We focus on the tikanga relating to the expression of testamentary wishes, obligations to a surviving partner and other whānau members (particularly tamariki), and obligations to someone who has contributed to a deceased or their estate.

Part Three

30. In Chapter 9, we examine what property should be claimable under the new Act, the respective priorities between claims, and options for what anti-avoidance mechanisms the new Act might incorporate to access property that may fall outside an estate.
31. Chapter 10 explores the court's power to grant individuals use and occupation orders over an estate. We propose the court should have powers under the new Act to grant rights to use or occupy property of the estate to meet the needs of the deceased's surviving partner or minor or dependent children.
32. In Chapter 11, we discuss the law that governs agreements people may make during their lifetime that determine rights against their estates when they die. We also look at the law that applies to parties wishing to enter agreements to settle disputes. We propose options for when and how parties can make these types of agreements.

33. Chapter 12 looks at the jurisdiction of the courts to hear and determine claims under the new Act. We propose that te Kōti Whānau | the Family Court and te Kōti Matua | the High Court should hold concurrent first instance jurisdiction, except that te Kōti Matua | the High Court should continue to hold jurisdiction for issues concerning the administration and distribution of intestate estates.
 34. Chapter 13 explores issues with the law and procedure relating to how disputes are resolved when they go to court. We address matters such as time limits, disclosure of information, evidence, representation of parties, costs and delays in the courts.
 35. Chapter 14 focuses on the law and procedure that applies to the resolution of disputes out of court. We look at various matters such as the legality of settling some claims without court involvement, the procedure that should apply to settlement and the representation of parties.
 36. In Chapter 15, we look at the resolution of disputes from an ao Māori perspective. We examine ways disputes may be resolved in a way consistent with tikanga Māori, and we ask what can be done to support these processes.
 37. In Chapter 16, we address the duties that should fall on personal representatives when claims are made against an estate under the new Act.
 38. Chapter 17 examines the cross-border elements to claims against an estate. It covers matters such as choice of law rules, foreign law agreements, enforcement and jurisdiction.
 39. Lastly, Chapter 18 covers a range of other reform issues. We emphasise the need for education about the law relating to succession. We look at the revocation rules under sections 18 and 19 of the Wills Act 2007 when people enter or leave marriages or civil unions. We address the relationship between social security and family provision claims. Lastly, we comment on the court's power to validate wills under the Wills Act, multi-partner relationships and distributing estates without grants of administration.
 40. We ask questions throughout this Issues Paper to seek your views. You can respond to any or all of these questions and raise any issues we have not covered.
-

Part One

Succession law for contemporary Aotearoa New Zealand



CHAPTER 1

Developing good succession law

IN THIS CHAPTER, WE CONSIDER:

- the context and current law relating to claims against an estate;
- the increasing diversity of New Zealanders and their families;
- public attitudes about succession as revealed through the Succession Survey;
- criteria for good succession law; and
- the desirability of a single statute addressing claims against estates.

INTRODUCTION

- 1.2 Before considering specific issues with the law and proposals for reform, it is helpful to place this review in context. This chapter considers the current law relating to claims against estates, the changing demographics of Aotearoa New Zealand, public attitudes towards succession and what may be considered criteria for good succession law. This chapter concludes with our proposal that claims against estates be consolidated into a single statutory regime.
- 1.3 This chapter explores what it means to develop good succession law at a general level and with a focus on state law. However, succession from an ao Māori perspective differs to state law. In Chapter 2, we acknowledge the significance of succession in te ao Māori and set out a framework for developing good succession law from an ao Māori perspective. Chapter 2 should therefore be read alongside this chapter. We have set out this discussion separately to allow consideration of possible approaches without assuming that it is appropriate for succession matters for Māori to be determined by state law rather than tikanga (the option of creating better state law for all is discussed in Chapter 8 below). We expect that the feedback we receive will allow us to draw together these separate threads in our report and will influence our recommendations.

CONTEXT AND CURRENT LAW RELATING TO CLAIMS AGAINST AN ESTATE

- 1.4 The law of succession is the body of law that governs how a person's property is distributed on their death. Succession law follows logically from the law that recognises property rights during a person's lifetime, such as rights to ownership, use and exclusion of others. These laws are well established in Aotearoa New Zealand, reflecting the British law that developed in the 18th century largely as a product of the rise of liberal individualism.¹ Croucher and Vines have observed that "the emphasis on the right to do what one liked with one's property reflected the social theory of the time – the importance of the individual, the emphasis on free will, the importance of contract and the rise of capitalism".²
- 1.5 The most common means of succeeding to the property of a deceased is by being named a beneficiary of their will. A will is a legal document that sets out the wishes of the will-maker for the distribution of their estate after they die. Where there is no will, the Administration Act 1969 sets out rules for how a person's estate is to be distributed (the intestacy regime).³
- 1.6 The deceased's will or the intestacy regime only governs the distribution of the deceased's estate. An estate does not include any property the deceased gave away during their lifetime, such as gifts or property the deceased settled on trust. Nor does an estate include property that passes independently of the will or intestacy regime, such as jointly owned property that passes to a co-owner by survivorship.
- 1.7 Succession law in Aotearoa New Zealand provides an individual with freedom to choose what will happen to their property on their death. Their decisions will be reflected in the terms of their will or the way they structure their affairs to include or exclude certain property from their estate. This is sometimes referred to as testamentary freedom.
- 1.8 Testamentary freedom is not absolute in existing succession law. A competing objective of succession law has been to ensure that property passes from the deceased to their family members. The law provides certain individuals with entitlements to, or the right to claim against, the deceased's estate despite how the deceased may have wanted their property to be distributed. These entitlements and claims are the subject of this review. In particular, we focus on:
- (a) the entitlements of the deceased's surviving partner to relationship property under the Property (Relationships) Act 1976 (PRA) (Chapter 3);
 - (b) the rights of the deceased's family to claim provision from the estate under the Family Protection Act 1955 (FPA) for their proper maintenance and support (Chapter 4);
 - (c) the rights of individuals who may have conferred a benefit on the deceased or the estate for which the law provides a remedy under the Law Reform (Testamentary Promises) Act 1949 (TPA) or through the common law or equity (Chapter 5); and

¹ See Sylvia Villios and Natalie Williams "Family provision law, adult children and the age of entitlement" (2018) 39 *Adel L Rev* 249 at 250.

² Rosalind F Croucher and Prue Vines *Succession: Families, Property and Death* (5th ed, LexisNexis Butterworths, Chatswood (NSW), 2019) at [1.36].

³ See Administration Act 1969, ss 75, 77 and 78–79.

(d) the rights of family members to receive the deceased’s property if the deceased died intestate (Chapter 6).

1.9 The existing state law of succession reflects societal attitudes and values prevalent at the time the laws were drafted. As we review these laws, we need to consider how attitudes and values have changed. This review calls for careful consideration of fundamental questions, such as who is “family”, who ought to receive property when a person dies and for what reasons, and the importance to be accorded to a person’s personal wishes in disposing property on their death. These questions are considered from an ao Māori perspective in Chapter 2.

INCREASING DIVERSITY OF NEW ZEALANDERS AND THEIR FAMILIES

1.10 Except for the PRA, the main statutes under review were drafted in the mid-20th century. Since then, Aotearoa New Zealand has undergone a period of significant social change.

1.11 Aotearoa New Zealand is now more ethnically diverse. In 2018, 27.4 per cent of all New Zealanders were born in another country.⁴ Those identifying as European represented the biggest ethnic group in Aotearoa New Zealand (70.2 per cent).⁵ Those identifying as Māori accounted for 16.5 per cent of the population in the 2018 Census, increasing from 14.9 per cent in the 2013 Census.⁶ Other ethnic groups have also grown in recent years. Those identifying as Asian accounted for 15.1 per cent of the population in the 2018 Census, compared with 11.8 per cent in the 2013 Census.⁷ Those identifying as Pacific peoples accounted for 8.1 per cent of the population in the 2018 Census compared with 7.4 per cent in the 2013 Census.

1.12 There is increasing diversity of family arrangements. The marriage rate has declined from 35.46 per 1,000 of the unmarried population in 1976 to 9.83 in 2019.⁸ De facto relationships are more common. In 2013, 22 per cent of people who were partnered were in a de facto relationship, up from eight per cent in 1986.⁹ It is now common for most

⁴ Tauranga Aotearoa | Stats NZ “Ethnic group summaries reveal New Zealand’s multicultural make-up” (3 September 2020) <www.stats.govt.nz>.

⁵ Tauranga Aotearoa | Stats NZ “Ethnic group summaries reveal New Zealand’s multicultural make-up” (3 September 2020) <www.stats.govt.nz>.

⁶ Tauranga Aotearoa | Stats NZ “Ethnic group summaries reveal New Zealand’s multicultural make-up” (3 September 2020) <www.stats.govt.nz>.

⁷ Tauranga Aotearoa | Stats NZ “Ethnic group summaries reveal New Zealand’s multicultural make-up” (3 September 2020) <www.stats.govt.nz>.

⁸ Te Aka Matua o te Ture | Law Commission *Relationships and Families in Contemporary New Zealand* | *He Hononga Tangata, he Hononga Whānau i Aotearoa o Nāiane* (NZLC SP22, 2017) at ch 1, figure 1a, citing Tauranga Aotearoa | Stats NZ “General marriage rate, December years (total population) (Annual-Dec)” (June 2017) <www.stats.govt.nz>; Tauranga Aotearoa | Stats NZ “Marriages, civil unions, and divorces” <www.stats.govt.nz>.

⁹ Te Aka Matua o te Ture | Law Commission *Relationships and Families in Contemporary New Zealand* | *He Hononga Tangata, he Hononga Whānau i Aotearoa o Nāiane* (NZLC SP22, 2017) at 15, citing Tauranga Aotearoa | Stats NZ “Partnership status in current relationship and ethnic group (grouped total responses) by age group and sex, for the census usually resident population count aged 15 years and over, 2001, 2006 and 2013 Censuses” <www.stats.govt.nz>.

couples to have lived for some time in a committed de facto relationship before choosing to marry or enter a civil union.¹⁰

- 1.13 More people leave relationships and enter new ones. In 1962, for example, 3.2 of every 1,000 marriages ended in divorce, compared with 8.6 of every 1,000 marriages in 2019.¹¹ Information on de facto separations is not routinely collected in Aotearoa New Zealand, although some evidence suggests that a de facto relationship is more likely than a marriage to end in separation.¹² Remarriages have increased, accounting for 28 per cent of all marriages in 2019 compared with 16 per cent in 1976.¹³
- 1.14 Children are less likely to be born to married parents. In 1976, 17 per cent of all births in Aotearoa New Zealand were to parents who were not married.¹⁴ In 2018, 46 per cent of babies were born to unmarried parents.¹⁵
- 1.15 Stepfamilies are more common. One study in Aotearoa New Zealand found that one in five children had lived in a stepfamily before age 17.¹⁶ A recent longitudinal survey found that only seven per cent of children lived from their birth to age 15 in households containing only nuclear family members.¹⁷
- 1.16 Life expectancy is progressively increasing and projected to keep increasing. Those reaching 65 today can expect to live another 21 years on average.¹⁸ A new-born today can expect to live more than 90 years, on average.¹⁹ The baby boomer generation (usually someone born in the years 1946–65) are moving into the 65+ age bracket, meaning the oldest segment of Aotearoa New Zealand’s population is now the fastest growing.²⁰
- 1.17 The 85+ section of the population is also growing significantly. The 2018 Census showed that there were around 85,000 people aged 85+.²¹ It is likely that, by 2041, 220,000 –

¹⁰ Te Aka Matua o te Ture | Law Commission *Relationships and Families in Contemporary New Zealand* | *He Hononga Tangata, he Hononga Whānau i Aotearoa o Nāianeī* (NZLC SP22, 2017) at 17.

¹¹ Tauranga Aotearoa | Stats NZ “Marriages, civil unions and divorces: Year ended December 2019” (5 May 2020) <www.stats.govt.nz>.

¹² See Te Aka Matua o te Ture | Law Commission *Relationships and Families in Contemporary New Zealand* | *He Hononga Tangata, he Hononga Whānau i Aotearoa o Nāianeī* (NZLC SP22, 2017) at 26–27 and the studies cited therein.

¹³ Tauranga Aotearoa | Stats NZ “Marriages, civil unions and divorces: Year ended December 2019” (5 May 2020) <www.stats.govt.nz>; Tauranga Aotearoa | Stats NZ “First Marriages, Remarriages, and Total Marriages (including Civil Unions) (Annual-Dec)” (May 2017) <www.stats.govt.nz>.

¹⁴ Tauranga Aotearoa | Stats NZ “Live births by nuptiality (Maori and total population) (annual-Dec)” (May 2017) <www.stats.govt.nz>.

¹⁵ Tauranga Aotearoa | Stats NZ “Good things take time: Changes in the timings of key life events across two generations” (5 December 2019) <www.stats.govt.nz>.

¹⁶ Arunachalam Dharmalingam and others *Patterns of Family Formation and Change in New Zealand* (Te Manatū Whakahiato Ora | Ministry of Social Development, 2004) at 73.

¹⁷ This was a sub-study of the Dunedin Multidisciplinary Health and Development Study, involving 209 participants: see JL Sligo and others “The dynamic, complex and diverse living and care arrangements of young New Zealanders: implications for policy” (2017) 12 *Kōtuitui: New Zealand Journal of Social Sciences Online* 41 at 47.

¹⁸ Tauranga Aotearoa | Stats NZ *Demographic trends: implications for the funeral industry* (January 2016) at 4.

¹⁹ Tauranga Aotearoa | Stats NZ *Demographic trends: implications for the funeral industry* (January 2016) at 4.

²⁰ Tauranga Aotearoa | Stats NZ *Demographic trends: implications for the funeral industry* (January 2016) at 4.

²¹ Tauranga Aotearoa | Stats NZ “2018 Census” <www.stats.govt.nz>.

270,000 people will be aged 85+, and 320,000–450,000 by 2068.²² By the 2050s, about one in four people aged over 65 will be aged 85+, compared with one in eight people in 2014.²³ These projections indicate large increases in the need for daily and weekly care of older people in the coming years.²⁴

PUBLIC ATTITUDES ABOUT SUCCESSION

- 1.18 The Succession Survey reveals attitudes and values toward issues in succession from a nationwide, statistically representative sample of the population, with “booster” targets for Māori, Pacific peoples and Asian populations.²⁵ We refer to the Succession Survey results throughout this paper. Statistically significant results for particular subgroups of the population are commented on in the Succession Survey. This discussion identifies findings from the Survey that inform criteria for the development of good succession law.
- 1.19 When asked whether respondents agreed or disagreed that a person should be allowed to leave family members out of their will, 80 per cent either agreed or strongly agreed.²⁶ This appears to suggest that New Zealanders value testamentary freedom.
- 1.20 Respondents were then presented with specific scenarios in which certain family members of the deceased were left out of the will. Respondents were asked if they agreed these family members should be allowed to challenge a will to get a share of the estate. In most cases, a majority of respondents agreed. There were high levels of support for young or disabled children of the deceased being able to challenge a will. Views were less strong in other situations regarding adult children and stepchildren. In all scenarios, respondents agreed a deceased’s surviving partner should receive a share of the estate. Around three-quarters of respondents agreed a surviving partner should be entitled to the share of relationship property they would otherwise have received had the couple hypothetically separated during their lives.²⁷
- 1.21 We discuss these results in greater detail in later chapters. These findings suggest that, although New Zealanders value testamentary freedom, there is also a strong expectation that some family members should succeed to the deceased’s property, even if they were left out of the deceased’s will.

²² Tauranga Aotearoa | Stats NZ *Demographic trends: implications for the funeral industry* (January 2016) at 5.

²³ Tauranga Aotearoa | Stats NZ *Demographic trends: implications for the funeral industry* (January 2016) at 5.

²⁴ One study concludes that large increases in the need for daily and weekly care are expected by 2026: Ngaire Kerse and others *Intervals of care need: need for care and support in advanced age – LiLACS NZ* (Te Whare Wānanga o Tāmaki Makaurau | University of Auckland, 21 April 2017) at 11.

²⁵ Ian Binnie and others *Entitlements to deceased people’s property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [66]–[74].

²⁶ Ian Binnie and others *Entitlements to deceased people’s property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [95] and figure 1.

²⁷ Ian Binnie and others *Entitlements to deceased people’s property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [148] and figure 13.

CRITERIA FOR GOOD SUCCESSION LAW

- 1.22 In developing proposals for reform presented in this Issues Paper, we have been guided by criteria that we think will lead to good succession law. Those criteria are:
- (a) meeting general objectives of:
 - (i) consistency with the Treaty;
 - (ii) reflecting values and attitudes of contemporary Aotearoa New Zealand;
 - (iii) aligning with fundamental values and principles of a democratic society and Aotearoa New Zealand's international obligations; and
 - (iv) making law that is clear and accessible;
 - (b) sustaining property rights and expectations;
 - (c) promoting positive outcomes for families and whānau; and
 - (d) promoting efficient estate administration and dispute resolution.
- 1.23 It is important to recognise that these criteria do not complement each other in all cases. They often involve conflict. Our task has been to carefully balance the competing objectives in a way we consider will make the best law.

General matters

- 1.24 First, there are several general matters that we consider make good succession law:
- (a) **The law should be consistent with the Treaty.** We discuss how that might be achieved in Chapter 2.
 - (b) **The law should reflect values and attitudes of contemporary Aotearoa New Zealand.** As noted above, the law of succession should follow society's attitudes to various concepts about family and property rights. Where evidence is available, we have attempted to base our proposals on public attitudes and values. The Succession Survey has been helpful. We will rely too on the feedback we receive to this Issues Paper when finalising our recommendations.
 - (c) **The law should align with fundamental values and principles of Aotearoa New Zealand's democratic society and comply with its international obligations.** Good law recognises and respects fundamental human rights, including the rights affirmed in the New Zealand Bill of Rights Act 1990 and international instruments. We have given particular attention to the United Nations Convention on the Rights of the Child and the United Nations Declaration on the Rights of Indigenous Peoples.
 - (d) **The law should be clear and accessible.** We will all be affected by succession law at some point in our lives. It is important that everyone can access the law and understand their rights and obligations. Our proposal for a single statute that we discuss below is based on this objective.

Sustaining property rights and expectations

- 1.25 Second, we consider the law should sustain property rights and expectations. The main focus of this criterion is will-makers' testamentary freedom.
- 1.26 An owner of property generally has rights to deal with that property in whatever way they wish. A question arises as to what extent this right applies when the owner dies. The traditional approach in common law jurisdictions is to recognise property owners' testamentary freedom.²⁸
- 1.27 As set out above, the law in Aotearoa New Zealand maintains testamentary freedom. Although the right is qualified by the various claims individuals can bring to seek further provision from the estate, a properly executed will remains effective until successfully challenged.
- 1.28 While the public may consider the right might be qualified in certain circumstances, we consider testamentary freedom generally aligns with public attitudes and expectations evidenced in the Succession Survey. There are further reasons to support a property owner's testamentary freedom:
- (a) The will-maker is usually the best person to judge who is family and what duties are owed to them when distributing their estate.
 - (b) There is symbolic value in beneficiaries receiving gifts that the will-maker has intentionally chosen to make, rather than through the operation of statute or a court order.
 - (c) The community may collectively benefit where will-makers have freedom to extend their testamentary dispositions to charities and other community organisations.
- 1.29 In addition to a will-maker's rights, there are property rights and expectations of others to be considered. A beneficiary of a will has an interest in seeing the deceased's testamentary wishes to benefit them upheld. Parties that acquire rights to property held by the deceased during the deceased's life have an interest in those rights enduring against the estate. A surviving partner's relationship property rights are an important example.
- 1.30 For these reasons, in a testamentary context, our preliminary view is that any restriction on the property rights individuals enjoy during their life must be supported by clear policy reasons.

²⁸ *Banks v Goodfellow* (1870) 5 LR QB 549 at 563. Cockburn CJ observed that "the law of every civilised people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass". However, he qualified this statement by explaining that a property owner would be under a "moral responsibility of no ordinary importance" to make provision for "those who are the nearest to them in kindred and who in life have been the objects of their affection". Unrestricted testamentary freedom developed in the 18th century largely from the rise of liberal individualism, led by thinkers such as John Locke, Jeremy Bentham and John Stuart Mill: see Rosalind F Croucher and Prue Vines *Succession: Families, Property and Death* (5th ed, LexisNexis Butterworths, Chatswood (NSW), 2019) at 16–17; and Sylvia Villios and Natalie Williams "Family provision law, adult children and the age of entitlement" (2018) 39 *Adel L Rev* 249 at 250.

Promoting positive outcomes for families and whānau

- 1.31 The Commission in the 1990s succession review said an important aim of good succession law is to promote strong social relationships that lend themselves to voluntary co-operation and mutual support among family members.²⁹ We agree. There is likely to be debate, however, on how the law should promote family and whānau relationships.
- 1.32 For 120 years, Aotearoa New Zealand has attempted to recognise obligations to family of the deceased primarily through family protection legislation.³⁰ Prior to its enactment, case law had referred to a “moral responsibility of no ordinary importance” on the deceased to provide for “those who are nearest to them in kindred and who in life have been the objects of their affection”.³¹ This “moral duty” has now been given legal force by providing certain family members a statutory right to claim further provision from the estate when the deceased has not made adequate provision for their “proper maintenance and support”.³²
- 1.33 While a claim may benefit the successful party, we are mindful of the limitations of this approach in achieving family cohesion. Some have argued that this approach too readily frustrates the deceased’s wishes and the expectations of those they intended to benefit.³³ Others question how judicial redistribution of an estate can effectively rectify a parent’s failure to recognise their family in their will.³⁴
- 1.34 We are also mindful of the growing diversity of families in Aotearoa New Zealand. Who constitutes “family” and what obligations should be owed to them is an increasingly complex inquiry. In the 1990s succession review the Commission addressed these concerns by observing that the values that best promote cohesion are normally those of the family itself, as long as it is well functioning.³⁵ In many cases the best person to judge how best to recognise family members is the will-maker.³⁶
- 1.35 In our preliminary view, there are various ways the law can usefully promote positive outcomes for family and whānau relationships. First, it can promote positive ways of thinking about relationships and their consequences. For example, in Chapter 3, we explain a partner’s entitlement to relationship property on death arises from each partner’s contributions to a “family joint venture” which are deemed to be of equal value. In Chapter 8, we ask how tikanga addresses obligations to a surviving partner. Also, in Chapter 4, we recognise that, in some family arrangements, there may be non-biological children for whom the deceased had assumed, in an enduring way, the responsibilities of

²⁹ Te Aka Matua o te Ture | Law Commission *Succession Law: Testamentary Claims – A discussion paper* (NZLC PP24, 1996) at [24].

³⁰ The first legislation enacted was the Testator’s Family Maintenance Act 1900.

³¹ *Banks v Goodfellow* (1870) 5 LR QB 549 at 563.

³² Family Protection Act 1955, s 4.

³³ Nicola Peart “New Zealand’s Succession Law: Subverting Reasonable Expectations” (2008) 37 Comm L World Rev 356 at 378–379.

³⁴ John Caldwell “Family protection claims by adult children: what is going on?” (2008) 6 NZFLJ 4 at 9.

³⁵ Te Aka Matua o te Ture | Law Commission *Succession Law: Testamentary Claims – A discussion paper* (NZLC PP24, 1996) at [25].

³⁶ Te Aka Matua o te Ture | Law Commission *Succession Law: Testamentary Claims – A discussion paper* (NZLC PP24, 1996) at [25].

a parent. In our preliminary view, they should be considered children of the deceased and be eligible for family provision from that parent's estate.

- 1.36 Second, the law may reflect the presumed family bonds of aroha, love and affection when setting a default regime for who should succeed to a deceased's property when they have not made a will. In Chapter 6, we set out proposals for which family members should succeed in an intestacy and in what priority. In Chapter 8, we ask how tikanga responds to the distribution of property when someone dies without expressing any testamentary wishes.
- 1.37 Third, the law can provide family members freedom to come to their own arrangements about what they mutually consider to be a fair way for property to be distributed on death. In Chapter 11, we propose processes for family members to make agreements about their property while ensuring those involved are informed of their rights. We consider this approach is likely to lead to more satisfactory and enduring outcomes than if a judge imposed outcomes on parties.
- 1.38 Lastly, the law can provide for clear and efficient procedures that promote the quick and efficient resolution of disputes. It is important for families and whānau to have the tools and procedures to work through disagreements in a way that minimises conflict and gives family and whānau members the best chance of remaining on good terms (see Chapters 11 and 14).

Promoting efficient estate administration and dispute resolution

- 1.39 It is essential the law facilitates claims against estates in a way that minimises delays and costs to their administration and distribution. There are several ways the law can do this:
- (a) The law needs to be clear, simple and accessible. Will-makers should be able to understand what obligations they owe when deciding on the terms of their will. For those who wish to claim against an estate or defend a claim, the law should enable them to understand their rights and to determine the strength of such a claim. For personal representatives charged with administering and distributing an estate, the law should be clear on their duties and what claims can be properly admitted.
 - (b) There should be clear processes for resolving disputes in and out of court. Parties should be able to understand what processes may be followed to resolve disputes. They should understand their legal and procedural obligations to facilitate the efficient resolution of disputes, such as disclosure of information and the need to organise the representation of minors or others who may lack capacity.
 - (c) Parties should be able to settle disputes without the need for defended court proceedings. In Chapters 11 and 14, we explain how the law can facilitate the settlement of disputes through agreement while ensuring parties are aware of their rights and unjust outcomes are avoided. In Chapter 15 we look at the resolution of disputes from an ao Māori perspective.

THE NEED FOR A SINGLE STATUTE

- 1.40 The law providing for claims against estates is found across several statutes, the common law and equity. As the law should be clear and accessible, our preliminary view is that there should be a single, comprehensive statutory regime that governs claims against estates (the new Act). The new Act would enable parties to refer to a single source to understand the law. It should be clear and readable, consistent with modern drafting standards.
- 1.41 Throughout this Issues Paper we present proposals for what law should be contained in the new Act. To summarise, our preliminary view is that the new Act should set out the law governing:
- (a) **relationship property entitlements**, which will replace, and require the repeal of, Part 8 of the PRA;
 - (b) **family provision claims**, which will replace, and require the repeal of, the FPA; and
 - (c) **contribution claims**, which will replace, and require the repeal of, the TPA as well as codifying aspects of the common law and equity.
- 1.42 In Chapter 6, we propose reforms to the intestacy regime under Part 3 of the Administration Act. We raise the question of whether a reformed intestacy regime ought to sit within the new Act or remain in the Administration Act.
- 1.43 The content of the new Act will also take into account the feedback we receive in relation to the ao Māori framework we set out in Chapter 2 and the matters discussed in Chapters 7, 8 and 15.
- 1.44 The proposed new Act would not completely codify the law. Instead, it should be regarded as the principal source of law. To the extent the new Act addresses matters, the new Act should apply over other law. For contribution claims, however, our preliminary view is that the new Act should codify claims for which the TPA, the common law and equity provide remedies in respect of benefits provided to the deceased or the estate.
- 1.45 Other statutes relating to succession and the administration of estates would continue to exist alongside the new Act, such as the Wills Act 2007 (and possibly the remainder of the Administration Act).
- 1.46 During our preliminary engagement and research, we heard arguments for a wider statute that would bring together all law relating to succession, including the provisions of the Wills Act and the Administration Act.³⁷ This suggestion is outside the scope of this review and, consequently, the furthest we might take that suggestion is to recommend that the Government give it further consideration. The Government could, for example, consider drafting the proposed new Act in such a way that it could later form a part of a wider succession Act if enacted.

³⁷ See for example Greg Kelly “An Inheritance Code for New Zealand” (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 2010). The Commission’s work in the 1990s had as its ultimate aim a new Succession Act drafted in plain language that would provide for all succession laws in one statute, including the law regarding wills, administration and intestacies: Te Aka Matua o te Ture | Law Commission *Succession Law: Testamentary Claims – A discussion paper* (NZLC PP24, 1996) at vii.

QUESTIONS

Q1

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

Q2

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



CHAPTER 2

Te ao Māori and succession

IN THIS CHAPTER WE CONSIDER:

- the implications of te Tiriti o Waitangi | the Treaty of Waitangi for this review;
- the tikanga relevant to succession; and
- our framework for considering an ao Māori perspective on succession.

INTRODUCTION

- 2.1 Succession is an important matter for Māori.
- 2.2 We have outlined in the Introduction the steps we have taken to date to inform ourselves of the rights and interests of Māori and to appreciate from Māori the nature and cultural dimensions of succession within te ao Māori. This is ongoing work, and we hope to receive feedback that further helps us to address succession matters of concern to Māori.
- 2.3 While our review does not include the rules about succession in Te Ture Whenua Maori Act 1993 (TTWMA), we recognise the centrality of succession to land within te ao Māori. We may therefore comment on aspects of TTWMA but do not intend to make recommendations to change it.
- 2.4 This chapter outlines our framework for considering an ao Māori perspective on succession. It builds on the Commission's succession work in the 1990s where significant work was undertaken by the Commission and external consultants.¹

¹ Edward Taihakurei Durie "Custom Law" (paper prepared for Te Aka Matua o te Ture | Law Commission, January 1994); Joan Metge "Succession Law: Background Issues Relating to Tikanga Maori" (paper prepared for Te Aka Matua o te Ture | Law Commission, 1994); Joseph Williams "He Aha Te Tikanga Maori" (paper prepared for Te Aka Matua o te Ture | Law Commission (draft), 1998); and David V Williams "He Aha Te Tikanga Maori" (paper prepared for Te Aka Matua o te Ture | Law Commission (revised draft), 10 November 1998). The Commission retained consultants (Professor Patu Hohepa, Dr David Williams and Waerete Norman) to advise on succession as it relates to Māori families. A number of hui were conducted around Aotearoa New Zealand to assist the Commission to hear from Māori about succession issues. Professor Hohepa and Dr Williams drafted a paper published as Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996). See also Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 283–295.

In its Preliminary Paper *Succession Law: Testamentary Claims*, the Commission noted that:²

Testamentary claims by Māori families are of special concern. This is an area of intense interest for Māori. Te Tiriti o Waitangi (the Treaty of Waitangi) confirms and guarantees to Māori te tino rangatiratanga (unqualified exercise of chieftainship). The Crown must respect Māori control over the inheritance of property. Laws affecting succession to Māori property should recognise that the fundamental principles of tikanga (custom law) apply amongst Māori people.

- 2.5 We have used the Commission’s earlier work to inform our own thinking. However, we recognise that this work was done 25 years ago, and we need to understand Māori perspectives afresh.

TE TIRITI O WAITANGI | THE TREATY OF WAITANGI

- 2.6 Te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty)³ is a foundation of government in Aotearoa New Zealand.⁴ As recorded in Cabinet guidance:⁵

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

- 2.7 The Commission recently discussed the Treaty and tikanga Māori in its report *The Use of DNA in Criminal Investigations | Te Whakamahi i te Ira Tangata i ngā Mātai Taihara*, and we draw on that discussion in this chapter.⁶ We also examine different aspects of the Treaty’s application given the different context of this review.
- 2.8 The Treaty was signed in 1840 by representatives of the British Crown and rangatira representing many, but not all, hapū.⁷ It comprises a Māori text and an English text. There are differences between the two texts, as we explain below. The meaning and significance of each text, the relationship between them and whether they can be

² Te Aka Matua o te Ture | Law Commission *Succession Law: Testamentary Claims* (NZLC PP24, 1996) at [11]–[12] (emphasis removed). The Commission also noted that some court decisions involving tikanga Māori raise questions about whether the courts can adequately find out and apply Māori values. The Commission also intended to consider taonga such as cloaks, greenstone or property returned as a result of Treaty of Waitangi claims.

³ When discussing te Tiriti o Waitangi | the Treaty of Waitangi in this paper, we use “the Treaty” as a generic term that is intended to capture both the Māori text (te Tiriti o Waitangi) and the English text (the Treaty of Waitangi). When we are referring to the Māori text only, we either use the term “te Tiriti”, refer to “the Māori text” or make this clear in the context. When we are referring to the English text only, we refer to “the English text” or make this clear in the context. To the extent that the principles of the Treaty, which have developed through jurisprudence, substantively reflect the rights and obligations arising from the texts, the principles may also be captured by the term “the Treaty”. Otherwise, we specifically refer to “the principles of the Treaty” or to specific principles.

⁴ Kenneth Keith “On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government” in Cabinet Office *Cabinet Manual 2017* 1 at 1. The Treaty was not, however, signed by representatives of all hapū: Te Puni Kōkiri | Ministry of Māori Development *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (2001) at 14.

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

⁶ Te Aka Matua o te Ture | Law Commission *The Use of DNA in Criminal Investigations | Te Whakamahi i te Ira Tangata i ngā Mātai Taihara* (NZLC R144, 2020) at [2.6]–[2.31].

⁷ Te Puni Kōkiri | Ministry of Māori Development *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (2001) at 14.

reconciled through interpretation and the elaboration of Treaty principles are the subject of significant debate, scholarship and judicial consideration.⁸ We acknowledge these ongoing debates as context for considering the implications of the Treaty for our review of succession law.

- 2.9 Our discussion draws on some of this scholarship and judicial consideration as well as the findings of Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal (the Tribunal). The Tribunal was established under the Treaty of Waitangi Act 1975, and its functions include inquiring into and making recommendations on claims that acts or omissions of the Crown are inconsistent with “the principles of the Treaty”.⁹ In performing this function, the Tribunal must have regard to both texts and, for the purposes of the Treaty of Waitangi Act, has exclusive authority to determine the meaning and effect of the texts and issues raised by the differences between them.¹⁰

The Treaty texts

- 2.10 In the Māori text, article 1 provides that Māori rangatira grant the Crown kāwanatanga, the right to govern. Article 2 provides that the Crown will protect the exercise of tino rangatiratanga over lands, villages and taonga katoa (all things valued and treasured). Tino rangatiratanga has been described as the exercise of the chieftainship of rangatira, which is unqualified except by applicable tikanga.¹¹
- 2.11 Article 1 of the English text provides that Māori rangatira cede the sovereignty they exercise over their respective territories to the Crown, while article 2 guarantees to Māori full exclusive and undisturbed possession of their lands and other properties.¹²
- 2.12 Under article 3 of the English text, the Crown imparted to Māori its protection as well as all the rights and privileges of British subjects. A similar undertaking was conveyed in article 3 of the Māori text, which provides that the Crown will care for Māori and give to

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

⁹ Treaty of Waitangi Act 1975, ss 5(1) and 6(1).

¹⁰ Treaty of Waitangi Act 1975, preamble and s 5(2).

¹¹ IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 319. Kawharu explained that the term emphasised to rangatira their complete control according to their customs. The term has also been translated as “paramount authority”: Margaret Mutu “Constitutional Intentions: The Treaty of Waitangi Texts” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters – The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 13 at 19–22; and “absolute authority”: Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Whaia te Mana Motuhake | In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 26.

¹² Article 2 also gave the Crown an exclusive right of pre-emption over any land Māori wanted to “alienate”.

Māori the same rights and duties of citizenship as the people of England.¹³ Article 3 has been understood as a guarantee of equity between Māori and other New Zealanders.¹⁴

- 2.13 At the time of signing the Treaty, Crown representatives made oral undertakings and assurances to Māori, including an undertaking to respect Māori customs and law.¹⁵ The Tribunal has held that these also form part of the agreement reached.¹⁶
- 2.14 Not all hapū were represented among the rangatira signatories to the Treaty. The Crown has taken the position that the benefit of the promises it made in the Treaty extends to all Māori, whether or not they signed the Treaty.¹⁷
- 2.15 Five years before the Treaty was signed, in 1835, a number of northern rangatira signed He Whakaputanga o te Rangatiratanga o Nu Tireni | the Declaration of Independence of the United Tribes of New Zealand. He Whakaputanga was a declaration of the sovereignty and independence of those rangatira. The Tribunal has considered the “striking absence” of any record of explicit discussion about its ongoing relevance or its relationship with the Treaty.¹⁸ The Tribunal has also considered the failure of the British to explain why and how the Treaty nullified He Whakaputanga to be significant.¹⁹

¹³ IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 321.

¹⁴ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 27.

¹⁵ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 114.

¹⁶ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 526–527.

¹⁷ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Urewera* (Wai 894, 2017) vol 1 at 139. This is reflected in s 9(1) of the Tūhoe Claims Settlement Act 2014. In 2018, the Tribunal concluded that the Treaty applied to non-signatory hapū as a unilateral set of promises by the Crown to respect and protect their tino rangatiratanga and other rights just as it would for hapū whose leaders had signed, noting that out of practical necessity, all Māori needed to engage with the Crown on the basis of the Treaty’s guarantees, whether they had signed the Treaty or not: Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Parts I and II* (Wai 898, 2018) at 188.

¹⁸ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 520.

¹⁹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 521. See also Ani Mikaere *Colonising Myths: Māori Realities – He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 127–128; and *He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (January 2016) at 43–49.

Te Tiriti

- 2.16 The overwhelming majority of Māori signatories signed the Māori text rather than the English text.²⁰ As a result, the Tribunal has said considerable weight should be given to the Māori text when there is a difference between them.²¹
- 2.17 With respect to articles 1 and 2 of te Tiriti, the Tribunal has also observed:²²
- The guarantee of tino rangatiratanga requires the Crown to acknowledge Māori control over their tikanga, resources, and people and to allow Māori to manage their own affairs in a way that aligns with their customs and values.
- 2.18 Within te ao Māori, rangatiratanga can embody the authority of a rangatira but also that of the people, which, in the context of this review, includes whānau and hapū. It involves the exercise of mana in accordance with and qualified by tikanga and its associated kawa and, through tikanga, the managing of a dynamic interface between people, their environment and the non-material world.²³
- 2.19 It is the substance of this rangatiratanga that needs to be upheld and not interfered with through the guarantee of tino rangatiratanga. In effect, te Tiriti envisages the co-existence of different but intersecting systems of political and legal authority.²⁴
- 2.20 Tino rangatiratanga is exercised within te ao Māori every day and independently of state law, in accordance with tikanga Māori. However, in some situations, consistency with te Tiriti may require that provision for the exercise of tino rangatiratanga be made in legislation. Implicit in this is that te Tiriti requires careful thought about what responsible kāwanatanga involves.

²⁰ It has long been acknowledged that most of the more than 500 rangatira who signed the Treaty signed te Tiriti not the English text, following their debate and discussion in Māori. While some signed the English sheet, most if not all of them would have relied on the oral explanation of the Treaty's terms in Māori, which likely reflected te Tiriti. See Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Parts I and II* (Wai 898, 2018) at 130, 136, 139–140 and 146. See also Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 522; Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) at 7.

²¹ Consistent with the *contra proferentem* rule of the law of treaties, where there is ambiguity, a provision should be construed against the party that drafted or proposed the relevant provision. See Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report of The Waitangi Tribunal on The Orakei Claim* (Wai 9, 1987) at 180.

²² Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 28. See also Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 21; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Whaia te Mana Motuhake | In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 26.

²³ New Zealand Māori Council *Kaupapa: te wāhanga tuatahi* (New Zealand Māori Council, Wellington, 1983) at 5–6; Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 41–42 and 229; and Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 36–38. See also the discussion in *He Whakaaro Here Whakaamu Mō Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (January 2016) at 34.

²⁴ See discussion in Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 524. Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) at 42.

- 2.21 This approach to articles 1 and 2 of te Tiriti allows an end to debating the different texts in an effort to understand what was exchanged between Māori and the British and how the wording of each of the texts should be qualified.²⁵ Instead, it focuses on the relationship between tino rangatiratanga and kāwanatanga and allows us to ask how responsible kāwanatanga might be exercised in specific contexts, including how the exercise of tino rangatiratanga might be facilitated.

The principles

- 2.22 The Treaty principles have become important tools in understanding the Treaty and have an extensive history in the Tribunal and the courts.
- 2.23 The Tribunal has explained that, although its statutory role is to inquire into the consistency of the Crown’s acts and omissions against the Treaty principles, this “does not mean that the terms [of the Treaty] can be negated or reduced”.²⁶ Rather, the principles “enlarge the terms, enabling the Treaty to be applied in situations that were not foreseen or discussed at the time”.²⁷ However, it should be noted that some regard the Treaty principles as distorting or diminishing the clear terms of the Māori text.²⁸
- 2.24 Given the Treaty’s constitutional significance, in the absence of clear words to the contrary, the courts will presume that Parliament intends to legislate in a manner that is consistent with the principles of the Treaty and will interpret legislation accordingly.²⁹
- 2.25 In several landmark cases, the courts have identified three broad Treaty principles: the principles of partnership, active protection and redress.³⁰ However, the nature of the Treaty as a living document means that the Treaty principles are constantly evolving as the Treaty is applied to new issues and situations.³¹ Neither the courts nor the Tribunal have sought to produce a definitive list of Treaty principles.³² As te Kōti Pīra | the Court of Appeal has observed, “[t]he Treaty obligations are ongoing. They will evolve from generation to generation as conditions change”.³³ Consequently, over time, other principles and duties associated with these three broad principles have been developed by the Tribunal and the courts.

²⁵ Article 3 in both the Māori and English texts conveys an undertaking of similar effect.

²⁶ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 385–386.

²⁷ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 386.

²⁸ For example, see Ani Mikaere *Colonising Myths: Māori Realities – He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 263–264. See also the discussion in Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 348 onwards for an in-depth discussion of the texts.

²⁹ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*] at 655–656 per Cooke P.

³⁰ See *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*]; *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) [*Broadcasting Assets*]; and *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA).

³¹ Te Puni Kōkiri | Ministry of Māori Development *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (2001) at 77.

³² Te Puni Kōkiri | Ministry of Māori Development *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (2001) at 77.

³³ *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 656 per Cooke P.

- 2.26 In our view, this review engages in particular the principles of partnership, active protection, and “options” (Māori having choices or options available to them).

Partnership

- 2.27 The principle of partnership requires Māori participation in decision-making that impacts on the lives of Māori. The starting point should be shared decision-making, but the form partnership takes will depend on what the rights and interests of the Treaty partners require in the circumstances.³⁴ Both partners should participate in identifying the nature and extent of the rights and interests engaged and how they may be protected through the partnership.³⁵
- 2.28 The Crown is subject to a related duty to make informed decisions on matters that affect Māori interests.³⁶ This requires the Crown to be fully informed of the rights and interests of Māori, other New Zealanders and the nation as a whole as well as the impact of its proposed course of action on these rights and interests so that those interests may be protected and balanced appropriately (although a conflict between the interests of Māori and others should not be presumed).³⁷ The Tribunal has observed that, in making decisions on matters that may impact on the exercise of rangatiratanga over taonga, it is essential that the Crown engage with Māori in order to fully understand the nature of those interests.³⁸

Active protection

- 2.29 The principle of active protection emerges from the relationship between kāwanatanga and tino rangatiratanga in articles 1 and 2 of te Tiriti.³⁹ It encompasses an obligation to

³⁴ See Te Aka Matua o te Ture | Law Commission *The Treaty of Waitangi and Maori Fisheries* | *Mataitai: Nga Tikanga Maori me te Tiriti o Waitangi* (NZLC PP9, 1989) at [2.12], [3.9]–[3.11] and [14.12]; and Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 80.

³⁵ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuarua* (Wai 262, 2011) at 341. See also *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*] at 667 per Cooke P and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Report on the Crown’s Review of the Plant Variety Rights Regime: Stage 2 of the Trans-Pacific Partnership Agreement Claims* (Wai 2522, 2020) at 12.

³⁶ This duty is also engaged by the principle of active protection discussed below. See Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Whakatōhea Mandate Inquiry Report* (Wai 2662, 2018) at 21–22.

³⁷ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Aha i Pērā Ai? The Māori Prisoners’ Voting Report* (Wai 2870, 2020) at 12. See also *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*] at 683 per Richardson J; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 23; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuarua* (Wai 262, 2011) at 86; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuatahi* (Wai 262, 2011) at 237.

³⁸ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Ngawha Geothermal Resource Report 1993* (Wai 304, 1993) at 101–102.

³⁹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report on the Crown’s Review of the Plant Variety Rights Regime: Stage 2 of the Trans-Pacific Partnership Agreement Claims* (Wai 2522, 2020) at 13; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Aha i Pērā Ai? The Māori Prisoners’ Voting Report* (Wai 2870, 2020) at 12. See also Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 26. In the English text of the Treaty, it is article 2 that provides

actively protect tino rangatiratanga, including the exercise of authority in accordance with tikanga and over taonga.⁴⁰ As discussed in relation to the principle of partnership and the associated duty of informed decision-making, to ascertain what the obligation of active protection requires in the given circumstances, the Crown must inform itself of the nature of the Māori rights and interests engaged.⁴¹ In this respect, the Tribunal has observed:⁴²

The Crown obligation actively to protect Maori Treaty rights cannot be fulfilled in the absence of a full appreciation of the nature of the taonga including its spiritual and cultural dimensions. This can only be gained from those having rangatiratanga over the taonga.

Options

2.30 This principle is concerned with the choice open to Māori.⁴³ Article 2 of te Tiriti guarantees tino rangatiratanga to Māori. Article 3 of both texts have the effect of promising Māori the protection of the Crown together with the same rights and duties of citizenship of all New Zealanders. Māori are free to pursue either or both of these.⁴⁴ This assures to Māori the right to choose their social and cultural path.⁴⁵ The Tribunal has described the choice as one to:⁴⁶

... develop along customary lines and from a traditional base, or to assimilate into a new way. Inferentially it offered a third alternative, to walk in two worlds.

2.31 The options open to Māori, as we see them, are essentially concerned with the decisions Māori make every day to live in and engage with both te ao Māori and te ao Pākehā.

that the Crown “guarantees” Māori the continued possession of their lands and other resources. Article 3 of both texts also includes an undertaking by the Crown to protect Māori rights and interests.

⁴⁰ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Aha i Pērā Ai? The Māori Prisoners’ Voting Report* (Wai 2870, 2020) at 13; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Report on the Crown’s Review of the Plant Variety Rights Regime: Stage 2 of the Trans-Pacific Partnership Agreement Claims* (Wai 2522, 2020) at 13; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Ngāpuhi Mandate Inquiry Report* (Wai 2490, 2015) at 30–31.

⁴¹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Aha i Pērā Ai? The Māori Prisoners’ Voting Report* (Wai 2870, 2020) at 13; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Ngawha Geothermal Resource Report 1993* (Wai 304, 1993) at 101–102. See also Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 22.

⁴² Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Ngawha Geothermal Resource Report 1993* (Wai 304, 1993) at 102. See also Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuatahi* (Wai 262, 2011) at 188, where the Tribunal emphasised that Māori are the kaitiaki of their own mātauranga and that the Crown should not assume that role for itself, but “[r]ather, the Crown must support Māori leadership of the effort to preserve and transmit mātauranga Māori, with both parties acting as partners in a joint venture”.

⁴³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Ngai Tahu Sea Fisheries Report 1992* (Wai 27, 1992) at 274.

⁴⁴ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Ngai Tahu Sea Fisheries Report 1992* (Wai 27, 1992) at 274.

⁴⁵ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wai 692, 2001) at 65.

⁴⁶ Te Rōpū Whakamana o Te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, 1988) at 195.

- 2.32 The nature of the interest in the matter at issue may affect how this principle will be given effect. However, responsible kāwanatanga should ensure that options remain open to Māori as genuinely as is possible.⁴⁷

Implications of the Treaty for this review

- 2.33 Given the significance of succession in te ao Māori, the implications of the Treaty in this review are that it engages the guarantee of “tino rangatiratanga o ... o ratou taonga katoa” (chieftainship over all things valued or treasured) and respect for Māori customs and law.⁴⁸ We suggest that responsible kāwanatanga requires appropriate facilitation of the exercise of tino rangatiratanga by Māori, and this then requires careful thought about the relationship between tikanga and state law in relation to succession.
- 2.34 Our preliminary consultation with Māori emphasised the importance of letting Māori be the Māori they want to be. Our approach to the review therefore seeks to:
- (a) involve Māori participation in identifying the nature and extent of the rights and interests engaged;
 - (b) understand Māori rights and interests; and
 - (c) consider and consult with Māori on how those rights and interests are best recognised in state law or otherwise.
- 2.35 To provide further context for considering these questions, we outline below aspects of tikanga Māori relevant to succession.

TIKANGA

- 2.36 For present purposes, tikanga is constitutionally significant to the development of the law in four mutually reinforcing respects:
- (a) First, as an independent source of rights and obligations in te ao Māori and the first law of Aotearoa.⁴⁹
 - (b) Second, in terms of the Treaty rights and obligations that pertain to tikanga.

⁴⁷ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuatahi* (Wai 262, 2011) at 24, where the Tribunal observed in that context that “[a]fter 170 years during which Māori have been socially, culturally, and economically swamped, it will no longer be possible to deliver tino rangatiratanga in the sense of full authority over all taonga Māori.” See also the discussion at 269.

⁴⁸ In *Te Aka Matua o te Ture | Law Commission The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1997) at 9, Professor Hohepa said “[t]he right to legal autonomy and to control of succession can be said to be a collective possession as well as taonga.”

⁴⁹ See Ani Mikaere “The Treaty of Waitangi and Recognition of Tikanga Māori” in Michael Belgrave, Merata Kawharu and David V Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) 331 and 334; and Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Waikato L Rev* 1 at 2–5.

- (c) Third, where tikanga values comprise a source of the New Zealand common law,⁵⁰ or have been integrated into law by statutory reference.⁵¹
- (d) Fourth, to give effect to Aotearoa New Zealand’s international obligations in relation to Māori as indigenous people, including under the UNDRIP.⁵²
- 2.37 Professor Patu Hohepa emphasised the need to revisit tikanga Māori in order that its part in succession law reform is understood. He explained the centrality of tikanga in the following terms:⁵³
- E kore e whakawaia
E whakangaro i te tikanga
Kei hiiritia e te ture
Waiho ki te ture tangata
- 2.38 Professor Hohepa observed that while surface changes may occur to things such as land tenure or social structures, they do so without sacrificing deep cultural principles because they have the underpinnings of cultural strength and continuity.⁵⁴

⁵⁰ As recognised by te Kōti Mana Nui | the Supreme Court in *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]–[95]. In *Ellis v R* [2020] NZSC 89, submissions were sought on the application of tikanga on the question of whether the Court has jurisdiction to hear an appeal against conviction after the death of the appellant. The Court issued its judgment allowing the appeal to proceed, but reasons for that decision are to be provided with the judgment on the substantive appeal: at [5]. See also *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291 at [43]–[47] and [58].

⁵¹ Statutes referencing tikanga include the Oranga Tamariki Act 1989 (see s 2 definitions of “tikanga Māori” and “mana tamaiti (tamariki)”); Resource Management Act 1991; and Taumata Arowai—the Water Services Regulator Act 2020. See also Christian N Whata “Evolution of legal issues facing Maori” (paper presented to Maori Legal Issues Conference, Legal Research Foundation, Auckland, 29 November 2013).

⁵² Aotearoa New Zealand affirmed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) GA Res 61/295 (2007) in 2010. The UNDRIP recognises the importance of protecting the collective rights of indigenous peoples and addresses the rights to self-determination, preservation of culture and institutions, participation in decision-making and consultation, and rights to lands and resources. As a declaration rather than a convention, the UNDRIP does not have legally binding force attached to it in international law. However, the UNDRIP is widely viewed as not creating new rights, but rather elaborating on internationally recognised human rights as they apply to indigenous peoples and individuals, thus in this way having a binding effect: see Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Whaia te Mana Motuhake | In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 34–35, 38–39 and 40–44); Te Rōpū Whakamana | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity — Te Taumata Tuatahi* (Wai 262, 2011) at 42 and 233; and Claire Charters “The UN Declaration on the Rights of Indigenous Peoples in New Zealand Courts: A Case for Cautious Optimism” in *UNDRIP Implementation: Comparative Approaches, Indigenous Voices from CANZUS – Special Report* (Centre for International Governance Innovation, 2020) 43 at 48–50. This is reflected in the right to self-determination in art 3 being characterised as “essential to the enjoyment of all human rights”: Melissa Castan “DRIP Feed: The Slow Reconstruction of Self-determination for Indigenous Peoples” in Sarah Joseph and Adam McBeth (eds) *Research Handbook on International Human Rights Law* (Edward Elgar Publishing, Cheltenham, 2010) 492 at 499; see also Office of the High Commissioner for Human Rights *CCPR General Comment No 12: Article 1 (Right to Self-determination) The Right to Self-determination of Peoples* (13 March 1984).

⁵³ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 16. Professor Hohepa explains this as stating that tikanga should never be watered down or lost, otherwise it would be codified in law and left to languish in human-created laws.

⁵⁴ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 17.

- 2.39 To put our discussion of tikanga relating to succession in context, we first acknowledge the place of death in te ao Māori. On the topic of Māori views on death, Mead writes that:⁵⁵
- ... human beings are transient and are not permanent features of the social landscape ... The condition of human life is compared with the apparent permanence of the land or of a mountain range ... a majority of Māori live happily with the images of their ancestors all around them in a carved meeting house, with the wairua of the ancestors above them, with the bones of their ancestors at the burial ground near by and surrounded by their living relatives. All are part of the reality of being Māori. All elements are part of the whole and death itself is not a frightening experience ... It is manageable because we have tikanga to guide us and help us through a crisis and a reality of life.
- 2.40 In Māori historical accounts, Hine-nui-te-pō is known as the kāwai tupuna of all that go to Rarohenga, their final resting place.⁵⁶ Hine-nui-te-pō was formerly known as Hinētītama, the daughter of Tāne. She became his wife without the knowledge of her whakapapa, and when she discovered the truth she was ashamed and fled to Rarohenga. She vowed to look after all Tāne’s descendants, of which humans are a part, once their time with him had ended.
- 2.41 In te ao Māori, everything has a mauri that originates from the atua Māori. Mead describes mauri as the “spark of life, the active component which indicates the person is alive”.⁵⁷ Mauri has also been described as the activity that moves within all people.⁵⁸ When a person dies, the mauri that they are born with disappears.⁵⁹ The wairua, however, remains and may journey to Rarohenga to be with Hine-nui-te-pō or remain close to the body.⁶⁰
- 2.42 One historical account of Māui-tikitiki-a-Taranga explains human mortality. Māui attempted to cheat death by entering Hine-nui-te-pō through the birth-way while she slept, in order to reverse the birth process. However, his pet tiwaiwaka woke Hine-nui-te-pō, and she killed Māui instead. As a result of Māui’s failure to find the source of life, all humans inevitably die.

⁵⁵ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 155–157; see also Harry Dansey “A View of Death” in Michael King (ed) *Te Ao Hurihuri: Aspects of Maoritanga* (Reed Publishing, Auckland, 1992) 105.

⁵⁶ Pūrākau (Māori stories) outlined in this paper derive from and belong to Māori through oral tradition. We have chosen not to cite specific sources for these stories for that reason.

⁵⁷ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 57.

⁵⁸ Elsdon Best “Spiritual Concepts of the Maori: Part II” (1901) 10 JPS 1 at 3–4.

⁵⁹ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 156.

⁶⁰ Wairua is usually translated as “soul” or “spirit”. It is an expression of forces beyond those of this world: see Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 184. Mead describes various beliefs in the journey the wairua takes after the person has died: see Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 59–63.

Tikanga relevant to succession

- 2.43 Succession in te ao Māori reflects the importance of whānau for Māori. Kin relationships together with their inherent reciprocal obligations provide the overall context for understanding succession from an ao Māori perspective.⁶¹
- 2.44 Understanding the nature of the relationships between Māori and the tangible and intangible is also important. Certain tangible items may be more important to the collective than the individual. An indicator of what might fall into this category can be found in te reo Māori, where the relationship between one thing and another is indicated by the pre-posed particles ‘o’ or ‘a’ (of which there is no equivalent in English).⁶² When it comes to possessions, ‘o’ is generally used when the possessor is passive, subordinate or inferior to that which is possessed. In contrast, ‘a’ is used when the possessor is active, dominant or superior to that which is possessed. These rules do not cover the broad range of relationships to which ‘a’ and ‘o’ apply though. For instance, qualities, feelings, clothing and parts of a wider whole are generally pre-posed by ‘o’, even though the possessor is not necessarily passive, subordinate or inferior to these things.
- 2.45 To illustrate the difference between ‘a’ and ‘o’, land and taonga will generally be pre-posed by ‘o’, but something like a pen will generally be pre-posed by ‘a’. It is clear from these examples that things pre-posed by ‘o’ are not only held by the possessor passively but are also imbued with tapu, ihi and mana. This may be indicative of when an item may have more importance to the collective than the individual.
- 2.46 Succession in te ao Māori is also concerned with the intangible. For example, even though a Māori person is born with mana derived from their tūpuna, they may inherit additional mana and the rights and obligations associated with that mana from their parents when their parents die.⁶³ In contrast, succession in te ao Pākehā is largely concerned with tangibles. This reflects the idea of succession law being a necessary extension of the broader ideas of property and ownership.⁶⁴ We do not intend to consider how Māori might succeed to the intangible in this review, although we observe that intangible rights and obligations handed down through succession may affect succession to tangibles.
- 2.47 The following discussion does not seek to be a comprehensive description of tikanga relevant to succession law. It is our attempt to identify principles that must be understood in order to consider an ao Māori perspective. Additionally, Māori, both individually and

⁶¹ For a broad-ranging discussion of social organisation among Māori, see Te Rangi Hiroa | Peter Buck *The Coming of the Maori* (Whitcombe and Tombs Ltd, Christchurch, 1949) at 331.

⁶² This description is based upon Professor Patu Hohepa’s writing in Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 25. We received feedback that there are varying opinions as to what exactly the ‘a’ and ‘o’ categories mean, and that the description we propose here is not universally accepted.

⁶³ We discuss mana, utu and kaitiakitanga below.

⁶⁴ See our discussion in Chapter 1.

collectively, interpret tikanga in their own ways and place varying degrees of importance on particular values.⁶⁵ The values:⁶⁶

... do not represent a hierarchy of ethics, but rather a koru, or a spiral, of ethics. They are all part of a continuum yet contain an identifiable core.

Tika

2.48 Professor Hohepa has described tika as the “major principle” that overarches and guides formalities and practice in Māori society.⁶⁷ Tika has a range of meaning from “right and proper, true, honest, just, personally and culturally correct or proper” to “upright”.⁶⁸ It forms the basis of the word tikanga. The practice of a particular tikanga therefore needs to be correct and right, or tika.⁶⁹

Whanaungatanga

2.49 Whanaungatanga has been described as “the glue that held, and still holds, the system together”.⁷⁰ It has been said to be:⁷¹

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

2.50 Whanaungatanga includes the ideas that, in te ao Māori, relationships among people and with the natural and spiritual worlds are fundamental to communal well-being, and all individuals owe certain responsibilities to the collective.⁷²

2.51 The idea of belonging, which underpins the Māori perspective on succession, has its basis in whanaungatanga principles. Harry Dansey writes that the Māori attitude to death is influenced by the depth of feeling for relations. Not only is the notion of family extended but so are the rights and responsibilities of relationship.⁷³ Rights to belong to the hapū and participate in resources are crucial from a whanaungatanga perspective and help promote a sense of belonging.

⁶⁵ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 28.

⁶⁶ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 29.

⁶⁷ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 16.

⁶⁸ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 16.

⁶⁹ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 29.

⁷⁰ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Waikato L Rev* 1 at 4.

⁷¹ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Waikato L Rev* 1 at 4.

⁷² Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 30–31.

⁷³ Harry Dansey “A View of Death” in Michael King (ed) *Te Ao Hurihuri: Aspects of Maoritanga* (Reed Publishing, Auckland, 1992) 105 at 109.

Whakapapa

- 2.52 Māori history contains a detailed account of Māori origins from Papatūānuku and Ranginui to Tāne-mahuta, Tangaroa, Tūmataurangi, Haumia-tiketike, Tāwhiri-mātea, Rongo and their siblings across many generations and significant figures and stories, to the tangata whenua of today.⁷⁴ This detailed history shows the power and importance of whakapapa to the Māori worldview.
- 2.53 Whakapapa literally means “to place in layers”.⁷⁵ It has been described by Sir Apirana Ngata as:⁷⁶
- ... the process of laying one thing upon another. If you visualise the foundation ancestors as the first generation, the next and succeeding ancestors are placed on them in ordered layers.
- 2.54 Whakapapa therefore details the nature of the relationships between all things.⁷⁷ Because all things come from Papatūānuku and Ranginui, all things are connected through whakapapa.⁷⁸
- 2.55 Whakapapa is crucial to succession for Māori because it underpins connections to whānau, tribal groups and whenua.⁷⁹ We have heard that a primary function of succession for Māori is to maintain whakapapa connections to their whenua, whānau, tūpuna and atua.

Mana

- 2.56 In a narrow sense, mana can be defined as “the integrity of a person or object”.⁸⁰ In a wider sense, it is a measure of all things that is gathered from “ancestral and spiritual inheritance, prestige, power, recognition, efficacy, influence, authority and personal ability”.⁸¹

⁷⁴ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 13–15.

⁷⁵ Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 504.

⁷⁶ Apirana T Ngata *Rauru-nui-ā-Toi Lectures and Ngati Kahungunu Origins* (Victoria University of Wellington, Wellington, 1972) at 6, cited in Joseph Selwyn Te Rito “Whakapapa: A framework for understanding identity” [2007] (2) MAI Review 1 at 1.

⁷⁷ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 30. See also Nin Tomas “Maori Concepts of Rangatiratanga, Kaitiakitanga, the Environment, and Property Rights” in David Grinlinton and Prue Taylor (eds) *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff Publishers, Leiden, 2011) 219 at 228.

⁷⁸ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999) at 39.

⁷⁹ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 11.

⁸⁰ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 18–19.

⁸¹ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 18.

- 2.57 It is often said there are three aspects of personal mana:⁸²
- Mana atua — mana that is derived from the atua Māori (Māori gods).
 - Mana tūpuna — ascribed mana from one's whakapapa line.
 - Mana tangata — mana from one's personal and leadership qualities.
- 2.58 Although these aspects to mana are distinct (and reflect the different ways mana may manifest itself) it is said that the source of all mana is the atua Māori.⁸³ The whakataukī “Ko te tapu te mana o ngā kāwai tūpuna” (“tapu is the mana of the kāwai tūpuna”) demonstrates that mana shares a very strong positive connection with tapu.⁸⁴
- 2.59 Mana is important to succession for two reasons. What happens after death can have an impact on the mana of the deceased and the collective.⁸⁵ Mana tūpuna demonstrates the importance of the mana of those who have died to those who are living today. The mana of the deceased can also impact on how closely their wishes are followed after death.
- 2.60 Associate Professor Khylee Quince has observed that, in daily life, mana supported the institution of tapu as the basis of property entitlements. Quince states:⁸⁶

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

Tapu and noa

- 2.61 Tapu is a principle in te ao Māori that acts as a “corrective and coherent power”.⁸⁷ Professor Hohepa has defined it as:⁸⁸
- ... the essence of sanctity, cultural protection, sacredness, set apartness. It is not only a possible source of protection for all things, it also has a ‘potential for power’.
- 2.62 Similar to mana, tapu can be traced to the tūpuna, then to the atua Māori, and then to Ranginui and Papatūānuku.⁸⁹ This gives rise to an “intrinsic tapu” that all people, places and things possess by virtue of their connection to the atua Māori.⁹⁰ A hara (violation or offence) against tapu demanded utu (reciprocity, retribution) for the hara. Because of

⁸² Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 33.

⁸³ Māori Marsden “God, Man and Universe” in Michael King (ed) *Te Ao Hurihuri: The World Moves on: Aspects of Maoritanga* (Hicks Smith, Wellington, 1975) at 191 and 194.

⁸⁴ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 51.

⁸⁵ *Ellis v R* [2020] NZSC Trans 19 at 5, 8, 11 and 20.

⁸⁶ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 262.

⁸⁷ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 59.

⁸⁸ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 18.

⁸⁹ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 50.

⁹⁰ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 52.

these consequences, tapu is sometimes seen as a form of social control based on the avoidance of risk.⁹¹

- 2.63 If tapu has the “potential for power”, then noa acts as a counter or antidote to that: it values the importance of ordinary, everyday human activity.⁹² However, it is not useful to think of noa as the opposite of tapu or the absence of tapu. Rather, noa indicates that, following an incursion on tapu, a balance has been reached, a crisis is over and things are back to normal again.⁹³ One way to think of tapu and noa might be as complementary opposites operating on a spiritual level to restore balance.
- 2.64 Tapu is relevant to succession because death and things closely associated with death are highly tapu.⁹⁴ Taonga and other items that were in possession of the deceased may be tapu by association or have their own intrinsic tapu by association with the atua Māori. Whakapapa is intrinsically tapu because it connects people directly to the atua Māori and also to their mate (dead). Maintaining whakapapa connections and ensuring taonga and other items are treated appropriately are therefore vitally important, and sanctions may follow if the tapu of whakapapa is breached.

Utu

- 2.65 Utu establishes principles and protocols in which relationships are created and maintained. It can be thought of as “compensation, revenge, or reciprocity”.⁹⁵ Utu is relevant to:⁹⁶
- ... both the positive and negative aspects of Māori life governing relationships within Māori society. It was a reciprocation of both positive and negative deeds from one person to another. Utu was a means of seeking, maintaining and restoring harmony and balance in Māori society and relationships.
- 2.66 Utu is closely linked with mana and tapu. Where utu is sought, the take (cause) was usually a breach of tapu or an increase or decrease in mana.⁹⁷ The extent and form of utu depends on the circumstances, making it highly contextual.
- 2.67 Utu can be linked to the analytical framework of take–utu–ea. The framework measures breaches of tikanga that require certain action to be taken in order to resolve the matter.⁹⁸

⁹¹ Mason Durie “The Application of Tapu and Noa to Risk, Safety, and Health” (paper presented to Challenges, Choices and Strategies, Mental Health Conference 2000, Wellington, 16 November 2000) at 3–4, cited in *Te Aka Matua o te Ture | Law Commission Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 37.

⁹² Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 50.

⁹³ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 50.

⁹⁴ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 54.

⁹⁵ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 35.

⁹⁶ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 2–3.

⁹⁷ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 67.

⁹⁸ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 31.

- 2.68 Utu is relevant to succession, because if there has been a take or hara (offence) that warrants utu, the obligation to respond does not die with the individual. That responsibility belongs to the collective, so if the individual dies, there is no ea (fulfilment, resolution).⁹⁹

Kaitiakitanga

- 2.69 Kaitiakitanga is an obligation on those who have mana to act unselfishly, with right mind and heart and with proper procedure.¹⁰⁰ Mana and kaitiakitanga operate together as “right and responsibility”.¹⁰¹ Kaitiakitanga obligations exist over all taonga.¹⁰² Rights to resources are dependent on maintaining kaitiakitanga obligations over that resource.¹⁰³ Kaitiakitanga might thus be described as the reciprocal obligation to care for the well-being of a person or resources.¹⁰⁴
- 2.70 Maintaining kaitiakitanga obligations is vital to fostering a sense of belonging. Ensuring that kaitiakitanga rights and obligations can pass down to the next generation is a crucial part of succession in te ao Māori.

Aroha and manaakitanga

- 2.71 Aroha is usually understood as a literal translation of love. However, the meaning is wider. Professor Hohepa describes aroha as having “a wide range of meaning from compassion and love to concern and sorrow”.¹⁰⁵ Aroha is an admirable attribute that has lasting effect and conveys that the values of care, respect and affection are important.¹⁰⁶ Cleve Barlow observes that “[a] person who has aroha for another expresses genuine concern towards them and acts with their welfare in mind, no matter what their state of health or wealth.”¹⁰⁷ Aroha underpins the strengthening of kin relationships, including in the rituals of tangihanga.¹⁰⁸

⁹⁹ See *Ellis v R* [2020] NZSC Trans 19 at 58–59, 63 and 69–71.

¹⁰⁰ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity – Te Taumata Tuatahi* (Wai 262, 2011) at 23.

¹⁰¹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity – Te Taumata Tuatahi* (Wai 262, 2011) at 23.

¹⁰² Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity – Te Taumata Tuatahi* (Wai 262, 2011) at 23.

¹⁰³ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Waikato L Rev* 1 at 4.

¹⁰⁴ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Waikato L Rev* 1 at 4.

¹⁰⁵ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 19.

¹⁰⁶ Tāhū o te Ture | Ministry of Justice *He Hināture ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 155.

¹⁰⁷ Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Auckland, 1994) at 8.

¹⁰⁸ See discussion in Harry Dansey “A View of Death” in Michael King (ed) *Te Ao Hurihuri: Aspects of Maoritanga* (Reed Publishing, Auckland, 1992) 105 at 110.

- 2.72 Manaakitanga literally translated means to care for a person’s mana.¹⁰⁹ Manaakitanga is required no matter what the circumstances might be, so even if there is no aroha in the situation, the obligation still applies.¹¹⁰ An obvious place where manaakitanga is important is looking after guests, but the obligation is always present.¹¹¹
- 2.73 Aroha and manaakitanga are relevant to succession because, through these values, other values can be upheld.

OUR FRAMEWORK FOR CONSIDERING TE AO MĀORI AND SUCCESSION

- 2.74 The challenge for the Commission is to understand the Māori perspective and make recommendations in our final report from a place of māramatanga (understanding).
- 2.75 We have identified three broad ways to consider law reform in relation to te ao Māori and succession and describe them briefly below. A common theme is what role state law should have in facilitating any reform.
- 2.76 Any law reform would need to be supported by appropriate dispute resolution mechanisms, including how to bring tikanga Māori into the resolution process. We discuss this in Chapter 15.

Allow tikanga Māori to determine succession matters for Māori, without state law involvement

- 2.77 The first way would be to give Māori the choice as to whether state succession law or tikanga should apply to matters of succession. Succession to all property owned individually or collectively by Māori could be governed by tikanga.¹¹² State law would recognise and respect the operation of tikanga in relation to succession. This would require adequate whānau, hapū and iwi support for dispute resolution. Tikanga would be applied and developed in whānau hui, on marae and possibly in other forums Māori might wish to use¹¹³ in accordance with tikanga.¹¹⁴ There might be a role for the state to support dispute resolution without interfering with the process. We have been told that colonisation has left many Māori without the knowledge or resources to support a separate tikanga regime, in which case some support may be necessary.
- 2.78 We heard that, on a day-to-day basis, tikanga often determines succession matters for Māori without any involvement of state law. Even though relevant state law might exist, it is not called upon by those involved. This approach would recognise tikanga as “packages of ideas which help to organise behaviour and provide some predictability in

¹⁰⁹ Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 166.

¹¹⁰ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 33.

¹¹¹ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 126.

¹¹² If this approach was to apply to Māori land under Te Ture Whenua Maori Act 1993, reform of that Act would be required. The terms of reference for this project do not include reviewing this Act.

¹¹³ See Amokura Kawharu “Arbitration of Treaty of Waitangi Settlement Cross-Claim Disputes” (2018) 29 PLR 295.

¹¹⁴ This would avoid the concern expressed during our preliminary consultation that if tikanga is solidified into law it becomes the norm for everybody and denies the beauty of iwi variety in perceptions of the world.

how certain activities are carried out”¹¹⁵ and leave Māori the choice whether to have tikanga determine what happens when they die.

- 2.79 This approach raises profound questions about the relationship between tikanga as the first law of Aotearoa New Zealand and state law. These questions go beyond this succession project.¹¹⁶ Several matters would need to be resolved before tikanga could function exclusively in relation to succession matters. First, there would need to be an understanding of who would be subject to tikanga, including the appropriate role of an individual, whānau and hapū in that decision. For example, is it the individual’s choice or the choice of the whānau that determines how property is succeeded to?¹¹⁷ Second, there would be practical questions about the understanding of tikanga and its application, together with how disputes might be resolved. Third, there would need to be a system of dealing with conflicts between tikanga and state law when one party to a dispute considered themselves governed by state law rather than tikanga. A system that recognises an intersection between tikanga and state law may be preferable. It would allow interaction between the courts and whānau or hapū to resolve difficult questions.
- 2.80 Due to the nature and extent of these matters, we have not included a further chapter elaborating on this option for reform as we do for the next two options. Nonetheless, we are interested in feedback from Māori about this approach as that would provide insights relevant to considering reform of succession law generally.

Remove taonga from succession law and apply tikanga

- 2.81 A second way of considering law reform in relation to te ao Māori and succession would be to prevent succession law applying to particular property. Items classified as taonga would not be subject to state law. This approach would not prescribe a set of rules in state law (as in the TTWMA regime) but provide that succession to taonga is determined by tikanga.
- 2.82 It has been stressed to us that it is the tikanga of the whānau that is most important when succession disputes arise, and the hapū should assist the whānau in resolving their disputes, where needed. Taonga would need to be defined broadly in any new law to include items that are important from a tikanga perspective to the whānau or hapū. This option would provide for tikanga Māori in state law without attempting to define and apply specific tikanga within state law.
- 2.83 We discuss this approach in more detail in Chapter 7.

¹¹⁵ Hirini Moko Mead “The Nature of Tikanga” (paper presented to Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11–13 August 2000) at 3–4, cited in *Te Aka Matua o te Ture | Law Commission Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 16.

¹¹⁶ See the discussion in *He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (January 2016).

¹¹⁷ Compare *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

Weaving together the values of tikanga Māori and state law to create better law for all

- 2.84 A third way of considering law reform in relation to te ao Māori and succession focuses on creating better state law that appropriately recognises and facilitates the application of tikanga Māori. This approach embraces the “third law” of Aotearoa New Zealand by creating better succession law that recognises the values underpinning both tikanga and state law.¹¹⁸ During our preliminary consultation, we heard the view expressed that it is desirable for tikanga to be reflected in state law. Such law would apply to all New Zealanders. This approach could operate in tandem with the removal of taonga from state succession law, as described above.
- 2.85 We discuss this approach in more detail in Chapter 8.

QUESTIONS

Q3

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

Q4

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

Q5

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

Q6

Should tikanga govern succession for Māori?

Q7

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

Q8

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

¹¹⁸ See Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Waikato L Rev 1 at 11–12.

Part Two

Claims and entitlements



CHAPTER 3

Relationship property entitlements

IN THIS CHAPTER, WE CONSIDER:

- the relationship property entitlements a person has on the death of their partner;
- the specific rules of relationship property division that apply; and
- the issues with the current law and proposals for reform.

THE CURRENT LAW

- 3.1 The Property (Relationships) Act 1976 (PRA) directs how couples should divide their property when relationships end because the partners have separated or because one of the partners has died.
- 3.2 The property division rules only apply when the relationship that ended was a marriage, civil union, or de facto relationship of three years or longer. The PRA defines a de facto relationship as a relationship between two people who “live together as a couple”.¹ De facto couples in relationships of less than three years will not be required to divide property unless they satisfy additional criteria.²
- 3.3 To determine which property a couple should divide, the PRA first classifies certain items of property as relationship property. Broadly, relationship property comprises property the partners acquire during the relationship, property acquired for the partners’ common use or common benefit and the family home and family chattels.³

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

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

³ Property (Relationships) Act 1976, s 8.

- 3.4 On division, each partner is generally entitled to an equal share in the relationship property.⁴
- 3.5 When a partner to a qualifying relationship dies, Part 8 of the PRA provides the surviving partner with a choice. They may divide the couple's relationship property (option A), or they may accept whatever gifts are made for them under the deceased's will (option B).⁵ If the surviving partner does not make a choice, they are treated as having chosen option B.⁶
- 3.6 If the surviving partner elects option A, the PRA's property division rules will apply with some modification.⁷ However, every gift to the surviving partner in the deceased's will is to be treated as having been revoked unless the will expresses a contrary intention.⁸

Policy behind Part 8 of the PRA

- 3.7 The PRA rests on the theory that a qualifying relationship is a joint venture between the partners to which each partner contributes in different but equal ways.⁹ Each partner therefore has an entitlement to an equal share of the couple's relationship property.
- 3.8 The policy basis of Part 8 is that the surviving partner should receive, at a minimum, the same entitlements they would have if the relationship had ended by separation. In other words, the law ensures the surviving partner is not worse off than if the couple had separated.¹⁰
- 3.9 The surviving partner's right to choose division (option A) or gifts under the will (option B) is to avoid forcing a compulsory property division on couples who are content to have the surviving partner's entitlements determined by the deceased's will.¹¹
- 3.10 The rationale for revoking the gifts to a surviving partner when they choose option A is to avoid the surviving partner receiving more property than the deceased intended.¹²

Particular rules of relationship property division on death

- 3.11 There are some differences between Part 8 of the PRA and the rules of relationship property division that apply when partners separate. Of particular note:

⁴ Property (Relationships) Act 1976, s 11.

⁵ Property (Relationships) Act 1976, s 61.

⁶ Property (Relationships) Act 1976, s 68(1).

⁷ Property (Relationships) Act 1976, s 75(b).

⁸ Property (Relationships) Act 1976, s 76.

⁹ Property (Relationships) Act 1976, s 1N(b); and Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [2.44]–[2.46].

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

¹¹ See *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, October 1988) at 44–45.

¹² See Matrimonial Property Amendment Bill 1999 (109-2) (select committee report) at iv.

- (a) All property the deceased partner owned at their death is presumed to be relationship property.¹³ The person who asserts the property is not relationship property carries the burden of proving that assertion.
- (b) Property acquired by the estate is presumed to be relationship property.¹⁴
- (c) Property acquired by the surviving partner after the death of the deceased partner is separate property unless the court considers that it is just in the circumstances to treat that property or any part of it as relationship property.¹⁵
- (d) The rules that apply to marriages and civil unions of short duration that end on separation do not apply when a partner dies. Rather, those relationships will be subject to equal sharing unless the court, having regard to all the circumstances of the marriage or civil union, considers that equal sharing would be unjust. De facto relationships of short duration, on the other hand, must still satisfy the same strict eligibility criteria that apply to relationships ended by separation.¹⁶

RECOMMENDATIONS FROM THE PRA REVIEW

- 3.12 In the PRA review, we made several recommendations for reform of the rules that apply to property division on separation that may be relevant to division on death.
- 3.13 We concluded that change to the classification of relationship property is required.¹⁷ We recommended that property be classified as relationship property if it:
- (a) was acquired for the partners' common use or common benefit;
 - (b) was acquired during the relationship other than as a third-party gift or inheritance; or
 - (c) is a family chattel.
- 3.14 On this basis, a family home should be a partner's separate property if it was acquired before the relationship or as a gift or inheritance.¹⁸ However, we recommended that the increase in value of a separate property family home during the time it is used as the family home should be relationship property. Any repayment of the principal amount owing on a mortgage debt relating to the family home using relationship property should entitle the non-owning partner to compensation.
- 3.15 We favoured allocating the burden of proof of establishing whether property is separate property to the partner that owns the property.¹⁹

¹³ Property (Relationships) Act 1976, s 81.

¹⁴ Property (Relationships) Act 1976, s 82.

¹⁵ Property (Relationships) Act 1976, s 84.

¹⁶ Property (Relationships) Act 1976, s 85.

¹⁷ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R9.

¹⁸ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [3.73]–[3.79] and [3.123]–[3.125].

¹⁹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R16.

- 3.16 We recommended excluding “items of special significance” from the definition of family chattels in addition to the current exclusions for heirlooms and taonga. As a result, they would not be classified as relationship property simply because they were used by the family.²⁰ We said items of special significance should be defined as items that:
- (a) have a special meaning to a partner; and
 - (b) are irreplaceable, in that a similar substitute item or its monetary value would be an insufficient replacement.
- 3.17 We recommended the continuation of the general rule of equal sharing of relationship property.²¹ We also favoured the continuation of an exception to equal sharing for cases where extraordinary circumstances make equal sharing repugnant to justice but with greater clarity about when a court may take misconduct into account.²²
- 3.18 We recommended the introduction of family income sharing arrangements (FISAs) to share the economic advantages and disadvantages arising from a relationship or its end. We recommended measures to strengthen children’s interests and participation in relationship property proceedings. We discuss the recommendations regarding FISAs and children’s interests further in later chapters.

ISSUES

Criticisms of the approach taken in Part 8 of the PRA

- 3.19 There is criticism that a partner, having chosen option A, must forgo their entitlements under the deceased’s will.²³ The argument is that, by claiming their share of relationship property, surviving partners are taking what is rightfully theirs. By denying the partner the right to inherit from the deceased on top of receiving their share of relationship property, the partner unjustly forfeits their rights under succession law.
- 3.20 A will-maker can avoid this outcome by stating that the provision for the surviving partner under the will is to remain even if the surviving partner chooses option A (a contrary intention provision). Critics argue, however, there is anecdotal evidence too that will-makers seldom include a contrary intention clause in their will because they are unaware of the surviving partner’s rights to choose option A.²⁴
- 3.21 On the other hand, we have heard concerns that Part 8 of the PRA provides a surviving partner with too great an entitlement. Those concerned gave the example of people who enter relationships late in life and bring property acquired beforehand, possibly during a previous relationship. If the relationship had lasted only a few years or the partners had

²⁰ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R21–R22.

²¹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R37 and [8.20]–[8.23].

²² Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R39, R41–R43, [8.41]–[8.45] and [8.83]–[8.95].

²³ See Nicola Peart “New Zealand’s Succession Law: Subverting Reasonable Expectations” (2008) *Comm L World Rev* 356 at 372; and Nicola Peart “Family Finances on Death of a Spouse or Partner” in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge, 2017) 95 at 118.

²⁴ Nicola Peart “New Zealand’s Succession Law: Subverting Reasonable Expectations” (2008) *Comm L World Rev* 356 at 372.

chosen not to formalise it, the surviving partner would share in half the relationship property, potentially affecting the inheritance of the deceased's children.

Criticism of the classification rules in Part 8 of the PRA

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

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

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

3.24 A further issue arises concerning former partners. Currently, Part 8 of the PRA applies to former spouses and civil union partners, provided not more than 12 months have elapsed since any dissolution order.²⁵ In contrast, no time limit applies to former de facto partners.²⁶ The omission of a time limit is probably an oversight as it is unlikely Parliament intended former de facto partners' relationship property rights to revive on death if they were out of time to bring proceedings following separation.²⁷

Unequal sharing of relationship property

3.25 Difficulties may arise when applying the PRA's exceptions to equal sharing to relationship property division on death. If there are extraordinary circumstances that would make unequal sharing repugnant to justice, the court may order that relationship property be divided based on the partners' contributions to the relationship.²⁸ In the PRA review, we recommended this provision continue. We added that, when deciding whether there are extraordinary circumstances that make equal sharing repugnant to justice, a court should be able to take into account a partner's gross misconduct when that misconduct has significantly affected the extent or value of relationship property.

3.26 When applying these provisions to relationships ending on death, the deceased would not be able to respond to allegations of misconduct made against them. Personal representatives may struggle to refute or substantiate arguments about the extraordinary circumstances and the partners' respective contributions to the relationship.

3.27 These discretionary exceptions to equal sharing are likely to cause uncertainty and lead to disputes. The parties may find it difficult to predict a surviving partner's likely

²⁵ Property (Relationships) Act 1976, s 89(1)(d). However, the court may grant an extension: s 89(1)(e).

²⁶ Property (Relationships) Act 1976, s 89(1)(b).

²⁷ See discussion in Nicola Peart (ed) *Family Property* (online looseleaf ed, Thomson Reuters) at [PR89.01].

²⁸ Property (Relationships) Act 1976, s 13.

relationship property entitlements. As those entitlements are more contestable, disputes are more likely to arise that cannot be settled by the parties without the court's intervention. Efficient estate administration may be undermined.

PROPOSALS FOR REFORM

Relationship property entitlements should remain available to surviving partners

- 3.28 Our preliminary view is that a surviving partner from a qualifying relationship should have available to them a right under the new Act to a share of the couple's relationship property. The extent of that entitlement should be based on the property division rules that apply when couples separate. The new Act should continue the policy that a surviving partner should not be worse off on the death of their partner than they would have been had they separated from their partner.
- 3.29 Our reasons are as follows:
- (a) The theory that a partner to a relationship has an entitlement to an equal share of the relationship property arising from their contributions to the relationship is sound.
 - (b) It is an accepted part of New Zealand law that partners have relationship property entitlements when a relationship ends by separation or on death.
 - (c) The policy appears to be consistent with public attitudes and expectations. In the Succession Survey, respondents were asked about a situation where a man dies and is survived by his two adult children from his first marriage and his second wife to whom he had been married for 10 years. The couple's family home was bought by the husband during the second marriage. In his will, the man left the home to his children even though, had the couple divorced, the wife would have been entitled to a half share of the home. Over 75 per cent of respondents either agreed or strongly agreed that the wife should be entitled to at least a half share of the home regardless of what the will said.²⁹
 - (d) The recommendations from the PRA review, if implemented, will address some of the concerns about the current law relating to equal sharing of relationship property when the property has been acquired before the relationship.
- 3.30 In Chapter 8, we consider obligations sourced from tikanga a deceased partner might owe to a surviving partner in relation to property. In particular, we ask whether the presumptions of sharing relationship property on death accord with tikanga and how tikanga might respond differently.

A partner should continue to have the right to elect a relationship property division

- 3.31 Our preliminary view is that surviving partners should continue to have a choice whether to elect a relationship property division under the new Act (option A) or receive only what is provided to them under the deceased's will or in an intestacy (option B).

²⁹ Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [148] and figure 13.

- 3.32 We do not consider the law should require a relationship property division in all cases. That would be a significant shift in the law. We are also mindful that, in most cases, will-makers provide generously for their partners.³⁰
- 3.33 A surviving partner is likely to choose option A only where the deceased intended to leave the surviving partner less than their relationship property entitlement. If a partner chooses a relationship property division, we do not consider the law should allow the partner to take their share of relationship property *plus* gifts under the will, unless the will displays a contrary intention. If the deceased was aware the survivor would receive a share of relationship property, it is reasonable to assume they would not have gifted them further property.
- 3.34 Where a partner dies intestate and a surviving partner elects option A, we propose the current law continues. The surviving partner would have no entitlement under the intestacy regime but instead receive their relationship property entitlement.³¹
- 3.35 We are, however, contemplating a change to the rule that revokes gifts to the surviving partner if they elect option A when the deceased partner has a will. Our preliminary view is that the new Act should take a “top-up” approach.³² Under a top-up approach, when a partner chooses option A, they would keep whatever gifts are made for them under the will rather than having to forfeit them. They would then receive from the estate whatever further property is needed to ensure they receive the full value of their relationship property entitlement.³³ We consider this approach is likely to disrupt the distribution of an estate pursuant to the will to a lesser extent than the current law. The top-up approach is therefore likely to be more consistent with the deceased’s testamentary intentions and easier for the personal representatives to administer.

Qualifying relationships

- 3.36 Our preliminary view is that the same qualifying criteria that apply to relationships ending on separation should apply to relationships ending on death under the new Act.
- 3.37 Consistent with our recommendations in the PRA review, the new Act should apply to all marriages and civil unions irrespective of their length. Couples in these relationships have chosen to formalise their commitment. There is also an increasing trend for marriages and

³⁰ For example, we have received data from the Probate Registry of te Kōti Matua | the High Court that shows that, in 2019, out of 18,397 applications for probate and letters of administration, 16 surviving partners filed notices of electing option A compared with 721 who filed notices of option B: email from Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding data on applications for probate and letters of administration (11 August 2020); and email from Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding data on probate applications (24 August 2020). Note that a partner will only file notices with the Registry if administration of the estate has not yet been granted. However, it is a strong indication that elections of option A are relatively rare.

³¹ See Property (Relationships) Act 1976, s 76(3).

³² This approach is taken in Manitoba: The Family Property Act CCSM 1987 c F25, s 39. The Law Reform Commission of Nova Scotia has recently recommended that Nova Scotia law be amended to take a top-up approach: Law Reform Commission of Nova Scotia *Division of Family Property* (Final Report, 2017) at 254–255.

³³ Our preliminary view is that further provision should be sourced from the relationship property held in the estate, with the court having discretionary power to order that it be sourced from other parts such as the residuary estate.

civil unions to be preceded by a de facto relationship,³⁴ which is included when determining the length of the relationship.³⁵

- 3.38 Our preliminary view is that de facto relationships of less than three years should not generally qualify for a relationship property division on the death of a partner. As explained in the PRA review, there are two broad objectives of a qualifying period for relationships ending on separation.³⁶ They are equally relevant to relationships ending on death. First, it is a measure of commitment between the partners in the absence of a deliberate decision to formalise the relationship. Second, it acts as a safeguard against the retrospective imposition of property sharing obligations on unsuspecting partners.
- 3.39 There are, however, instances where a de facto relationship of less than three years ought to qualify. In the PRA review, we recommended that the current rules be amended so that the ordinary rules of equal division should apply to de facto relationships of less than three years if:³⁷
- (a) there is a child of the relationship and the court considers it just to make an order for division; or
 - (b) the applicant has made substantial contributions to the relationship and the court considers it just to make an order for division.
- 3.40 Our preliminary view is that these rules ought to apply in the new Act.
- 3.41 We favour a single rule that determines the eligibility of former spouses and de facto partners. Our preliminary view is that all former spouses and partners should remain eligible for relationship property division under the new Act provided no longer than two years have elapsed between the partners ceasing to live together in the relationship and the time a partner dies.³⁸ A two-year period is likely to reflect a period after which former partners can reasonably be expected to have moved on with their lives.³⁹ Two years is also the period that a married couple or civil union partner must be living apart for before a dissolution order can be granted.⁴⁰

³⁴ See Superu *Families and Whānau Status Report 2014: Towards Measuring the Wellbeing of Families and Whānau* (Kōmihana ā Whānau | Families Commission, June 2014) at 164. See also Te Aka Matua o te Ture | Law Commission *Relationships and Families in Contemporary New Zealand | He Hononga Tangata, he Hononga Whānau i Aotearoa o Nāianei* (NZLC SP22, 2017) at 17–18.

³⁵ Property (Relationships) Act 1976, ss 2B–2BAA.

³⁶ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [6.9].

³⁷ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [6.64].

³⁸ The concept of ceasing living together in the relationship is drawn from ss 2A(2), 2AB(2) and 2D(4) of the Property (Relationships) Act 1976 which define when a marriage, civil union and de facto relationship end for the purposes of the PRA.

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

⁴⁰ Family Proceedings Act 1980, s 39(2). We recognise the difference between this proposal and s 24 of the Property (Relationships) Act 1976, which provides that an application must be made under the Act no later than three years after a de facto relationship has ended.

- 3.42 Lastly, we consider tailored rules are required to address contemporaneous relationships. Currently, the PRA establishes a regime for dividing relationship property in contemporaneous relationships, specifically when a person was a partner in:⁴¹
- (a) a marriage or civil union as well as a de facto relationship; or
 - (b) two de facto relationships.
- 3.43 In the PRA review, we identified several issues with the provisions applying to contemporaneous relationships and recommended reform.⁴² Our preliminary view is that those recommendations should apply to the new Act. Accordingly, we propose a rule that applies whenever property of the deceased comprises property that may be relationship property of two or more qualifying relationships (contested relationship property). Under the new Act, that would occur when both surviving partners from the contemporaneous relationship elect option A. When determining how to apportion the contested relationship property to meet each surviving partner's respective top-up entitlement, we propose the court should apportion it in accordance with the contribution of each relationship to the acquisition, maintenance and improvement of that property.

Classification and division of relationship property

- 3.44 A surviving partner's relationship property entitlements should continue to be based on the classification and division rules that apply when partners separate. Our preliminary view is that the new Act should incorporate those rules.
- 3.45 We consider the general revisions to the definition of relationship property recommended in the PRA review should apply. This would include the changes recommended to the classification of the family home, family chattels and jointly owned property.
- 3.46 Our preliminary view is that the burden of proof of establishing whether property is separate property should be on the party that owns the property. If the personal representatives claim property of the estate is separate property, they would have the burden of proof. Similarly, a surviving partner's property would be classified as relationship property unless they were able to prove it was their separate property.
- 3.47 The main reason for allocating the burden of proof this way is to balance the position of the estate and the surviving partner as both would carry the burden in relation to separate property. It also ensures consistency with the regime that the Commission recommended should apply to relationships ending on separation.
- 3.48 The new Act should continue to provide a general rule that each partner is entitled to an equal share of relationship property. Our preliminary view is that the court should also have discretion to order unequal division of relationship property where there are extraordinary circumstances that make equal sharing repugnant to justice. When this exception applies, the court would order that relationship property be divided pursuant to the partners' contributions to the relationship. Although we recognise the difficulties when the court is required to make a discretionary assessment like this, we consider they

⁴¹ Property (Relationships) Act 1976, ss 52A and 52B. Some multi-partner relationships may be captured by the contemporaneous relationships provisions, although others will not. See discussion on multi-partner relationships in Chapter 18.

⁴² Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R33–R34, [7.34]–[7.48] and [7.55]–[7.61].

are outweighed by the benefit of enabling the court to respond when the facts of a case warrant unequal division.

3.49 Likewise, our preliminary view is that the new Act should take an approach towards a partner's misconduct that is consistent with the recommendations in the PRA review. The court should consider misconduct relevant when it is gross and has affected the value or extent of relationship property. However, it should only be relevant to the court's determination when considering:

- (a) whether there are extraordinary circumstances that make equal sharing repugnant to justice;
- (b) the partners' contributions to the relationship;
- (c) whether to make an occupation, tenancy or furniture order; and
- (d) what orders to make under the new Act to implement the division of relationship property.

SUMMARY OF PROPOSALS FOR REFORM

- A surviving partner to a qualifying relationship should have a right under the new Act to choose a division of relationship property on the death of their partner.
- If a surviving partner chooses a relationship property division, they should keep whatever gifts are made for them under the will. They should then receive from the estate whatever further property is needed to ensure they receive the full value of their relationship property entitlement.
- To be eligible to choose a division of relationship property, the surviving partner should have been in a qualifying relationship with the deceased, being a:
 - marriage;
 - civil union; or
 - de facto relationship of three years or more.
- De facto relationships of less than three years should satisfy additional criteria to be considered a qualifying relationship.
- Where the partners have separated prior to death, the survivor should remain eligible to claim under the new Act provided no longer than two years have elapsed between the partners ceasing to live together in the relationship and the time a partner dies.
- The new Act should contain specific rules that require a court to apportion contested relationship property between surviving partners from contemporaneous qualifying relationships in accordance with the contribution of each relationship to the acquisition, maintenance and improvement of that property.
- A surviving partner's relationship property entitlements should be based on the classification and division rules recommended in the PRA review that would apply when partners separate, including that:
 - property acquired before the relationship or as a gift or inheritance should be separate property, including the family home;

the burden of proof of establishing whether property is separate property should be on the party that owns the property; and

- the court should have discretion to order unequal division of relationship property where there are extraordinary circumstances that make equal sharing repugnant to justice.

QUESTIONS

Q9

Do you agree with the issues we have identified?

Q10

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

Q11

What are your views on the proposals for reform?

Q12

Do you have any other suggestions for reform?

CHAPTER 4

Family provision claims

IN THIS CHAPTER, WE CONSIDER:

- the rights family members have to challenge a will or entitlements in an intestacy because the provision is inadequate for their maintenance and support; and
- issues with the current law and proposals for reform.

THE CURRENT LAW

- 4.1 A family member of the deceased may consider that, given their familial relationship, the provision available for them under the deceased's will or an intestacy is inadequate. In these circumstances, the Family Protection Act 1955 (FPA) allows family members to apply to the court for further provision from the estate. The family member may claim under the FPA in addition to any other claims they may have under the Property (Relationships) Act 1976 (PRA) or Law Reform (Testamentary Promises) Act 1949 (TPA).
- 4.2 The family members eligible to claim under the FPA are the deceased's:¹
- (a) spouse or civil union partner;
 - (b) de facto partner who was living in a de facto relationship at the date of death;
 - (c) children² regardless of their age or whether they were being maintained by the deceased immediately before the death;
 - (d) grandchildren living at the date of death;³
 - (e) stepchildren who were being maintained wholly or partly or were legally entitled to be maintained wholly or partly, by the deceased immediately before the death; and
 - (f) parents if they were being maintained wholly or partly, or were legally entitled to be maintained, by the deceased immediately before the death, or there is no living

¹ Family Protection Act 1955, s 3.

² This includes legally adopted children but not whāngai: see *Keelan v Peach* [2003] 1 NZLR 589 (CA) at [43].

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

spouse, civil union partner, de facto partner or child of the deceased's qualifying relationship.

- 4.3 When considering an application under the FPA, a court has discretion to grant further provision from the estate if under the deceased's will or in an intestacy, adequate provision is not available for the family member's "proper maintenance and support".⁴
- 4.4 Early case law introduced the concept of a "moral duty", articulated as "a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children".⁵ Over the past 110 years, New Zealand courts have embedded the concept of moral duty in their decisions. The test is now commonly articulated as whether, objectively considered, there has been a breach of a moral duty judged by the standards of a wise and just will-maker.⁶
- 4.5 The courts have established several principles to aid in determining whether there has been a breach of the moral duty and to establish parameters for awards.⁷ Perceived unfairness is not sufficient to establish a breach, nor is mere unequal treatment between beneficiaries. All the circumstances of the case will be relevant including changing social attitudes. The size of the estate and competing claims are also relevant considerations. The award should not exceed what is necessary to remedy the failure to make adequate provision.⁸
- 4.6 The FPA is not limited to only those family members who depended on the deceased. Rather, the courts have confirmed adequate "support" means financial provision from an estate as recognition of belonging to the family, even if the claimant has no economic need.⁹
- 4.7 FPA claims are commonly made where a child has been treated differently to their siblings or the interests of a subsequent partner have been preferred over those of a child (or vice versa). There are many reasons why a parent might treat their children unequally in their will. It could be that one child received greater financial assistance during the parent's lifetime, or that the children are in differing financial positions. Sometimes, the parent is estranged from one child or had a closer relationship with another, or it could be that one child spent a substantial amount of time or money assisting the parent during their lifetime.

⁴ Family Protection Act 1955, s 4.

⁵ *Re Allardice* (1909) 29 NZLR 959 (CA) at 972–973.

⁶ *Little v Angus* [1981] 1 NZLR 126 (CA) at 127. See also *Talbot v Talbot* [2018] NZCA 507, [2018] NZFLR 128 at [40].

⁷ See *Vincent v Lewis* [2006] NZFLR 812 (HC) at [81] for a summary of principles frequently applied.

⁸ See *Henry v Henry* [2007] NZCA 42, [2007] NZFLR 640 at [55]–[56].

⁹ See the leading Court of Appeal decision in *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [52]. A Te Aka Matua o te Ture | Law Commission survey of cases published on Westlaw NZ and LexisAdvance over a 10-year period ending 18 November 2019 identified that awards were made to recognise the family bond in the absence of financial need in 28 of 93 (30 per cent) first instance cases involving adult children. In two of these cases, there were allegations of abuse that factored into the awards. Additional to these 28 cases, there was one court order (by consent) approving settlement to children with no apparent financial need: *Re Estate of C; C v G* [2017] NZHC 1326, [2017] NZFLR 493.

ISSUES

Unclear objectives and broad judicial discretion

- 4.8 Although not clear from the FPA itself, the Act has been applied in pursuit of different policy objectives under the guise of “moral duty”. Broadly, these objectives might be described as protection, recognition, and reward/compensation:¹⁰
- (a) **Protection** – by providing maintenance to dependent or “needy” family members.¹¹
 - (b) **Recognition** – by recognising the presence of a family relationship and symbolising the bonds that ought to exist.
 - (c) **Reward/compensation** – by rewarding the family member’s good conduct¹² or compensating the family member for the deceased’s bad conduct.¹³
- 4.9 These broad objectives combined with judicial discretion may make the FPA a compelling choice of claim. The FPA may be used instead of, or in addition to, other (sometimes more suitable) claims against an estate. For example, an FPA claim may be used instead of a TPA claim when the claimant contributed to the deceased or their estate,¹⁴ or it may be used as a catchall amongst several other claims.¹⁵
- 4.10 The court’s reliance on morality is problematic. In any situation, there can be a wide variety of views about what, if any, moral obligation the deceased has, particularly in a culturally diverse society or one where there are differences in wealth and social perspective.¹⁶ Case analysis shows variation both in the reasons for determining a breach of moral duty and for quantifying awards.¹⁷ The FPA has been criticised for enabling a

¹⁰ These objectives were discussed by the Commission in the 1990s succession review: see *Te Aka Matua o te Ture | Law Commission Succession Law: Testamentary Claims – A discussion paper* (NZLC PP24, 1996) at [200].

¹¹ Protection of dependants is arguably the statute’s intended purpose. The predecessor to the FPA, the Testator’s Family Maintenance Act 1900, was enacted at a time where there was no established welfare state and women and dependent children were economically vulnerable. The Parliamentary debates recorded a desire to avoid dependence on the state and although the legislation did not require complete destitution, it was acknowledged that awards would be constrained to providing for a wife or child’s maintenance where this was needed: see (12 July 1900) 111 NZPD 503–504.

¹² This might include rewarding dutiful acts by the claimant towards the deceased or contribution to the estate property: see for example *Norton v Norton* [2013] NZFC 7619; and *Brosnahan v Meo* [2021] NZHC 79.

¹³ A common example is compensation for a parent’s failures in the child’s upbringing, potentially even for abuse the child suffered: *R v Public Trust* [2016] NZFC 6313; *L v B* [2013] NZFC 9167; *B v S* [2013] NZFC 2932; *B v K* [2013] NZFC 591; *Joan v Mary* [2012] NZHC 1830; and *C v C FC Auckland FAM-2007-004-773*, 26 July 2010. Note that ACC cover may be available for personal injury: Accident Compensation Act 2001, pt 2.

¹⁴ See for example *Brosnahan v Meo* [2021] NZHC 79 at [75], where the Court commented that the deceased mother’s promise to her son was in the nature of a testamentary promise but that the son did not make a claim under the TPA.

¹⁵ An FPA claim is often brought alongside other claims such as challenges to the capacity of a will-maker and the validity of a will, relationship property claims or even spousal maintenance applications: see for example *R v R FC Invercargill FAM-2008-025-1095*, 10 May 2011; and *H v K* [2020] NZHC 2149. In the recent case *Dymond v Upritchard* [2020] NZHC 3274, the Court upheld the Family Court’s award of 40 per cent of the estate to the deceased’s husband which was at least in part to implement the deceased’s erroneous belief that their home would pass by survivorship to her husband: at [67]–[70].

¹⁶ Richard Sutton and Nicola Peart “Testamentary Claims by Adult Children – The Agony of the Wise and Just Testator” (2003) 10 Otago L Rev 385 at 408.

¹⁷ In the 10-year period ending 18 November 2019, there were 32 appeals published on Westlaw NZ and LexisAdvance that inquired into awards under the FPA. Twelve (37.5 per cent) of these appeals were successful and resulted in

judge to substitute their determination of what is moral or fair in the place of the will-maker's determination.¹⁸

- 4.11 The lack of clarity has practical consequences. Predicting case outcomes may be difficult for will-makers, potential claimants and lawyers advising these parties. The uncertainty may discourage claimants and personal representatives from settling out of court. Court resources may be required to resolve such disputes.

Inconsistency with public perceptions of testamentary freedom and family obligations

- 4.12 The majority of FPA claims reaching the courtroom are made by the deceased's adult children, most of whom were not dependent on their deceased parent and may be financially secure.¹⁹ Concerns have at times been raised by the legal profession and members of the judiciary that some of the awards and settlements in favour of adult children not in any need of maintenance may have been out of line with social attitudes to testamentary freedom.²⁰
- 4.13 Eighty per cent of respondents to the Succession Survey said they agreed that a person should be allowed to exclude family members from their will.²¹ However, when presented with different family scenarios, respondents were more likely than not to agree that a family member should be allowed to challenge a will and get a share of an estate. For example, 80 per cent of respondents agreed that a young child should be able to challenge their parent's will and get a share where that estate is being left to a charity. This reduced to 56 per cent where that child was an adult.²²
- 4.14 The Survey findings suggest that testamentary freedom is important to most New Zealanders, but there is general support for some limits on this freedom to ensure certain family members are provided for. In our preliminary view, it remains appropriate to have

changes to the awards made, increasing or decreasing the award in the first instance or in some cases reinstating the will. A thirteenth case, *George v Blomfield* [2017] NZFC 7553, was a rehearing rather than an appeal but also resulted in an increase in the award made.

¹⁸ John Caldwell "Family protection claims by adult children: what is going on?" (2008) 6 NZFLJ 4 at 4. See also Mary Foley "The Right of Independent Adult Children to Receive Testamentary Provision: A Statutory Interpretation and Philosophical Analysis of the New Zealand Position" (PhD Dissertation, Te Whare Wānanga o Ōtākou | University of Otago, 2011) at 84; and Greg Kelly "An Inheritance Code for New Zealand" (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 2010) at 19.

¹⁹ Te Aka Matua o te Ture | Law Commission's review of FPA cases published on Westlaw and LexisNexis in the 10-year period ending 18 November 2019 found that of the 116 cases heard and decided (excluding appeals), 93 cases (80 per cent) involved a claim by one or more adult child, none of whom were dependent on the deceased immediately before death. In 40 of the 93 cases (43 per cent), the court found that none of the child claimants were in financial need, and in an additional five cases, the court found that only some of the child claimants were in financial need. Awards were made in 28 of the 45 cases and a court order (by consent) approved a settlement in an additional case.

²⁰ *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [45]. See also Nicola Peart "Awards for children under the Family Protection Act" (1995) 1 BFLJ 224.

²¹ Sixteen per cent disagreed and the remaining four per cent said it depends or they do not know: Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [95] and figure 1.

²² Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at figure 11.

a law that balances these competing interests, but views are mixed about who should receive provision and in what circumstances.

Effects of disputes on families

- 4.15 We have heard from lawyers that, while a claimant may feel vindicated by an award, FPA claims can severely damage relationships between family members. Prolonged disputes add to the time and costs of administration, negatively affecting beneficiaries of the estate who are often also family members. There are also questions as to how the hurt caused by a parent's failure to recognise a child in their will can be remedied by a judge's decision to award provision from an estate.²³

PROPOSALS FOR REFORM

- 4.16 We propose that the FPA should be repealed, and the new Act should provide that certain family members may make a claim for a family provision award. We present several options below for which family members should be eligible to claim and the basis for those awards. By way of summary, these options are:
- (a) **Option One: family provision awards for partners** — A surviving partner who has insufficient resources to maintain a reasonable, independent standard of living, having regard to the economic consequences of the relationship or its end for that partner, should be entitled to a family provision award from the estate to transition from the family joint venture.
 - (b) **Option Two: family provision awards for children under a prescribed age** — A child of the deceased should be able to make a claim for a family provision award from the estate to enable the child to be maintained to a reasonable standard, and so far as is practical, educated and assisted towards attainment of economic independence. A child would be defined in the new Act according to an age limit. Three alternatives are presented: 18, 20 or 25 years.
 - (c) **Option Three: family provision awards for disabled children** — A disabled child of the deceased should be able to make a claim for a family provision award from the estate where the child does not have sufficient resources to enable them to maintain a reasonable standard of living.
 - (d) **Option Four: recognition awards for children of all ages** — A child of the deceased should be able to claim for provision from the estate to recognise the importance of the parent child relationship and to acknowledge that the child belongs to the family. Such an award would be available if the deceased fails to recognise the child in their will or the child receives nothing on intestacy. We refer to this type of family provision as recognition awards.
- 4.17 In our preliminary view, the law relating to family provision should be consistent with the legal duties the deceased owed to their family members during their lifetime. The first and second options for reform we propose represent our preferred approach. They draw on established pillars of family law policy regarding the obligations between partners and the obligations parents owe their children before they reach adulthood.

²³ John Caldwell "Family protection claims by adult children: what is going on?" (2008) 6 NZFLJ 4 at 9.

- 4.18 There are compelling reasons to prefer Options One and Two (and not Options Three and Four). The first is that they would improve certainty and predictability in the law. Second, they would reduce the amount of litigation in this area, which in turn would relieve pressure on judicial resources and may have positive implications for the relationships between surviving family members.
- 4.19 We recognise, however, that many people may feel uncomfortable that a parent could exclude their adult children under their will or perhaps treat one or more of them less favourably than their siblings. Adult children could potentially have their economic needs ignored by their parents, feel excluded from the family or suffer the hurt of seeing other family members shown greater favour.
- 4.20 A majority (59 per cent) of respondents in the Succession Survey said that children of any age should be able to challenge a will and receive a share of the estate if they are not included in it.²⁴ Additionally, 87 per cent of respondents supported a disabled adult child's ability to challenge a parent's will when the estate was left to charity. Where a parent had two adult children and left everything to one of them, 62 per cent of respondents supported the other child being able to claim provision. When asked whether it made a difference that the excluded child was struggling financially, this only increased to 67 per cent.²⁵ To us, this suggests that recognition and fairness matter more to people in these situations than financial need.
- 4.21 Consequently, we present a third option for reform relating to disabled adult children and a fourth option for reform relating to the recognition of children generally. The third and fourth options could each be adopted in addition to the first and second options.
- 4.22 In Chapter 8, we consider what tikanga says about the rights of whānau members to challenge a deceased's testamentary wishes. We ask specifically whether the proposals presented in this chapter are consistent with tikanga and how whāngai should be treated in this context.

Option One: family provision awards for partners

- 4.23 In relationships ending on death, the surviving partner may have suffered and continue to suffer economic disadvantages from the relationship or its end. A common example is where the surviving partner has forgone full participation in the workforce to care for the couple's children. The deceased partner, while alive, was free to work. Both partners will have benefited from the arrangement, which can be understood as a family joint venture.²⁶ However, the surviving partner's expectations of continued provision through the family joint venture may be defeated on the deceased's death through no or

²⁴ Respondents were asked separately about children aged under 18 and over 18, and 59 per cent supported the challenge in each age category. Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at figure 4.

²⁵ Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at figure 11.

²⁶ For a description of the theory of the family joint venture see Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [2.43]–[2.48].

inadequate provision. In these circumstances, it is appropriate that the court award the surviving partner provision from the estate to enable them to maintain a reasonable, independent standard of living while they move towards financial independence.²⁷

- 4.24 We therefore propose that a surviving partner should be eligible to make a family provision claim. The court should grant an award when the surviving partner has insufficient resources to enable them to maintain a reasonable, independent standard of living, having regard to the economic consequences for that partner of the relationship or its end. The provision the court grants from the estate should be to enable the partner to transition from the family joint venture.
- 4.25 An assessment of sufficient resources should take into account any relationship property to which that partner is entitled. When a surviving partner's entitlement under the will or on intestacy is less than their share of relationship property, the partner should first apply to divide their relationship property before seeking a family provision award.

Definition of “partner” for the purpose of a family provision award

- 4.26 We propose that people who, prior to the death of their partner, were in qualifying relationships for the purposes of the PRA (as amended in accordance with the recommendations in the PRA review) should be eligible for family provision from the estate.²⁸ That would include surviving spouses, civil union partners and de facto partners who have been in a de facto relationship for three years or more.²⁹ Partners in a de facto relationship that does not satisfy the three-year qualifying period should still qualify if the relationship meets additional eligibility criteria. In the PRA review, we recommended that the criteria should be:³⁰
- (a) there is a child of the relationship and the court considers it just to make orders;³¹ or
 - (b) the applicant has made substantial contributions to the relationship and the court considers it just to make an order for division.
- 4.27 Separated partners who have not made a valid settlement agreement should remain eligible provided that no longer than two years have elapsed between the partners

²⁷ In limited circumstances a surviving partner may be entitled to maintenance from the estate under pt 6 of the Family Proceedings Act 1980. For example, a maintenance order granted after a marriage or civil union has been dissolved or the de facto relationship ended can extend against the deceased's estate: Family Proceedings Act 1980, ss 70, 71 and 180. The Commission recommended that the maintenance regime be repealed: see *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R50.

²⁸ Where the deceased is survived by more than one partner, each partner may be eligible to make a family provision claim provided they were in a qualifying relationship with the deceased. For further discussion on contemporaneous and multi-partner relationships see Chapters 3 and 18.

²⁹ In the PRA review we made recommendations to include a presumption that two people are in a qualifying de facto relationship if they have maintained a common household for a period of at least three years: see *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R26.

³⁰ *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [6.64].

³¹ In the PRA review we said the court must be satisfied it is just to make “division” orders, but that could be applied to family provision awards.

ceasing to live together in the relationship and the death.³² We have included a limited period of eligibility for separated partners because the essence of the claim is to address the economic consequences of the relationship or its end that the surviving partner carries into the future. It would defeat the purpose of the remedy if the surviving partner was ineligible because they happened to have separated from the deceased shortly before the death. A two-year period is likely to reflect the period after which former partners can reasonably be expected to have moved on with their lives. Two years is the period that a married couple or civil union partner must be living apart for before a dissolution order can be granted.³³

Quantifying a family provision award

4.28 We consider that the amount of a family provision award to a surviving partner should be at the discretion of the court but guided by the matters we set out below. Our reasons for a discretionary approach are as follows:

- (a) The purpose of an award is to afford the surviving partner a reasonable, independent standard of living, having regard to the economic consequences of the relationship or its end, as they transition from the family joint venture towards financial independence. This is a highly factual inquiry, focusing on the circumstances of the surviving partner and the consequences of the relationship or its end.
- (b) An award should factor in any provision made by the deceased to a partner during the deceased's lifetime, such as gifts. It may also be relevant to inquire into the property the surviving partner receives outside the estate, such as property passing by survivorship. Again, these are highly factual matters and are best considered through the exercise of the court's discretion.

4.29 In determining the amount of the award for partners, we propose the court should take into account:

- (a) the extent of the economic disadvantages the partner suffers from the relationship or its end;³⁴
- (b) the duration of the relationship;
- (c) the partner's responsibilities for the deceased's children; and
- (d) the partner's current and likely future employment situation.

4.30 We expect it will be rare for the court to make family provision awards to partners as usually:

- (a) the deceased will have left sufficient property to the surviving partner;

³² The concept of ceasing living together in the relationship is drawn from ss 2A(2), 2AB(2) and 2D(4) of the Property (Relationships) Act 1976, which define when a marriage, civil union and de facto relationship end for the purposes of the Act. For further discussion about contracting out and settlement agreements see Chapter 11.

³³ Family Proceedings Act 1980, s 39(2). We recognise the difference between this proposal and s 24 of the Property (Relationships) Act 1976, which provides that an application must be made under the Act no later than three years after a de facto relationship has ended.

³⁴ Our preliminary view is that when assessing the extent of the economic disadvantage, a court should not have regard to any means-tested assistance an applicant receives under Part 2 of the Social Security Act 2018, but we are still considering this matter.

- (b) the division of relationship property will enable the surviving partner to maintain a reasonable, independent standard of living; or
 - (c) the economic consequences of the relationship or its end for the surviving partner are minimal and do not justify an award.
- 4.31 We propose that the award may take the form of a lump sum payment, transfer of specific property, periodic payments, or the establishment of a trust.³⁵ Preference should be made for a lump sum payment over periodic payments as these give claimants greater control and make administration of the estate quicker and less expensive.³⁶

Interface between family provision awards for partners and FISAs

- 4.32 The PRA recognises that a just division of relationship property has regard to the economic advantages or disadvantages to the partners arising from the relationship.³⁷ In the PRA review we affirmed that there were compelling policy reasons to share economic advantages and disadvantages when a relationship ends by separation and proposed a regime of Family Income Sharing Arrangements (FISAs).³⁸ A FISA would require the partners to share their income after separation for a specified period (to a maximum of five years) based on what the partners earned in the period before separation and subject to the court's power to adjust the sharing arrangement where necessary to avoid serious injustice. In practice, a FISA would require the economically advantaged partner to pay the economically disadvantaged partner an amount to equalise their respective incomes for the duration of the FISA.
- 4.33 We recommend against applying FISAs to relationships ended by the death of a partner for the following reasons:
- (a) Although as a matter of general principle, there is a case for sharing economic disadvantages a partner (Partner A) suffers through a FISA when the advantaged partner (Partner B) dies, the economic advantages Partner B has gained through a relationship cease on their death and therefore cannot be shared through a FISA. If FISAs were to be available, a very different approach would need to be devised to move away from notionally sharing the deceased partner's future income.
 - (b) The evidence we have suggests that in most cases, partners will make generous provision for each other in their wills.³⁹ It is therefore likely that if FISAs were available on death, they would be sought in a minority of cases.

³⁵ Compare s 43(1) of the Draft Succession (Adjustment) Act in *Te Aka Matua o te Ture | Law Commission Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at 116.

³⁶ *Te Aka Matua o te Ture | Law Commission Succession Law: Testamentary Claims – A discussion paper* (NZLC PP24, 1996) at [105].

³⁷ *Property (Relationships) Act 1976*, s 1N(c).

³⁸ *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [10.4]–[10.9].

³⁹ For example, far more notices of option B than option A are filed with te Kōti Matua | the High Court each year. In 2019, out of 18,397 applications for probate and letters of administration, 16 surviving partners filed notices of electing option A compared with 721 who filed notices of option B: email from Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding data on applications for probate and letters of administration (11 August 2020); and email from Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding data on

- (c) Most relationships that end on the death of one partner occur in older age.⁴⁰ Responding to economic advantages and disadvantages when Partner A is at retirement age is different to scenarios where the partners are of working age. In many cases there will be no economic disparity between the partners. It may also be difficult to identify what economic disadvantage Partner A suffers given that, as they are retired, they cannot suffer a diminished income-earning potential and they may have benefited from Partner B's income and accumulation of assets.
- 4.34 As proposed above, separated partners who have not settled their relationship property matters prior to the death of one of the partners would be eligible to make a family provision claim on the death of a partner. Our view is that, in such circumstances, partners should lose the ability to claim a FISA. This would depart from our recommendation in the final report of the PRA review where we said that the death of either partner after separation should not affect the disadvantaged partner's (Partner A's) entitlement to a FISA.⁴¹
- 4.35 Where the former partners have reached a settlement on a FISA or a court order has been made, and one of the partners dies during the period for which the FISA is notionally payable, we propose that the FISA continues to be payable subject to the court's ability to order an adjustment to the FISA as recommended in the PRA review.⁴²
- 4.36 An application for an adjustment order in these circumstances could be made by Partner B (the advantaged partner) in circumstances where Partner A died. Where Partner B died, the application could be brought by the personal representative of the deceased's estate or by a beneficiary of Partner B's estate.
- 4.37 A court should have the power to make an adjustment order if it is satisfied that failure to make an adjustment would result in serious injustice. The court should have regard to the considerations set out in the proposed new Relationship Property Act.⁴³

Option Two: family provision awards for children under a prescribed age

- 4.38 We propose that the deceased's children who are younger than a prescribed age should be able to make a family provision claim from the estate when they would receive inadequate provision under the deceased's will or in an intestacy. The court should have discretion to grant an award from the deceased's estate to enable the children to be maintained to a reasonable standard and, so far as is practical, educated and assisted towards attainment of economic independence.

probate applications (24 August 2020). Note that a partner will only file notices with the Registry if administration of the estate has not yet been granted. However, it is a strong indication that elections of option A are relatively rare.

⁴⁰ In the year ending March 2020, four in every five deaths were people aged 65 years and older and the median age at death was 80.6 years (78.1 for men and 83.4 for women): Tauranga Aotearoa | Stats NZ "Births and deaths: Year ended March 2020 – Infoshare tables" (18 May 2020) <www.stats.govt.nz>.

⁴¹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [10.138].

⁴² Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R55 and [10.115]–[10.121].

⁴³ See Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [10.117] for the list.

- 4.39 Family provision awards for children would be based on New Zealand’s overarching obligation under the United Nations Convention on the Rights of the Child (the UNCROC) to make a child’s best interests a primary consideration in matters concerning children.⁴⁴ The proposed approach is also consistent with a parent’s duties to maintain their children consistent with the Care of Children Act 2004, the Child Support Act 1991 and section 152 of the Crimes Act 1961.

Definition of “child” for the purpose of a family provision award

- 4.40 We propose that a child of the deceased should be widely defined in the new Act so that it includes natural children, adopted children and “accepted children”.⁴⁵ An accepted child would be a child for whom the deceased had assumed, in an enduring way, the responsibilities of a parent.
- 4.41 In deciding whether the person is an accepted child of the deceased, the court should have regard to how much responsibility has been assumed, why this was done, the period of time during which the deceased maintained the child, guardianship arrangements and the responsibility of others for the child.
- 4.42 Our intention is that any child should have the opportunity to bring a claim where the deceased had established an ongoing and nurturing relationship with the child and became responsible for that child. This might include stepchildren, tamariki whāngai,⁴⁶ foster children and grandchildren. The mere fact of the deceased being in a qualifying relationship with that child’s parent would not be sufficient.
- 4.43 In our preliminary view, unborn children in utero prior to the expiry of the limitation period⁴⁷ should be eligible under the new Act.
- 4.44 It is possible that this approach would exclude children who are born from gametes and embryos stored for posthumous reproduction that have not been implanted in utero at the time of death. The Advisory Committee on Assisted Reproductive Technology (ACART) has undertaken a recent review of guidelines relating to posthumous reproduction.⁴⁸ In its discussion document and during its deliberations, ACART considered that where the deceased gave consent for their sperm or eggs to be used to create offspring for their partner, the wishes of the deceased should be enabled through the revised guidelines. If posthumous reproduction is enabled through revised guidelines, our preliminary view is that a posthumously conceived child should be eligible for family provision under the new Act, provided the unborn child was in utero prior to the expiry of the limitation period.

⁴⁴ The United Nations Convention on the Rights of the Child, 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) sets out basic rights of children, including the right to have their “best interests” treated as a “primary consideration” in actions concerning them: art 3(1).

⁴⁵ This is based on the Commission’s proposal in 1997: *Te Aka Matua o te Ture | Law Commission Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at 84–85.

⁴⁶ See Chapter 8 for a further discussion on whāngai.

⁴⁷ See Chapter 13 for the proposed time limits to make a claim.

⁴⁸ Advisory Committee on Assisted Reproductive Technology (ACART) *Posthumous Reproduction: A review of the current Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man to take into account gametes and embryos* (Manatū Hauora | Ministry of Health, 3 July 2018); and Advisory Committee on Assisted Reproductive Technology (ACART) *Proposed Guidelines for the Posthumous Use of Gametes, Reproductive Tissue and Stored Embryos: Stage two consultation document* (Manatū Hauora | Ministry of Health, July 2020).

- 4.45 If it is possible an embryo may be successfully implanted shortly after the expiry of the limitation period, the court could exercise its discretion to grant leave to apply out of time.

Age limit for children eligible to make family provision claim

- 4.46 We propose the new Act should define “child” by imposing a maximum age limit. A claimant child would need to be the prescribed age or younger at the time the parent died and would only be able to claim family provision for the period up until they turned the prescribed age. We present three alternatives for the age limit the new Act might adopt: 18, 20 or 25 years.

Eighteen years

- 4.47 Eighteen is the age that a parent’s guardianship obligations to support their child ends,⁴⁹ subject to the requirement to continue to pay child support if the child is still attending school.⁵⁰ Eighteen would be consistent with the definition of a “child” under the UNCROC. Additionally, by the age of 18 a young person has typically assumed most of the rights and responsibilities of an adult.⁵¹ For many New Zealanders, this is the age associated with obtaining “adulthood”.

Twenty years

- 4.48 Twenty is the legal age of majority in Aotearoa New Zealand, pursuant to the Age of Majority Act 1970.⁵² Unless an enactment or instrument expresses a different age, 20 is deemed to be the age a person ceases to be a minor.⁵³ We recognise that an age limit of 18 may be too severe a restriction. For example, many 18-year-olds are still attending secondary school. If their parent is still alive, an 18-year-old attending school would qualify for child support.⁵⁴

Twenty-five years

- 4.49 Twenty-five might be justifiable on the basis that young adults are maturing towards adult responsibility and independence. Some may be studying or just starting their working life. The later age would recognise that common societal “markers of adulthood” such as marriage, children, home ownership and fulltime work, are often happening later in life.⁵⁵

⁴⁹ Care of Children Act 2004, ss 8 and 15; and Crimes Act 1961, s 152.

⁵⁰ Child Support Act 1991, s 5(1).

⁵¹ For example, at 18 years a person is eligible to vote, purchase alcohol, get married or enter a civil union without a parent or guardian’s consent. Also note the recent change in s 20 of the Trusts Act 2019 lowering the age of majority from 20 to 18 years for the purposes of that Act.

⁵² Age of Majority Act 1970, s 4(1).

⁵³ Age of Majority Act 1970, s 4(3). For example s 4A of the Administration Act 1969 provides that for the purposes of that Act and of a will, the age of majority is 18.

⁵⁴ Child Support Act 1991, s 5(1).

⁵⁵ Data obtained from Stats NZ’s Infoshare platform shows that this is the case for marriage and home ownership, but the data is less clear in respect of the average age of having a first child or entering fulltime work: Tatauranga Aotearoa | Stats NZ “Marriages, civil unions, and divorces: Year ended December 2018” (3 May 2019) <www.stats.govt.nz>; Alan Bentley “Homeownership in New Zealand: Trends over time and generations” (paper presented to New Zealand Population Conference, Wellington, 20 June 2019) at 14; and Tatauranga Aotearoa | Stats NZ “Births and deaths: Year

At this stage of life, young adults may continue to benefit from parental support. Scientific research has shown that parts of the brain controlling decision-making and impulses continue to develop in the early 20s.⁵⁶ There are also laws reflecting the expectation that parents will provide financial support to their children into their early 20s. For example, until a student reaches 24 years, their eligibility for a student allowance generally depends on their parents' income,⁵⁷ and under the Oranga Tamariki Act 1989, a young person is entitled to be supported to live with a caregiver until they are 21.⁵⁸

- 4.50 Where age restrictions are imposed by family provision legislation in comparable jurisdictions, eligibility may be extended into the 20s for children who are undertaking further education.⁵⁹

Quantifying a family provision award

- 4.51 We propose that in determining a family provision award for a child, the court must make the best interests of the child a primary consideration, taking into account:⁶⁰
- (a) the child's age and stage of development, including the level of education or technical or vocational training reached;
 - (b) any other actual or potential sources of support available to the child, including support from a surviving parent (including any family provision award made to that parent that reflects their responsibilities for the child), a trust, a family provision award from the estate of another deceased parent;
 - (c) the amount of support provided by the deceased to the child during the deceased's life or on their death; and
 - (d) the actual and potential ability of the child to meet their needs.
- 4.52 A question arises as to whether a court should be required to take into account any social security assistance an applicant receives. Section 13 of the FPA requires a court to disregard assistance, except for "a superannuation benefit, a miner's benefit, or a family benefit". The exclusion under section 13 has been criticised as being too strict.⁶¹ Our

ended December 2019" (19 February 2020) <www.stats.govt.nz>. Differences in demographics such as ethnicity and socio-economic status may also have a significant impact.

⁵⁶ The bulk of this research is centred in the criminal justice arena: see for example Peter Gluckman *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister's Chief Science Advisor, 12 June 2018) at [16].

⁵⁷ Student Allowances Regulations 1998, reg 4. This applies to students who are single and without a supported child or children.

⁵⁸ Oranga Tamariki Act 1989, ss 386AAA and 386AAD. A young person under that Act may also be entitled to advice or assistance up to 25 years: ss 386A, 386B and 447(1)(cc) and (da).

⁵⁹ For example, in Victoria a child's eligibility is extended to 25 years if they are in full-time education: Administration and Probate Act 1958 (Vic), s 90 definition of "eligible person". Alberta makes a similar distinction for children up to the age of 22: Wills and Succession Act SA 2010 c W-12.2, s 72(b)(v). The Scottish Law Commission proposed an option that dependent children should be entitled to claim from their deceased parent's estate where the parent owed an obligation of aliment immediately before death. This was therefore applicable to those aged under 18 years or under 25 years if engaging in higher education: see Scottish Law Commission *Report on Succession* (Scot Law Com No 215, 2009) at [3.67]–[3.70]; and Family Law (Scotland) Act 1985.

⁶⁰ Section 28(3) of the Draft Succession (Adjustment) Act in Te Aka Matua o te Ture | Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at 86.

⁶¹ See the criticism of s 13 of the FPA in *Re Hollick (deceased)* HC Christchurch CP57/87, 18 July 1990 at 27–28.

preliminary view is that a court should not generally take into account any means-tested assistance an applicant receives under Part 2 of the Social Security Act 2018, but we are still considering this matter.

- 4.53 The award may take the form of a lump sum, transfer of specific property, periodic payments or the establishment of a trust.
- 4.54 We propose that a family provision award in favour of a child should be presumed to be payable to the guardian of the child, except where the child is 18 years or older or the court considers it inappropriate.⁶² This would enable money to be used for the support of the child during their childhood. Paying money to the child’s guardian would also be consistent with the Child Support Act. Lump sum payments should be preferred over periodic payments for the reasons given above.

Option Three: family provision awards for disabled children

- 4.55 In addition to Options One and Two, the new Act could provide that disabled children of any age are eligible for family provision. An award would recognise that a child in this category who does not have sufficient resources to enable them to maintain a reasonable standard of living should receive provision from the estate.

Definitions in this category

- 4.56 Option Three would apply to the deceased’s disabled children of any age. It would include “accepted children” as defined above.
- 4.57 Disability should be defined broadly and consistently with Article 1 of the Convention on the Rights of Persons with Disabilities (CRPD) so that any long-term physical, mental, intellectual or sensory impairments are included.⁶³ Eligibility under this category would require that the disability reduces the person’s independent function to the extent that the person is unable to earn a livelihood.⁶⁴
- 4.58 In our preliminary view, further criteria would need to be met to limit the interference with the deceased’s testamentary freedom and to recognise that the general (at least implied) policy of New Zealand’s welfare and support law is that a parent’s responsibility for their

⁶² The court may, for example, order that a trust is established in favour of the child.

⁶³ Article 1 of the United Nations Convention on the Rights of Persons with Disabilities, 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008) (the CRPD) states that “[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” Consideration should be given to the adoption of the broader definition in s 21(1)(h) of the Human Rights Act 1993. Aotearoa New Zealand ratified the CRPD on 25 September 2008.

⁶⁴ Internationally, it is not uncommon for family provision legislation to prioritise disabled children of any age alongside minor children: Administration and Probate Act 1958 (Vic), s 90 definition of “eligible person”; Wills and Succession Act SA 2010 c W-12.2, s 72(b)(iv) definition of “family member”; The Dependents Relief Act CCSM 1990 c D37, s 1 definition of “dependant”; The Dependents’ Relief Act RSS 1978 c D-25, s 2 definition of “dependant”; Dependents of a Deceased Person Relief Act RSPEI 1974 c D-7, s 1 definition of “dependant”; Dependents Relief Act RSY 2002, c 56, s 1 definition of “dependant”; Dependents Relief Act RSNWT 1988 c D-4, s 1 definition of “dependant”; Dependents Relief Act RSNWT (Nu) 1988 c D-4, s 1 definition of “dependant”; and Louisiana Constitution 1974, art XII § 5. The term “livelihood” is used in Alberta, Saskatchewan, Prince Edward Island, Yukon, Northwest Territories and Nunavut.

child ends when the child is no longer a minor, even if that child is disabled.⁶⁵ Eligibility would therefore also require that:

- (a) the child's disability occurred prior to reaching the prescribed age in Option Two; and/or
- (b) the child was wholly or partly dependent on the deceased for support immediately prior to death.

Quantifying a family provision award to a disabled child

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

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

4.60 Like Option Two, a question arises as to whether a court should be required to take into account any social security assistance an applicant receives. Our preliminary view is that a court should not generally take into account any means-tested assistance an applicant receives under Part 2 of the Social Security Act 2018, but we are still considering this matter.

4.61 Again, the court would have discretion as to the manner of award but a lump sum payment should be preferred for the reasons discussed above.

Reservations about this option

4.62 This third option is based on the view that the estate rather than the state should be responsible for supporting disabled adult children of the deceased. This may be inconsistent with contemporary attitudes that accept it is society's collective responsibility to support people with disabilities. The approach would also be at odds with the obligations the deceased would have had while alive to maintain their disabled children. For these reasons we have reservations about whether to recommend this option for reform.

⁶⁵ See for example Care of Children Act 2004, ss 8 and 15; Child Support Act 1991, s 5; and Social Security Act 2018, ss 23, 78–83 and 84–89 and sch 2.

Option Four: recognition awards for children of all ages

- 4.63 This fourth option is to allow children of the deceased, regardless of their age or needs, to make a claim for a “recognition award” to recognise the importance of the parent-child relationship and to acknowledge that the child belongs to the family.⁶⁶ It would essentially continue the courts’ existing approach to interpreting “support” under the FPA but it would make the objective more transparent.
- 4.64 We propose that a family provision award to a surviving partner, child under the prescribed age or disabled child would be prioritised over a recognition award.⁶⁷ A child entitled to a family provision award may also be entitled to a recognition award.

Definitions in this category

- 4.65 An eligible child would be a child of any age and would include “accepted children” as defined above.

Quantifying a recognition award

- 4.66 The court should award the minimum amount⁶⁸ that is appropriate to recognise that the child belongs to the family if the deceased’s will fails to do so or if the child receives nothing on intestacy.⁶⁹
- 4.67 In determining whether to make an award, and the amount, the court should have regard to:⁷⁰
- (a) the deceased’s will;
 - (b) any evidence of the deceased’s reasons for making the dispositions in the deceased’s will (if any);
 - (c) any other evidence of the deceased’s intentions in relation to providing for the child;
 - (d) any provision that the deceased made for the child either during the deceased’s lifetime or from the estate;
 - (e) the size and nature of the estate;
 - (f) the effect an order would have on the amounts received from the deceased by other beneficiaries or other claimants; and

⁶⁶ Where comparable jurisdictions allow for recognition awards, these are not separated. More commonly, they reflect the approach currently taken in the FPA to refer to maintenance and support: see for example Succession Act 1981 (Qld), s 41(1); Administration and Probate Act 1958 (Vic), s 91(4)(b); and Testator’s Family Maintenance Act 1912 (Tas), s 3(1).

⁶⁷ This may mean that nothing is awarded for the recognition of a child if the estate is small and there are other competing claimants. For further discussion about the priorities of competing claims see Chapter 9.

⁶⁸ This principle of awarding only the minimum appropriate to remedy the breach has been recognised by the courts in FPA proceedings: see for example *Little v Angus* [1981] 1 NZLR 126 (CA) at 127; and *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [70].

⁶⁹ An accepted child may not receive a share of the intestate estate under both the current law and our proposals in Chapter 6.

⁷⁰ These criteria are adapted from principles established in Aotearoa New Zealand case law and from comparable international legislation: see for example s 91A(1) of the Administration and Probate Act 1958 (Vic); and s 60(1)–(2) of the Succession Act 2006 (NSW).

- (g) gross misconduct on behalf of the child that might reduce provision from the deceased's estate.⁷¹

Reservations about this option

4.68 In our view, because this option largely continues the current law, it does little to address the issues we have identified earlier in the chapter. We note that around 56 per cent of respondents to the Succession Survey supported adult children being allowed to challenge a will and receive a share of the estate when presented with a scenario where the estate had been left either to charity or the deceased's second wife.⁷² However, we do not consider this is a sufficiently strong showing of public support for this option to outweigh the disadvantages of this option. This option would be a discretionary version of forced heirship,⁷³ and in our early engagement, legal practitioners were overwhelmingly opposed to a system of forced heirship in Aotearoa New Zealand. We consider the existing uncertainties regarding the amount of an award would persist. Lastly, we are mindful of the potential impacts disputes around recognition claims would have on families. Parties would have to contest the applicant's worthiness to be recognised as a family member. For these reasons, we do not favour Option Four as a recommendation for reform.

Other considerations

Parents

4.69 Our preliminary view is that parents of the deceased should not be eligible claimants under the new Act. Parents have been eligible claimants since 1943 but there have been very few cases involving a claimant parent. Although many children will provide for their ailing parents in later life, this is not a legal requirement, nor is it reliable to infer that, because someone was providing support to a person when they died, they would have wanted this support to be continued. The Succession Survey respondents were divided about whether a parent should be able to challenge their child's will and get a share of the estate but more than half (52 per cent) said this should not be allowed.⁷⁴ Children concerned about their parents' future welfare should be encouraged to provide for them in their will. Under our proposals, parents may be eligible to make a contribution claim,⁷⁵ for example, where a parent paid for improvements to their child's home intending that they would live with and be cared for by that child.

⁷¹ Compare s 5 of the Family Protection Act 1955; and s 18A of the Property (Relationships) Act 1976. In our view, a high threshold is desirable to avoid family members presenting disparaging and likely irrelevant evidence about each other.

⁷² Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at figure 11.

⁷³ This has been a criticism that legal commentators have made of the current law: see Richard Sutton and Nichola Peart "Testamentary Claims by Adult Children – The Agony of the Wise and Just Testator" (2003) 10 Otago L Rev 385 at 403. Note that Richard Sutton was a Commissioner during the 1990s succession review.

⁷⁴ Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at figure 4.

⁷⁵ See Chapter 5.

Adult stepchildren of a surviving partner

4.70 On occasion an adult child may miss out on an inheritance from their parent if the parent prefers the interests of a subsequent partner over the child. This may seem particularly unfair if the child had an expectation to inherit and the deceased, in leaving their estate to their partner, intended for the partner to provide for the deceased's children when they eventually died but for whatever reason this did not happen. Under the current law, the adult child is unlikely to have any legal recourse against their stepparent's eventual estate.⁷⁶ Our proposals do not address this scenario.

SUMMARY OF PROPOSALS FOR REFORM

- For the purpose of family provision and recognition awards, a child of the deceased would include children for whom the deceased had assumed, in an enduring way, the responsibilities of a parent.
- **Option One: family provision awards for partners.** A surviving partner who has insufficient resources to maintain a reasonable, independent standard of living, having regard to the economic consequences of the relationship or its end for that partner, should be entitled to a family provision award from the estate to transition from the family joint venture.
- Separated partners who have not entered a valid settlement agreement should remain eligible for an award provided that no longer than two years have elapsed between the partners ceasing to live together in the relationship and the death of one partner.
- In determining a family provision award for a partner, the court should take specific factors into account.
- Where one partner dies while a Family Income Sharing Arrangement (FISA) is payable to the surviving partner, the FISA should continue to be payable subject to the court's ability to order an adjustment. Otherwise, FISAs should not be available in relationships ended by the death of a partner.
- **Option Two: family provision awards for children under a prescribed age.** A child of the deceased should be able to make a claim for a family provision award from the estate to enable the child to be maintained to a reasonable standard, and so far as is practical, educated and assisted towards attainment of economic independence.
- A child would be defined in the new Act according to an age limit. Three options are presented: 18, 20 or 25 years.
- In determining a family provision award for a child, the court should take specific factors into account.
- **Option Three: family provision awards for disabled children.** A disabled child of the deceased should be able to make a claim for a family provision award from the estate where the child does not have sufficient resources to enable them to maintain a reasonable standard of living.

⁷⁶ The stepchild might be entitled to claim under the FPA if they were being maintained by the stepparent: Family Protection Act 1955, s 3(1)(d). See also the definition of "stepchild" in s 2(1).

- Disability should include any long-term physical, mental, intellectual or sensory impairments that have reduced the person's independent function to the extent that they are unable to earn a livelihood.
- A disabled adult child should be eligible if they had been wholly or partly dependent on the deceased for support immediately prior to death. In the absence of this, the child's disability must have arisen prior to reaching the prescribed age in Option Two.
- In determining a family provision award for a disabled child, the court should take specific factors into account.
- **Option Four: recognition awards for children of all ages.** A child of the deceased should be eligible for provision from the estate to recognise the importance of the parent-child relationship and to acknowledge that the child belongs to the family if the deceased's will fails to do so or the child receives nothing on intestacy.
- The court should award the minimum amount that is appropriate to recognise the parent-child relationship and that the child belongs to the family.
- In determining whether to make an award, and the amount, the court should take specific factors into account.
- Family provision awards would take priority over recognition awards.

QUESTIONS

Q13

Do you agree with the issues we have identified?

Q14

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

Q15

What are your views on the proposals for reform?

Q16

Do you have any other suggestions for reform?

CHAPTER 5

Contribution claims

IN THIS CHAPTER, WE CONSIDER:

- the claims a person who has provided a benefit to the deceased or their estate can bring against an estate;
- the issues with the current law; and
- proposals for reform.

THE CURRENT LAW

5.1 Sometimes, people will provide benefits to someone who later dies. In other instances, after someone has died, people will provide benefits to the deceased person's estate. These benefits could include money, work, property, or services. Sometimes, these benefits are provided in the expectation that the person providing them (a contributor) will receive something in return from the deceased's estate. There are several claims a contributor can make against an estate.

Contract

5.2 If there is a contract between the contributor and the deceased, the contributor could enforce that contract against the estate.

Constructive trust

5.3 A contributor might claim a constructive trust over the estate. To establish a constructive trust, a contributor must show:¹

- (a) contributions, direct or indirect, to the deceased's property;
- (b) the expectation of an interest therein;
- (c) that such an expectation is a reasonable one; and
- (d) that the legal owner of the property should reasonably expect to yield the claimant an interest.

¹ *Lankow v Rose* [1995] 1 NZLR 277 (CA) at 294.

- 5.4 The amount of an award will be the value of the contributions that give rise to a constructive trust or the particular property if it is appropriate.²

Estoppel

- 5.5 A contributor may claim estoppel by showing that the deceased encouraged them to expect that they would receive an interest in the recipient's property and that they provided the benefit in reliance on this expectation. To establish estoppel, the contributor must show:³
- (a) a belief or expectation has been created or encouraged through some action, representation, or omission to act by the legal owner of the property;
 - (b) the belief or expectation has been reasonably relied upon by the contributor;
 - (c) detriment will be suffered if the belief or expectation is departed from; and
 - (d) it would be unconscionable for the party against whom the estoppel is alleged to depart from the belief or expectation.
- 5.6 The amount and form of an award is largely discretionary and can respond to the circumstances of the case.⁴

Unjust enrichment

- 5.7 Although the law is continuing to develop in this area, te Kōti Matua | the High Court has held that claims in Aotearoa New Zealand may be founded on unjust enrichment.⁵ To establish unjust enrichment the contributor must show:
- (a) proof of the recipient's enrichment by receipt of a benefit;
 - (b) a corresponding deprivation by the contributor; and
 - (c) the absence of any "juristic reason" for the enrichment (meaning there was no legal reason for the enrichment, like a contract).
- 5.8 The amount of an award is the gain the recipient made at the contributor's expense.⁶ A remedy may be proprietary (by way of a constructive trust) or monetary (by way of a personal remedy).⁷

Quantum meruit

- 5.9 Contributors might make a claim for quantum meruit where the recipient requested or freely accepted services without paying for them and the recipient knew that the

² *Lankow v Rose* [1995] 1 NZLR 277 (CA) at 286.

³ See James Every-Palmer "Equitable Estoppel" in Andrew S Butler (ed) *Equity & Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 601 at 613–621; and *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567 at [44].

⁴ *Carroll v Bates* [2018] NZHC 2463, [2018] NZAR 1570 at [74].

⁵ *Enright v Enright* [2019] NZHC 1124; and *Young v Hunt* [2019] NZHC 2822. See also Peter Twist, James Palmer and Marcus Pawson *Laws of New Zealand Restitution* (online ed) at [9].

⁶ Peter Twist, James Palmer and Marcus Pawson *Laws of New Zealand Restitution* (online ed) at [2].

⁷ Peter Twist, James Palmer and Marcus Pawson *Laws of New Zealand Restitution* (online ed) at [2].

contributor expected to be reimbursed for those services.⁸ To establish a claim for quantum meruit, a contributor must show that:⁹

- (a) the recipient asked the contributor to provide services or freely accepted services provided by the contributor; and
- (b) the recipient knew (or ought to have known) that the contributor expected to be reimbursed for those services.

5.10 The award amount will be the reasonable cost of providing the services.¹⁰

The TPA

5.11 When the deceased promised to reward the contributor in their will, there is a statutory remedy. The contributor may claim the reasonable value of the work or services from the estate under the Law Reform (Testamentary Promises) Act 1949 (TPA). To establish a TPA claim, the contributor must show:¹¹

- (a) the contributor rendered services to, or performed work for, the deceased during the deceased's lifetime;
- (b) the deceased either expressly or impliedly promised to reward the contributor;
- (c) there is a nexus between the services rendered or work performed and the promise; and
- (d) the deceased failed to make the promised testamentary provision or to otherwise remunerate the contributor.

5.12 The award amount must be reasonable in all the circumstances of the case having regard to certain factors listed in section 3(1) of the TPA.¹²

ISSUES

5.13 The main issue with the current law is its complexity and uncertainty. A contributor can potentially bring several claims against an estate in respect of the same contributions, each with different inquiries and awards available. This can lengthen litigation and increase costs. It also makes predicting outcomes and awards difficult, which can discourage parties from settling claims out of court.

5.14 Some of the law, particularly unjust enrichment and quantum meruit, is developing. Cases have taken different approaches when deciding the availability and elements of the claims. In particular, there is a debate as to whether unjust enrichment is a separate and broad cause of action that encompasses quantum meruit cases.¹³ This debate may have

⁸ See for example *Tervoert v Scobie* [2020] NZHC 1039.

⁹ *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd* CA90/05, 8 August 2006 at [50].

¹⁰ *Electrix Ltd v Fletcher Construction Co Ltd (No 2)* [2020] NZHC 918 at [96]–[100].

¹¹ Law Reform (Testamentary Promises) Act 1949, s 3.

¹² Law Reform (Testamentary Promises) Act 1949, s 3(1); and *Re Welch* [1990] 3 NZLR 1 (PC) at 6.

¹³ In *Enright v Enright* [2019] NZHC 1124 and *Young v Hunt* [2019] NZHC 2822 the Court held that unjust enrichment was a separate cause of action. However, the Court in *Tervoert v Scobie* [2020] NZHC 1039, relying on the earlier case *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* HC Auckland CIV-2003-404-5143, 6 April 2005, held that unjust

practical consequences for claimants. If the foundation of quantum meruit is unjust enrichment, then the focus of the inquiry will be ensuring that the recipient gives up any benefits unjustly received. However, if it is not, then the focus of the inquiry may be ensuring that the reasonable costs of providing the services by the contributor are returned to them.¹⁴

- 5.15 Life expectancy in Aotearoa New Zealand is progressively increasing and is projected to continue.¹⁵ The average age of the population is going up as the baby boomer generation (someone born in the years 1946–1965) reaches the 65+ age bracket.¹⁶ As life expectancy increases, more people may need to rely on informal care arrangements.¹⁷ Because state provision for carers is limited, the rise in these arrangements may lead to more contribution claims.¹⁸ Additionally, were our preferred proposals for reform regarding family provision implemented, meaning adult children of a deceased could not claim family provision, more adult children may bring contribution claims if they consider they have not been adequately provided for in their parent’s will or under the intestacy regime.

PROPOSALS FOR REFORM

- 5.16 We consider that the new Act should address contribution claims. They may form a substantial part of the rights a person may have against an estate. People should be able to refer to one statute to understand the extent of their rights in respect of an estate. We present two options for reform. Our preliminary view is that a comprehensive statutory cause of action is desirable.
- 5.17 In Chapter 8 we consider how tikanga might respond to a situation where someone has contributed to a person who has since died or their estate and whether our proposed cause of action is consistent with tikanga.

Option One: a comprehensive statutory cause of action for contribution claims

- 5.18 The first option we propose is to establish a single and comprehensive statutory cause of action in place of the TPA and the other causes of action described above for contributions to the deceased or the estate. This approach should assist claimants and personal representatives by making the law more accessible. The proposed cause of

enrichment was not a separate cause of action. In *Electrix Ltd v Fletcher Construction Company Ltd (No 2)* [2020] NZHC 918 the Court preferred to decide the case on quantum meruit principles, holding that unjust enrichment did not provide a “satisfactory unifying conceptual foundation”: at [96].

¹⁴ See *Electrix Ltd v Fletcher Construction Co Ltd (No 2)* [2020] NZHC 918 at [96]–[100]; and *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd* CA90/05, 8 August 2006 at [44].

¹⁵ Tauranga Aotearoa | Stats NZ *Demographic trends: implications for the funeral industry* (January 2016) at 4–5.

¹⁶ Tauranga Aotearoa | Stats NZ *Demographic trends: implications for the funeral industry* (January 2016) at 4–5.

¹⁷ One study concludes that large increases in the need for daily and weekly care are expected by 2026: Ngaire Kerse and others *Intervals of care need: need for care and support in advanced age – LiLACS NZ* (Te Whare Wānanga o Tāmaki Makaurau | University of Auckland, 21 April 2017) at 11.

¹⁸ See Te Manatū Whakahiato Ora | Ministry of Social Development *A Guide for Carers | He Aratohu mā ngā Kaitiaki* (February 2021).

action is based on the Commission’s recommendation in its 1990s succession review although we propose some modifications.¹⁹

- 5.19 Our proposal is reflected in draft provisions set out at the appendix to the end of this chapter, which have been prepared with the assistance of Parliamentary Counsel.
- 5.20 The cause of action should be available when a person has provided a benefit to the deceased or the estate. A benefit should be defined in the new Act to include money, property, work and services.
- 5.21 To exclude frivolous claims or contributions that might be seen as part of “normal family life”, benefits that did not involve a significant contribution of time, effort or money should be excluded. What is “significant” should not be defined for the purposes of this claim due to the variable nature of benefits that are likely to be provided. It is better for the court to decide whether to grant a remedy with all the circumstances of a case before it.
- 5.22 We propose that a contributor may apply to the court to seek compensation in respect of a benefit that the contributor provided to the deceased or the estate if:
- (a) the benefit was of value; and
 - (b) the contributor has not been fully compensated for providing the benefit.
- 5.23 In determining whether the benefit is of value, the court should take into account the monetary value of the contribution and also benefits that may have been of value or assistance to the deceased. We propose the new Act should provide that a benefit should be considered to be of value if it:
- (a) ensured an appropriate quality of life for the deceased person;
 - (b) maintained or increased the value of the deceased person’s property;
 - (c) was provided at the request of the deceased person; or
 - (d) otherwise provided substantial assistance or advantage to the deceased person.
- 5.24 Similarly, we propose the new Act should provide that a benefit is of value to the estate if it:
- (a) maintained or increased the value of the estate;
 - (b) was a payment in respect of an outgoing on the deceased person’s estate; or
 - (c) in any other way relieved the estate from expenditure.
- 5.25 In these circumstances, we propose that the court may grant compensation to the contributor when it considers it just and reasonable. In determining whether it is just and reasonable, the new Act should state that it is not just and reasonable if:²⁰
- (a) the contributor provided the benefit to fulfil a contractual, legal or equitable obligation; or
 - (b) the contributor did not intend to receive any reward for the contribution.

¹⁹ Te Aka Matua o te Ture | Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at 16–17 and 92–99.

²⁰ These factors are based on Canadian jurisprudence on unjust enrichment: see *Garland v Consumers’ Gas Co* 2004 SCC 25, [2004] 1 SCR 629 at [38]–[44].

- 5.26 In addition, a contributor should not recover if the deceased informed the contributor, or it was agreed between the deceased and the contributor, or it was otherwise clear from the circumstances, that no compensation would be given in return for the benefit.
- 5.27 If the contribution of the benefit in question has been taken into account through a relationship property division, compensation should not be available to the contributor.
- 5.28 Where the court considers it just and reasonable to award compensation, the court should have power to grant a monetary award to be met rateably from the estate. In determining the value of a compensation award, the court should have regard to:
- (a) any arrangement or understanding between the contributor and the deceased person;
 - (b) the value of the benefit to the deceased person or the deceased person's estate;
 - (c) the period of time that has elapsed since the benefit was provided and the extent to which the benefit has diminished in value or relevance over that period;
 - (d) any extent to which the deceased altered their position after receiving the benefit in the reasonably held belief that no compensation was payable in respect of the benefit;²¹
 - (e) the costs to the contributor in providing the benefit;
 - (f) any implications that the award may have for any other persons; and
 - (g) any other circumstances the court considers relevant.
- 5.29 The court should also have power to order the transfer of specific property. When the court grants an award of specific property to the contributor, the court should have power to grant priority over any claims by unsecured creditors of the estate. This is to be consistent with equitable remedies where the court may grant a contributor priority by recognising their property interest in the asset they have contributed towards.
- 5.30 We propose the cause of action would codify the law relating to claims under constructive trusts, estoppel, unjust enrichment, quantum meruit and any other restitutionary relief that might otherwise arise from contributions to a deceased or their estate. Because the precise rules of these claims and how they relate to one another are subject to debate, we favour clarifying the law in a single cause of action expressed in one place. The new Act should therefore provide that no claim other than under the Act can be brought in respect of these claims or otherwise. Where a contributor brings proceedings in contract against an estate in respect of a benefit they have provided, we propose the court should be able to order that the claim be held in the same manner as a claim under this proposed new cause of action.
- 5.31 We recognise there is likely to be some initial uncertainty about how the cause of action is to apply. In our view, this uncertainty is preferable to the uncertainty that exists under the current law. It is also advantageous that contributors, personal representatives and beneficiaries are able to turn to a single statute to see how a court will determine a contribution claim.

²¹ This reflects the common law "change of position" defence. It also reflects the defence to a restitutionary claim that "the defendant's position has so changed that it would be inequitable in all the circumstances to require restitution in whole or in part": *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 (CA) at 219.

Option Two: retain the TPA cause of action within the new statute

5.32 An alternative option for reform is to retain the TPA cause of action within the new Act and leave the remaining claims to operate outside the statute. This would provide the opportunity to modernise the drafting of the TPA but leave the law substantively the same. This approach has the advantage of retaining the existing case law and commentary on the TPA and the other areas of law. However, litigants would continue to face the difficulty of dealing with multiple potentially overlapping claims arising from law outside the new Act.

SUMMARY OF PROPOSALS FOR REFORM

- Option One: a codification of the current claims a contributor may make against an estate into a single statutory cause of action. The remedy would apply when a contributor has provided a benefit to the deceased or their estate and the court considers it is just and reasonable that compensation be made to the contributor; or
- Option Two: inclusion of the TPA cause of action within the new Act, updated to modern drafting standards.

QUESTIONS

Q17

Do you agree with the issues we have identified?

Q18

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

Q19

What are your views on the proposals for reform?

Q20

Do you have any other suggestions for reform?

APPENDIX: PROVISIONS RELATING TO OPTION ONE – A STATUTORY CAUSE OF ACTION FOR CONTRIBUTION CLAIMS

Part 00 Contribution claims

1 This Part to be code

- (1) This Part has effect in place of the rules of common law and equity governing the circumstances in which a person may bring a claim against a deceased person's estate in respect of a benefit that the person provided to—
 - (a) the deceased; or
 - (b) the deceased's estate after the death of the deceased.
- (2) However, nothing in this Part limits or affects a contributor bringing a claim against a deceased person's estate under—
 - (a) the Property (Relationships) Act 1976 for the division of relationship property; or
 - (b) the law of contract.

2 Interpretation

In this Part, unless the context otherwise requires,—

benefit, provided to a deceased person or a deceased person's estate, means anything conferred from the expenditure of significant time, effort, or money, including (without limitation)—

- (a) any property conferred;
- (b) any work or services performed

compensation award means an award made by the court under **section 5(1)** in respect of a contribution claim

contribution claim means a claim made under **section 3(1)**

contributor means a person who provided a benefit to a deceased person or a deceased person's estate

partner, in relation to a contributor, means a spouse, civil union partner, or de facto partner of the contributor

personal property includes money

property means real and personal property of any description.

3 Contribution claims

- (1) A contributor may apply to the court claiming compensation in respect of a benefit that the contributor provided to the deceased person or the deceased person's estate if—
 - (a) the benefit was of value (monetary or otherwise) to the deceased person or the deceased person's estate; and
 - (b) the contributor has not been fully compensated (by payment or otherwise) for the provision of the benefit.
- (2) A benefit was of value to the deceased person if it—
 - (a) ensured an appropriate quality of life for the deceased; or

- (b) maintained or increased the value of the deceased’s property; or
 - (c) was provided at the request of the deceased; or
 - (d) otherwise provided substantial assistance or advantage to the deceased.
- (3) A benefit was of value to the deceased person’s estate if it—
- (a) maintained or increased the value of the deceased’s estate; or
 - (b) was a payment in respect of an outgoing on the deceased’s estate; or
 - (c) in any other way relieved the deceased’s personal representative from incurring any expenditure in the administration of the deceased’s estate.

4 Contribution claim cannot be made by partner if benefit included in relationship property division

A contributor cannot make a contribution claim in respect of any benefit provided to a partner or former partner if the benefit has been taken into account in a relationship property division under any law applying to the division of relationship property between partners.

5 Compensation awards

- (1) If, on an application made by a contributor under **section 3**, the court is satisfied that it is just and reasonable to award compensation to the contributor, it may make 1 or both of the following orders:
- (a) an order that a sum of money be paid to the contributor from the deceased person’s estate;
 - (b) an order that specific property be transferred to the contributor from the deceased person’s estate (a **property order**).
- (2) The circumstances in which a court will not be satisfied that it is just and reasonable to award compensation to a contributor include where—
- (a) the contributor provided the benefit in accordance with a contractual, legal, or equitable obligation; or
 - (b) the contributor provided the benefit without intending to receive compensation; or
 - (c) the contributor otherwise knew, or could have reasonably known from the circumstances of the provision of the benefit, that no compensation would be received for the benefit (for example, because the deceased informed the contributor that no payment would be made, or the contributor agreed not to receive any payment).
- (3) The court may order that a property order take priority over any claim or claims by unsecured creditors.

6 Amount of compensation award

- (1) In determining the value of a compensation award, the court must have regard to—

- (a) any arrangement or understanding between the contributor and the deceased person or the deceased person's personal representative, and the fairness and reasonableness of the terms and operation of that arrangement or understanding;
 - (b) the value of the benefit to the deceased or the deceased's estate;
 - (c) the period of time that has elapsed since the benefit was provided and the extent to which the benefit has diminished in value or relevance over that period;
 - (d) any extent to which the deceased altered their position after receiving the benefit in the reasonably held belief that no compensation was payable in respect of the benefit;
 - (e) any costs incurred by the contributor in providing the benefit;
 - (f) any other circumstances that the court considers relevant.
- (2) The value of a contribution award may be equivalent to the full value of the benefit provided by the contributor or more or less than that value.
 - (3) However, a contribution award must take into account the extent to which the contributor received any compensation of any kind from the deceased or the deceased's personal representative in respect of the provision of the benefit.

7 **Illegal benefits**

- (1) A court may make a contribution award to a contributor in respect of a benefit that was conferred unlawfully or was conferred under an unlawful agreement or arrangement.
- (2) In considering whether to make a contribution award under **subsection (1)**, the court must have regard to—
 - (a) the conduct of the contributor and the deceased person or the deceased person's personal representative; and
 - (b) in the case of a breach of an enactment, the purpose of the enactment and the gravity of the penalty expressly provided for the breach; and
 - (c) any other matters that the court thinks proper.
- (3) However, the court must not make a contribution award under **subsection (1)** if it considers that to do would not be in the public interest.

8 **Monetary order falls rateably on deceased person's estate**

Unless the court otherwise orders, a sum of money ordered to be paid under **section 5(1)(a)** falls rateably on the whole estate of the deceased person (that is, payment of the sum of money is shared across all beneficiaries with each beneficiary paying an amount that is proportional to their interest in the estate).

9 Relationship with law of contract

- (1) If a contributor brings a proceeding under the law of contract against a deceased person's estate in respect of a benefit provided by the contributor to the deceased in the deceased's lifetime, the court in which the proceeding is brought may order that the contract claim be heard in the same manner as a contribution claim under this Part.
 - (2) When making an order under this section, the court may further order that the proceeding be transferred to another court with jurisdiction to hear a contribution claim.
 - (3) This section does not apply in respect of a contract for the provision of a benefit on a strictly commercial basis by a person with no close personal relationship to the deceased.
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CHAPTER 6

Intestacy entitlements

IN THIS CHAPTER, WE CONSIDER:

- the statutory rules for distributing intestate estates; and
- issues with the current law and proposals for reform.

THE CURRENT LAW

- 6.1 Intestacy occurs when the whole or part of the deceased's estate is not disposed of by will. Total intestacy arises where the deceased makes no effective testamentary disposition of any of their property, such as where they left no will or their will is invalid¹ or the beneficiaries died before the deceased. Partial intestacy occurs where the deceased fails to dispose of some of their property.
- 6.2 Dying intestate is relatively common in Aotearoa New Zealand. It is estimated that around half of all adults (aged 18 or over) do not have a will.² Every year, around one in 10 of the applications for administration filed with the te Kōti Matua | the High Court (the High Court) is for an intestate estate.³
- 6.3 The total administration applications filed with the High Court represent around half the number of registered deaths each year.⁴ Those individuals for whom an administration

¹ Wills Act 2007, s 7.

² The Commission for Financial Capability surveyed 11,069 people online in 2017. 5,222 respondents (47.2 per cent) stated they had a legal will, 5,343 stated they did not (48.3 per cent), and 504 were unsure (4.6 per cent): Commission for Financial Capability *Financial Capability Barometer Survey 2017*. Fifty-three per cent of respondents to the Succession Survey said they had a will: Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [156] and table 5.

³ For example, based on statistics extracted from the High Court's case management system, 18,465 applications for probate, letters to administer or elections to administer were filed in 2019. Of these, 1,454 were for letters of administration and another 318 were letters of administration with will annexed: email from Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding data on applications for probate and letters of administration filed with the court annually between 2015 and 2019 (11 August 2020).

⁴ In 2019, 18,465 administration applications were made and there were 33,774 registered deaths of adults aged 18 and over (55 per cent). In 2018, there were 17,561 applications and 32,799 deaths (54 per cent) and in 2017 there were 18,121 applications and 32,937 deaths (55 per cent): email from Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding data on applications for probate and letters of administration filed with the court annually

application is not filed probably leave estates that do not require a formal grant of administration in order to distribute the assets of those estates.⁵ It is likely that a significant proportion of those individuals died intestate.

- 6.4 Certain demographic groups are less likely to make wills. Rates of will-making are lower in Māori, Pacific peoples and Asian communities.⁶ Will-making is often associated with significant life events such as buying a home or having a child. Rates of will-making also increase with age so the intestate population is generally expected to be younger than those who die with a will.⁷

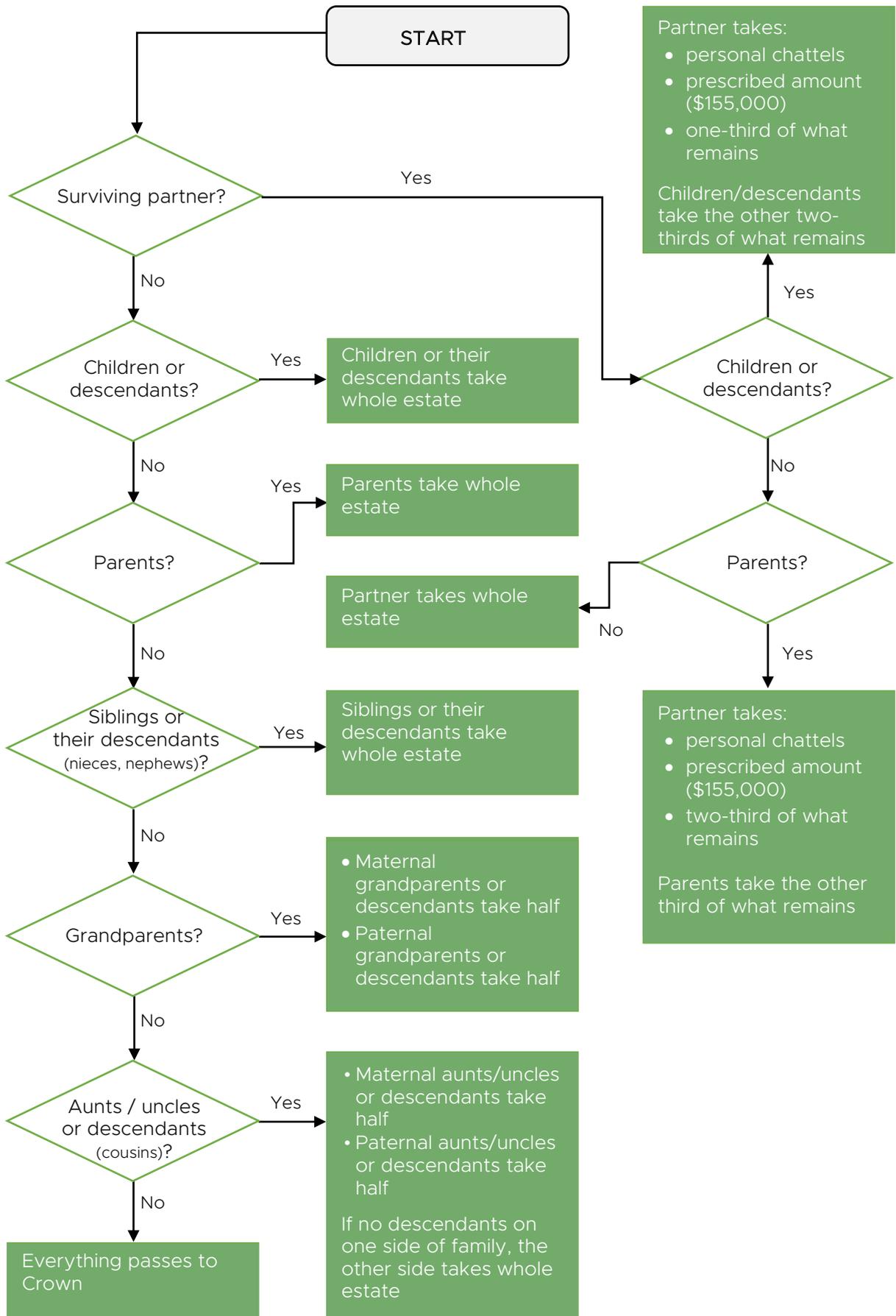
In the absence of a will, there needs to be a system of rules for distributing the deceased's property

- 6.5 Section 77 of the Administration Act 1969 sets out the rules for distributing intestate estates consisting of all property other than Māori land.⁸ Broadly, the rules prioritise the deceased's partner and children, followed by parents, siblings, grandparents, aunts and uncles (by blood) and cousins. When none of the specified family members are alive to succeed, the Crown will take the estate as bona vacantia (ownerless goods). The Crown may provide for dependants of the deceased or other persons⁹ for whom the deceased might reasonably have been expected to make provision. We summarise the rules under section 77 in the following diagram.

between 2015 and 2019 (11 August 2020). Total deaths figures have been sourced from the Infoshare platform, available at Tatauranga Aotearoa | Stats NZ "Births and deaths: Year ended March 2020 – Infoshare tables" (18 May 2020) <www.stats.govt.nz>.

- ⁵ Section 65 of the Administration Act 1969 provides that certain assets with a value not exceeding the prescribed amount may be paid to specified individuals without requiring administration of the estate to be obtained. The prescribed amount is currently set at \$15,000: Administration (Prescribed Amounts) Regulations 2009, reg 4.
- ⁶ In response to the Succession Survey 41 per cent of Māori respondents, 24 per cent of Pacific respondents and 21 per cent of Asian respondents said they had a will: Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at table 5. The Commission for Financial Capability *Financial Capability Barometer Survey 2017* found that of the 1,602 respondents who identified as Māori, 498 said they had a will (31.1 per cent) compared with 4,098 respondents who identified as European/Caucasian (55.2 per cent).
- ⁷ The Succession Survey found that age was the primary influence on having a will: Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [159]. In the Commission for Financial Capability *Financial Capability Barometer Survey 2017*, nearly all (97.3 per cent) European/Caucasian respondents aged 75+ had a will but only two thirds (64.4 per cent) aged 50–54 had a will. The rate of will-making also increased with age for Māori respondents (75 per cent of Māori respondents aged 75+ had a will compared with 29.8 per cent of Māori respondents aged 50–54: Commission for Financial Capability *Financial Capability Barometer Survey 2017*).
- ⁸ Succession to Māori freehold land on intestacy is determined according to ss 109 and 109A of Te Ture Whenua Maori Act 1993.
- ⁹ Under s 29 of the Interpretation Act 1999, "person" includes a corporation sole, a body corporate and an unincorporated body.

SUMMARY OF THE DISTRIBUTION OF INTESTATE ESTATES UNDER SECTION 77 OF THE ADMINISTRATION ACT 1969



ISSUES

6.6 The intestacy provisions in the Administration Act are old. They consolidated the regime established by the Administration Amendment Act 1944 and there have been few updates since 1969. Several issues arise.

The rules may not reflect contemporary public attitudes and expectations

6.7 The intestacy rules are designed to reflect what most people who die intestate would do with their estate had they made a will.¹⁰

6.8 Overseas law reform bodies have used various methods to identify what is the most common approach to distributing assets on death, including analysing wills proved, conducting public surveys and consulting with members of the legal profession and public. In addition to our initial discussions with practitioners and professional trustee corporations, we have used the to give us insight into contemporary attitudes about fair distributions where there is no will.

6.9 The Succession Survey results suggest certain ways in which the current regime does not align with contemporary attitudes and expectations:

- (a) Respondents generally supported sharing the estate between partners and children on a fixed proportion basis that did not differ depending on the estate size.¹¹ Currently, when a deceased is survived by a partner and children, the intestacy regime provides a partner with a prescribed amount¹² in addition to a share of the remaining estate, which means the respective proportions are impacted by the total value of the estate.
- (b) Respondents generally supported a partner getting all of the estate when the deceased is also survived by a parent and sibling.¹³ Currently, when the deceased is survived by a partner and parents but no children, the surviving partner takes the

¹⁰ This is the general aim of the present regime in Aotearoa New Zealand: see the speech of Hon Rex Mason when introducing the Administration Bill: (23 November 1944) 267 NZPD 288–289. See also the speech of Hon Ralph Hanan when introducing the Administration Amendment Bill 1965: (21 September 1965) 344 NZPD 2875. It is also that most frequently opined in comparable jurisdictions as the principal basis for intestacy rules: see for example Law Commission of England and Wales *Family Law: Distribution on Intestacy* (LC187, 1989) at [24]; and New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at [1.24]; Manitoba Law Reform Commission *Report on Intestate Succession* (Report 61, 1985) at 7; and Alberta Law Reform Institute *Reform of the Intestate Succession Act* (Report No 78, 1999) at 59.

¹¹ In the scenario, respondents were asked to divide a deceased woman's estate between her two adult children and her second husband. Respondents were first told that the estate was worth \$1 million. They were then asked whether their answer would change if the estate was worth \$150,000. Only seven per cent said they would. About 50 per cent of respondents said that the two adult children should get more than half of the estate regardless of whether it was worth \$1 million or \$150,000: Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [182] and figure 17.

¹² Under the current law, a surviving partner is entitled to a prescribed amount where the intestate is also survived by descendants or parents. The prescribed amount is set by regulation and is currently \$155,000 plus interest: Administration (Prescribed Amounts) Regulations 2009, reg 5.

¹³ Nearly three-quarters (73 per cent) of respondents agreed that the partner should get all of the estate: Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [164] and figure 16.

deceased's personal chattels and the prescribed amount. Of the remaining estate, the deceased's parents get one-third of the estate.

- (c) Respondents without wills were generally more likely than those with wills to divide an estate more favourably towards children in scenarios where the deceased is survived by a partner and children.¹⁴ However, the age of the respondents also influenced some responses.¹⁵

The rules have not been adjusted to accommodate the increase in blended families

- 6.10 The rules may need to be adjusted to account for changes in family arrangements, particularly increasing rates of re-partnering and the associated increase of blended families.
- 6.11 Information about re-partnering in Aotearoa New Zealand is limited. Since the 1980s, remarriages have made up approximately one-third of total marriages each year (28 per cent in 2019). This proportion has increased since the 1970s (in 1971, 16 per cent of marriages were remarriages). Statistics on remarriages do not capture people who divorce and then enter a de facto relationship.¹⁶ Blended families also appear to be quite common, with one study indicating that one in five children had lived in a stepfamily before age 17.¹⁷
- 6.12 It is common for people who enter relationships in later life or who have children from a previous relationship to choose to structure their finances differently than they might have in earlier relationships, particularly those relationships where they shared children. This can also be reflected in how people choose to divide their property when they die. The Succession Survey suggested that there is some preference for partners taking a greater proportion of the estate where they share children compared with where the children are from a former relationship.¹⁸

¹⁴ Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [173] and [180].

¹⁵ For example, in one scenario younger and middle-aged respondents without wills generally preferred the adult children to get more than half the estate but this was a minority viewpoint among respondents without wills aged 50 and older: Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [180].

¹⁶ Tatauranga Aotearoa | Stats NZ “Marriages, civil unions, and divorces: Year ended December 2019” (5 May 2020) <www.stats.govt.nz>. See also Te Aka Matua o te Ture | Law Commission *Relationships and Families in Contemporary New Zealand | He Hononga Tangata, he Hononga Whānau i Aotearoa o Nāiane* (NZLC SP22, 2017) at 30.

¹⁷ This is just under one in three Māori children (29 per cent): Arunachalam Dharmalingam and others *Patterns of Family Formation and Change in New Zealand* (Te Manatū Whakahiato Ora | Ministry of Social Development, 2004) at 73.

¹⁸ When presented with a scenario involving a surviving husband and the couple's two adult children, 64 per cent of respondents favoured the husband getting more than a per capita share of the estate. This was around 42 per cent when the children were from a former relationship: Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [169] and figure 17.

The rules pre-date subsequent developments in relationship property law

- 6.13 Under the Property (Relationships) Act 1976 (PRA), a surviving partner to a qualifying relationship may elect to divide the couple’s relationship property rather than receive their entitlements in the deceased partner’s intestacy. The intestacy regime in the Administration Act pre-dates the PRA. A surviving partner’s entitlements on intestacy are not quantified in terms of their relationship property rights. It is preferable that any reform to the intestacy regime provides for consistency between the two regimes to the extent possible.
- 6.14 One issue is that the Administration Act does not specify how a relationship property settlement affects the intestacy regime. There is some uncertainty on what the position should be when married or civil union partners have separated and entered into a settlement agreement but have not obtained a formal dissolution or separation order. Cases have reached different conclusions about whether the surviving former spouse or civil union partner should remain eligible in the intestacy.¹⁹

The Act is framed in outdated and inaccessible language

- 6.15 The Act does not comply with modern legislative drafting principles. The provisions that detail the statutory distribution rules use uncommon terms and phrases such as “issue” and “absolutely vested interest”. There are several examples of long, unbroken sentences throughout the Act that make it difficult to comprehend.²⁰

The prescribed amount for partners can produce unfair outcomes

- 6.16 Under the current law, a surviving partner is entitled to a prescribed amount where the deceased is also survived by issue or parents. The prescribed amount is set by regulation and is currently \$155,000 plus interest.²¹
- 6.17 The prescribed amount (sometimes referred to as a statutory legacy) is a method that aims to protect the partner against hardship. Overseas law reform bodies have suggested one of the main objectives of the prescribed amount is to enable a surviving partner to purchase the deceased’s interest in the family home, so the partner does not have to move.²²
- 6.18 There are several issues arising from the use of a prescribed amount and the way it currently operates:

¹⁹ The Courts have interpreted s 77C of the Administration Act differently. See *Re Trotter* HC Christchurch, CIV-2009-409-2584, 10 May 2010; *W v P* [2012] NZFC 3293; and *Warrender v Warrender* [2013] NZHC 787, [2013] NZFLR 565.

²⁰ See for example Administration Act 1969, s 78(1)(a).

²¹ Administration (Prescribed Amounts) Regulations 2009, reg 5.

²² Law Commission of England and Wales *Intestacy and Family Provision Claims on Death: A Consultation Paper* (Consultation Paper No 191, 2009) at [3.9] and [3.14]; and Law Reform Commission of Saskatchewan *Reform of The Intestate Succession Act, 1996: Final Report* (2017) at 9.

- (a) It does not reflect the apparent public preference that an estate be shared between partners and children on a fixed proportion basis regardless of the total estate size.²³
- (b) It can produce inequitable outcomes. In small estates, the prescribed amount may mean that children receive little or none of the estate, potentially leading to Family Protection Act 1955 (FPA) claims for further provision. In other cases, the prescribed amount may not be set high enough to provide the partner with a sufficient legacy. There may be times where the partner's total share of the estate is less than their relationship property entitlement.²⁴
- (c) It is inflexible and does not take into account different ownership structures of the deceased's assets (such as tenancy in common compared with joint ownership).
- (d) The single fixed sum does not account for geographic variation in housing prices.
- (e) It is infrequently reviewed and is not responsive to changes in housing prices over time.²⁵

PROPOSALS FOR REFORM

- 6.19 Our preliminary view is the intestacy regime in the Administration Act should be repealed and new provisions enacted that conform to modern drafting standards.
- 6.20 We have not reached a preliminary view on where the new provisions should sit. One option is they are contained within the new Act. An alternative option is they are kept within the Administration Act.²⁶ The main advantage of containing the intestacy provisions within the new Act is it would consolidate rights to succeed from an estate, whether testate or intestate, in one statute. On the other hand, the Administration Act deals with matters related to intestacy, such as letters of administration and appointments of administrators.
- 6.21 As under the current law, we propose a beneficiary in an intestacy should retain rights to make a relationship property, family provision or contribution claim.
- 6.22 The intestacy regime should be designed to replicate what most intestate people would have done had they made a will. In addition to this overarching objective, there are other objectives that should underpin the regime:
 - (a) The rules should be simple to understand and to implement.
 - (b) The regime should be consistent with the other rights and entitlements family members might have under the new Act, for example a surviving partner's entitlements to relationship property.

²³ Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [182] and figure 17.

²⁴ This is because where an intestate is survived by a partner and descendants, the partner will receive the personal chattels, \$155,000 prescribed amount and one third of the remaining estate.

²⁵ The current amount was set in 2009. The average house price in New Zealand in January 2021 was \$806,151: Property Value "Residential House Values" <www.propertyvalue.co.nz> (formerly QV).

²⁶ See Chapter 1 for our proposals about a single statute.

- 6.23 The proposals for reform we set out below assume that a partially intestate estate should be distributed according to the same rules as a wholly intestate estate.
- 6.24 In Chapter 8 we consider tikanga Māori and the distribution of intestate estates.

Defining “issue”

- 6.25 The current law uses the term “issue” but does not define it.²⁷ We are considering whether this should be replaced with the better understood term “descendants”. Whichever term is used, we propose that it is defined in the new Act so that people understand it to mean all lineal descendants.²⁸ In the rest of this chapter, we use “descendants”.

Other classes of parent–child relationships

- 6.26 We propose that a deceased’s biological children and children the deceased formally adopted in accordance with the Adoption Act 1955 should remain eligible to succeed in an intestacy.
- 6.27 Our preliminary view is that stepchildren and other classes of children for whom the deceased may have accepted parental responsibilities should remain excluded from the intestacy regime (we discuss whāngai below). Although we recognise that the deceased may have wished to provide for them, extending the definition of child or descendant would overcomplicate the law, create practical uncertainties and establish an unreasonable responsibility for administrators.²⁹ Administrators may be required to undertake complicated factual analyses about the nature of the child’s relationship with the deceased. It may have the unintended result of encouraging rather than dissuading claims against the estate. Where the surviving family are all in agreement that a parent–child relationship existed, they may have no trouble accepting that the child should also share in the estate, but where there is contention about that relationship, conflict is likely to arise.
- 6.28 At times, this approach will produce seemingly unfair results, for example, where one of the child’s biological parents died when the child was very young and a stepparent assumed the place of that biological parent. We acknowledge that, in the Succession Survey, 57 per cent of respondents stated that the deceased’s estate should be split evenly between two adult children from the deceased’s first marriage and two adult stepchildren.³⁰ However, we are not convinced that it is the role of the intestacy regime to respond to such situations. Preferably, the deceased would have made a will that suits

²⁷ This is not uncommon. The term “issue” is used frequently in intestacy regimes internationally and is rarely defined.

²⁸ This would accord with most Canadian jurisdictions: Intestate Succession Act RSNWT 1988 c I-10, s 1(1); The Intestate Succession Act CCSM 1990 c 185, s 1(1); Intestate Succession Act RSNL 1990 c I-21, s 2(b); Intestate Succession Act RSNS 1989 c 236, s 2(b); Probate Act RSPEI 1988 c P-21, s 86(b); Wills and Succession Act SA 2010 c W-12.2, s 1(1)(e); Wills, Estates and Succession Act SBC 2009 c 13, s 1; and The Intestate Succession Act SS 2019 c I-13.2, s 2.

²⁹ It would be consistent with the intestacy regimes throughout Australia, the United Kingdom and Canada for the definition of descendants to refer only to natural and legally adopted descendants.

³⁰ A third believed that the children from the first marriage should receive a majority share: Ian Binnie and others *Entitlements to deceased people’s property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [185] and figure 17.

their family circumstances. In the absence of a will, families can agree to share the estate differently to the intestacy rules and in certain circumstances such a child may be eligible to make a claim for a family provision award.³¹

- 6.29 Similarly, our preliminary view is that the intestacy rules should not be extended to include guardians or other parental figures.
- 6.30 We are considering whether whāngai should be excluded from the intestacy regime. We have learned from initial hui with Māori that it would not be appropriate for tamariki whāngai to always be entitled to succeed from their matua whāngai on intestacy alongside any biological children or children adopted according to the Adoption Act. This is because tikanga around whāngai arrangements differ among whānau and hapū. There may be an expectation that a tamaiti whāngai will receive a share of the matua whāngai estate, or the biological parents' estate, or both. If whāngai were excluded from the intestacy regime, their position would be the same as other accepted children. That is, in the absence of a will they may reach an agreement with surviving whānau members or claim a family provision or recognition award. One alternative option would be to allow for provision for whāngai depending on the tikanga of the relevant whānau or hapū. We discuss tikanga Māori and intestacy in more detail in Chapter 8.

Children not born at the time of death

- 6.31 Our preference is that children in utero at the time of the deceased's death who are later born should continue to be eligible to succeed on intestacy.³² However, we are considering whether the regime should allow for other children born after the deceased's death. This might include children born from gametes and embryos stored for posthumous reproduction that have not been implanted in utero at the time of death.
- 6.32 As noted in Chapter 4, the Advisory Committee on Assisted Reproductive Technology (ACART) has undertaken a recent review of guidelines relating to posthumous reproduction.³³ In its discussion document and during its deliberations, ACART considered that where the deceased gave consent for their sperm or eggs to be used to create offspring for their partner, the wishes of the deceased should be enabled through the revised guidelines.
- 6.33 We propose two reform options for consideration if posthumous reproduction is enabled through revised guidelines:
- (a) Retain the current law, which has the effect of excluding children from posthumous reproduction.
 - (b) Amend the law to include children from posthumous reproduction subject to some limitations.

³¹ See Chapter 11 about settlement agreements and Chapter 4 on family provision.

³² Administration Act 1969, s 2(1).

³³ Advisory Committee on Assisted Reproductive Technology (ACART) *Posthumous Reproduction: A review of the current Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man to take into account gametes and embryos* (Manatū Hauora | Ministry of Health, 3 July 2018); and Advisory Committee on Assisted Reproductive Technology (ACART) *Proposed Guidelines for the Posthumous Use of Gametes, Reproductive Tissue and Stored Embryos: Stage two consultation document* (Manatū Hauora | Ministry of Health, July 2020).

Option One: retain the current law excluding posthumous reproduction

- 6.34 There are several reasons not to amend the current regime to include children born from posthumous reproduction:
- (a) It may delay the distribution of intestate estates.
 - (b) Posthumous conception is uncommon, and parents storing their genetic material for future use are likely to be encouraged to make a will that deals with its use.³⁴
 - (c) Recognising legal rights of a child not yet in existence may be detrimental to the rights of other people who might inherit from the deceased.
- 6.35 Most comparable jurisdictions do not provide intestate succession rights to children born from posthumous reproduction.³⁵ Several law reform bodies that have considered the issue have recommended their exclusion.³⁶

Option Two: amend the law to include posthumous reproduction subject to some limitations

- 6.36 The primary rationale for including children born from posthumous reproduction is that it would be in the best interests of that child and would avoid treating children differently based on the way they came into the world.³⁷ This option would be consistent with our preference discussed in Chapter 4 that an unborn child in utero prior to the expiry of the limitation period should be eligible to claim family provision under the new Act.
- 6.37 Several law reform bodies have recommended that children born from posthumous reproduction should be entitled to share in their intestate parent's estate.³⁸ The law reform bodies have suggested restrictions to balance the rights of other entitled family members and to facilitate timely distribution of an intestate estate. These include requiring that the child is born within a specified time limit and requiring notice to interested parties that posthumous reproduction is a possibility.
- 6.38 If there is support for providing intestate succession rights to children born from posthumous reproduction and ACART guidelines are revised to permit posthumous reproduction, we propose that, in order to succeed in an intestacy, the child must be in utero within 12 months from the grant of administration of the estate unless this time period has been extended by the court. The 12-month time period is preferred because

³⁴ The impact of including children born from posthumous reproduction may also depend on which reform proposal is preferred for the distribution between partners and children (discussed later in this chapter).

³⁵ Jurisdictions that provide intestate succession rights to children born from posthumous reproduction include British Columbia, Ontario and South Australia: Wills, Estates and Succession Act SBC 2009 c 13, s 8.1; Succession Law Reform Act RSO 1990 c S.26, ss 1, 1.1(1) and 57(2); and Family Relationships Act 1975 (SA), s 10C(5).

³⁶ See Law Reform Commission of Saskatchewan *Reform of The Intestate Succession Act, 1996: Final Report* (2017) at 18; New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at [7.21]–[7.32]; and Alberta Law Reform Institute *Assisted Reproduction After Death: Parentage and Implications* (Final Report 106, 2015) at vii.

³⁷ See Manitoba Law Reform Commission *Posthumously Conceived Children: Intestate Succession and Dependants Relief; The Intestate Succession Act: Sections 1(3), 6(1), 4(5), 4(6) and 5* (Report 118, 2008) at 16; Law Reform Commission of Saskatchewan *Reform of The Intestate Succession Act, 1996: Final Report* (2017) at 15.

³⁸ Manitoba Law Reform Commission *Posthumously Conceived Children: Intestate Succession and Dependants Relief; The Intestate Succession Act: Sections 1(3), 6(1), 4(5), 4(6) and 5* (Report 118, 2008) at 31; and Ontario Law Reform Commission *Report on Human Artificial Reproduction and Related Matters* (1985) at 278.

it aligns with our proposed time limit to make a claim (see Chapter 13) and promotes timely distribution.

Defining “personal chattels”

- 6.39 We propose that a surviving partner remains entitled to the deceased’s personal chattels as we explain further below. However, the current definition of personal chattels is outdated.³⁹ We propose that the definition of personal chattels should be modernised with reference to the definition of “family chattels” in the PRA as amended in accordance with our recommendations in the PRA review.⁴⁰
- 6.40 Our preliminary view is that taonga should be expressly excluded from the definition of personal chattels. Taonga is excluded from the definition of family chattels in the PRA. In the PRA review, the Commission recommended that the new Relationship Property Act should ensure that taonga cannot be classified as relationship property in any circumstances and that a court cannot make orders requiring a partner to relinquish taonga as compensation to the other partner.⁴¹ By expressly excluding taonga from the definition of personal chattels in the intestacy regime, taonga will not automatically pass to a deceased’s surviving partner. This is important for protecting taonga from being passed outside the whakapapa line. We discuss in Chapter 7 whether taonga should be excluded generally from state succession law.
- 6.41 We are also considering whether heirlooms should be expressly excluded from the definition of personal chattels. The nature of an heirloom is that it is an item of particular importance that is passed down from one generation to another in accordance with some special family custom.⁴² In some situations, the deceased’s children would be devastated that an heirloom passes to the surviving partner. However, it may be onerous to require an administrator to determine whether an item was an heirloom. In comparable jurisdictions, it is uncommon for heirlooms to be expressly excluded.⁴³ Excluding heirlooms from the definition of personal chattels would mean that these do not automatically pass to the surviving partner, and an administrator will then be required to

³⁹ For example, the definition refers to “stable furniture and effects” and “consumable stores”: see Administration Act 1969, s 2(1) definition of “personal chattels”.

⁴⁰ Property (Relationships) Act 1976, s 2 definition of “family chattels”. In the PRA review we recommended amending the definition of family chattels to those items “used wholly or principally for family purposes”: Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R11 and [3.86]–[3.89].

⁴¹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R82.

⁴² *Humphrey v Humphrey* FC Christchurch FAM-2003-009-3044, 25 May 2005 at [112]. See also *H v F* FC Auckland FAM-2005-004-1312, 27 January 2006 at [48]; and *Stuart v Stuart* FC Christchurch FAM-2003-00-5175, 16 March 2005 at [19].

⁴³ Scotland is the only jurisdiction across the UK, Australia and Canada to exclude heirlooms: see Succession (Scotland) Act 1964, ss 8(6)(b) and (c). Section 8(6)(c) defines heirloom to mean any article which has associations with the intestate’s family of such nature and extent that it ought to pass to some member of that family other than the surviving spouse of the intestate. The position of heirlooms was raised by the Law Commission of England and Wales and Australia’s National Committee but neither made recommendations to exclude heirlooms from the definition of personal chattels: Law Commission of England and Wales *Distribution on Intestacy* (Working Paper No 108, 1988) at 19; and New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at [4.17]–[4.19].

value and distribute the heirlooms between the surviving partner and other family members.

- 6.42 In the PRA review, the Commission recommended that items of special significance should be expressly excluded from the definition of family chattels.⁴⁴ This would include items that have special meaning to a partner and are irreplaceable in that a similar substitute item or its monetary value would be an insufficient replacement.⁴⁵ We do not propose that this exception is made to the definition of personal chattels in the intestacy rules. One of the purposes of distinguishing personal chattels from other property is to reduce conflict over the ownership of particular items. Carving out items of special significance to the deceased might undermine this benefit and, unlike heirlooms, an item of special significance to the deceased may not be significant to the deceased's children or may be significant to the deceased's partner.

Qualifying relationship

- 6.43 A qualifying partner should include a spouse, civil union partner and anyone in a qualifying de facto relationship as set out in the PRA (and our recommendations in the PRA review). Generally, a de facto relationship should not qualify if it is less than three years. However, a surviving de facto partner from a relationship of less than three years should be eligible if:⁴⁶
- (a) there is a child of the relationship and the court considers it just that the surviving partner is eligible; or
 - (b) the applicant has made substantial contributions to the relationship and the court considers it just that the partner is eligible.
- 6.44 Where the deceased is survived by more than one qualifying partner, we think these partners should share evenly in the property allocated for a surviving partner.⁴⁷ This would not represent a change from the current law.⁴⁸
- 6.45 Our preliminary view is that separated surviving partners should remain eligible to claim under the intestacy regime provided no more than two years have elapsed since they ceased living together as a couple. This is a shift from the current law, which provides that a former spouse or civil union partner would only cease to be eligible if their marriage or

⁴⁴ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R21.

⁴⁵ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R22.

⁴⁶ This approach will be consistent with our proposals regarding eligibility for relationship property entitlements (Chapter 3) and family provision awards (Chapter 4)

⁴⁷ Note several Australian jurisdictions expressly provide that the surviving partners can enter a written agreement or obtain a court order within a set period to distribute the property differently: Succession Act 2006 (NSW), s 125; Succession Act 1981 (Qld), s 36; Intestacy Act 2010 (Tas), s 26; Administration and Probate Act 1958 (Vic), ss 70Z–70ZE. The distribution of personal chattels can cause difficulties where there are contemporaneous partners and some jurisdictions make special provision for these: see for example Administration and Probate Act 1969 (NT), s 67(3).

⁴⁸ Administration Act 1969, s 77C. See Chapter 3 for our proposed rules to share relationship property contested by surviving partners from contemporaneous relationships.

civil union has been formally dissolved or the court has granted a separation order.⁴⁹ While we recognise this approach may require an administrator to make difficult factual determinations about the date of separation, we favour it because it enables consistency between the treatment of married, civil union and de facto partners.⁵⁰ It would also promote consistency with proposals regarding relationship property claims in Chapter 3, family provision claims in Chapter 4, and revocation provisions under the Wills Act in Chapter 18.

- 6.46 In Chapter 11, we propose that partners should be able to contract out of and settle claims against each other's estates under the new Act provided the agreements conform to the Act's procedural requirements. If the partners have separated and entered an agreement that purports to settle all claims and entitlements to the other's property, even if the marriage or civil union has not been formally dissolved, we propose that the terms of the agreement should mean the surviving partner is ineligible to receive in the deceased partner's intestacy.
- 6.47 There are, however, difficulties with this approach. Couples may have informally settled the division of their relationship property. Where this has happened and one partner dies within two years of separation, the other partner would remain eligible under the intestacy regime. People may feel that this partner is getting a windfall at the expense of other beneficiaries and that this would be contrary to the deceased's intentions. If fewer claimants are eligible to make family provision claims than exist under the FPA (as we propose in Chapter 4), this would generally not be resolved through that mechanism.
- 6.48 One option to manage this problem would be to incorporate a mechanism whereby the affected beneficiaries may bring proceedings to challenge the partner's eligibility on the basis that the couple's informal settlement of their relationship property affairs should mean that the surviving partner is excluded. This may resolve situations perceived to be unfair but it also risks undermining our preference for settlement agreements that meet the requirements of the PRA and increasing delays in estate administration.

Prescribed amount for partners

- 6.49 A possible reform would be to increase the prescribed amount. Where overseas law reform bodies have recommended an increase, the general view has been that any increase should reflect rising house prices and inflation.⁵¹ We do not see this as a satisfactory solution. We have heard concerns that children sometimes miss out entirely because a family home passes by survivorship to the surviving partner, leaving the estate below the value of the current prescribed amount. It is also difficult to set a prescribed amount that reflects house prices given the range in house values across different areas in Aotearoa New Zealand.⁵²

⁴⁹ Administration Act 1969, s 77A.

⁵⁰ The inconsistency in the current law may constitute discrimination under human rights law: New Zealand Bill of Rights Act 1990, s 19(1); and Human Rights Act 1993, s 21.

⁵¹ See for example New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at R6; and Law Reform Commission of Saskatchewan *Reform of The Intestate Succession Act, 1996: Final Report* (2017) at 9.

⁵² See a similar discussion on a partner's protected interest in the family home under the Property (Relationships) Act 1976 in Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [18.14].

- 6.50 Consequently, our preliminary view is that the prescribed amount for partners should be repealed. All options presented in this chapter assume a surviving partner would not receive a prescribed amount.

Partner, no descendants but one or more parent

- 6.51 Our preliminary view is 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. We have heard that the current law of providing one-third of the residuary estate to the deceased's parents runs counter to public expectations. This is supported by the results of the Succession Survey, which found that 73 per cent of respondents agreed or strongly agreed that a surviving partner should get all of an intestate estate when the deceased is also survived by their mother and brother.⁵³

Partner and descendants

- 6.52 Where the deceased is survived by a partner and descendants, the surviving partner should continue to be entitled to the deceased's personal chattels based on the amended definition set out above. This approach will discourage conflict over ownership of the items and help to avoid delay for administrators. We also anticipate that the deceased's partner will have depended on several of the items for day-to-day living. A surviving partner's entitlement to the personal chattels should cause less disruption for the surviving partner than if the chattels were to be sold or distributed to other beneficiaries.
- 6.53 We present three reform options for distribution of the rest of the estate where there is a surviving partner and descendants.

Option One: the partner takes the whole or a greater share of the estate where all the deceased's descendants are of that relationship

- 6.54 Under this option, we propose that a surviving partner would get the entire estate where the deceased's children (or more-remote descendants where the child died before the intestate parent) are of that relationship. We propose that, where one or more of the deceased's children are of another relationship, the deceased's partner takes the personal chattels and 50 per cent of the remaining estate, and the deceased's children share evenly in the remaining 50 per cent.
- 6.55 Option One may be justified on several grounds:
- (a) It would best reflect the practices of most will-makers. International studies have indicated a general preference for prioritising a partner over children, particularly where the children are also of that relationship.⁵⁴ The Succession Survey

⁵³ Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, Research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [164] and figure 16.

⁵⁴ A survey of 548 wills proved in the NSW Probate Registry in 2004 revealed that around 75 per cent of will-makers with a partner and children chose to give the entire residue of their estate to their partner: New South Wales Law Reform Commission *I give, devise and bequeath: an empirical study of testators' choice of beneficiaries* (Research Report 13, 2006) at [3.9]. A survey of 800 wills filed with the court in Alberta in 1992 identified similar results. Of 260 wills involving a surviving spouse and children, 164 (63 per cent) allocated the entire estate to the spouse: see Alberta Law Reform Institute *Reform of the Intestate Succession Act* (Report No 78, 1999) at 190. Older studies conducted in England and

respondents also indicated a preference for prioritising a partner with shared children compared with children of a former relationship but the majority still favoured splitting an estate evenly between children and partner (either in equal shares or with half the estate being allocated to the partner).⁵⁵

- (b) A surviving parent will act as a conduit for their children. Children may share the benefit of the surviving parent inheriting in two possible ways. If the children are young their interests are normally best served by better equipping the surviving parent and if they are adults, they are likely to inherit any unconsumed portion of property from their surviving parent.⁵⁶ If the surviving partner is not the parent of the deceased's children, there is less likelihood the partner would act as a conduit for the deceased's children.
- (c) It eliminates the need for trusts for children of that relationship who are under 18. At times, trusts can be a cumbersome way of providing for minor children.⁵⁷ Difficulties may arise for parents seeking access to funds from trustees for the child's benefit.⁵⁸
- (d) This approach is preferred in several jurisdictions in Australia, Canada and the United States.⁵⁹

the United States are also cited in that report: at 52. A public attitudes survey conducted in the United Kingdom in 2010 found that 51 per cent of respondents would allocate the whole estate to the wife where a married man was survived by his wife and two children over 18 and a further 29 per cent would prioritise the wife. Similar results were seen when respondents were asked about young children: Alun Humphrey and others *Inheritance and the family: attitudes to will-making and intestacy* (National Centre for Social Research, August 2010) at 39–40. Note that when respondents were asked about a cohabitant instead of a wife, only a third (32 per cent) said that the whole estate should be allocated to the partner: at 43.

⁵⁵ When asked what should happen to the estate when an intestate is survived by their partner and the couple's two adult children, 64 per cent said the partner should get more than a per capita share. When presented with a scenario where the children were from an earlier relationship, around 42 per cent thought the partner should get more than a per capita share: Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, Research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [169] and figure 17.

⁵⁶ See Lawrence W Waggoner "The Multiple-Marriage Society and Spousal Rights under the Revised Uniform Probate Code" (1991) 76 Iowa L Rev 223 at 232–233; and the discussion of conduit theory in Law Commission of England and Wales *Intestacy and Family Provision Claims on Death: A Consultation Paper* (Consultation Paper No 191, 2009) at [3.100]–[3.111].

⁵⁷ See the discussion in Law Commission of England and Wales *Family Law: Distribution on Intestacy* (LC187, 1989) at [36].

⁵⁸ This concern was raised in consultation in NSW: see New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at [3.45].

⁵⁹ This includes New South Wales, Victoria, Tasmania, Manitoba, Alberta and British Columbia: see Succession Act 2006 (NSW), ss 112 and 113; Administration and Probate Act 1958 (Vic), ss 70K–70L; Intestacy Act 2010 (Tas), ss 13 and 14; The Intestate Succession Act CCSM 1990 c 185, ss 2(2) and 2(3); Wills and Succession Act SA 2010 c W-12.2, s 61; Wills, Estates and Succession Act SBC 2009 c 13, s 21. It was recommended by the Law Reform Commission of Saskatchewan: see Law Reform Commission of Saskatchewan *Reform of The Intestate Succession Act, 1996: Final Report* (2017) at 10. It also forms part of the Uniform Probate Code that has been enacted by many American states: see Uniform Probate Code § 2-102.

6.56 However, there are potential problems with Option One.⁶⁰

- (a) A parent will not always be a reliable conduit. They will not always choose to pass wealth on to their children, or a subsequent re-partnering may have the effect of diverting some or all the wealth from the children. Under our proposals about family provision (see Chapter 4), older children will have limited recourse if they do not receive a share of the estate when their parent dies intestate.
- (b) Conduit theory may not be relevant in many estates. For example, in low-value estates where the children are adults, it is unlikely that there will be surplus inheritance to be passed on when the surviving parent dies.
- (c) It has been argued that it is wrong in principle for the entitlement of one partner to differ from that of another because of the presence of children from other relationships.⁶¹

Option Two: the partner's share decreases depending on the number of descendants

6.57 Under this option, a partner would take the personal chattels and two-thirds of the remaining estate where there is one child (or their descendants where the child died before the intestate parent) or one-half where there are two or more children (or their descendants). It would be irrelevant whether or not the deceased's children are also children of the partner.

6.58 Option Two may be justified on the grounds of equity. That is, people view it as fairer for the surviving partner to take a larger share when there are fewer children. The Succession Survey did not directly address this matter, however, a sizeable minority indicated favour for splitting estates in equal shares between partners and children.⁶² However, we do not propose a per capita split. In some circumstances (particularly where the deceased had many children), this will mean a surviving partner's entitlement would diminish below their relationship property entitlement, thereby undermining our objective of ensuring consistency with the rights and entitlements under the new Act.

6.59 Another benefit is that as all children will receive a share of the estate under Option Two, there is not a risk that a child might miss out because their parent was an unreliable conduit.

6.60 Where this method has been applied internationally, the common approach is for a partner to take half of the residuary estate (generally in addition to a prescribed amount) where there is one child and one-third where there is more than one child.⁶³

⁶⁰ For further discussion of the criticisms of conduit theory, see Law Commission of England and Wales *Intestacy and Family Provision Claims on Death: A Consultation Paper* (Consultation Paper No 191, 2009) at [3.106]–[3.110]; and the final report Law Commission of England and Wales *Intestacy and Family Provision Claims on Death* (LC331, 2011) at [2.68].

⁶¹ Law Commission of England and Wales *Intestacy and Family Provision Claims on Death* (LC331, 2011) at [2.68].

⁶² Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at figure 17.

⁶³ See Administration of Estates Act (Northern Ireland) 1955, s 7; Administration and Probate Act 1929 (ACT), s 49 and sch 6; Intestate Succession Act RSNS 1989 c 236, s 4(5); Devolution of Estates Act RSNB 1973 c D-9, s 22; Intestate Succession Act RSNWT 1988 c I-10, s 2(6); Intestate Succession Act RSNL 1990 c I-21, s 4.

- 6.61 However, some of the benefits of Option One may be lost under Option Two, such as reducing the need for trusts and the likelihood of split inheritance of the family home. Option Two also introduces different treatment of partners based on the number of children the deceased had, which may be an unwelcome distinction.

Option Three: the partner's share is a set percentage and does not change depending on the number of descendants or the relationship of those descendants to the surviving partner

- 6.62 Under this option, we propose that a surviving partner would take the personal chattels and half of the remaining estate while the other half would be divided evenly between the deceased's children (or their descendants where the child died before the intestate parent).
- 6.63 Option Three has the benefit of being the simplest of the three proposals. However, it may not reduce the number of trusts needed for minor children nor would it reflect what we understand to be the common practice of will-makers to prioritise their surviving partner where the children are of that relationship.

Descendants but no partner

- 6.64 Where the deceased is survived by descendants but no partner, we propose no change to the current law. The deceased's children should share the estate evenly. More remote descendants should share the estate when a child has predeceased the deceased. How the shares of more-remote descendants are to be determined is discussed below, where we consider options for distribution on a per stirpes (by family) approach or a per capita (by head) approach.

No partner or descendants but siblings and parents

- 6.65 Where the deceased is survived only by their siblings and parents, our preliminary view is that the deceased's parents should have priority above siblings.⁶⁴ This is the position under current law as well as in most comparable jurisdictions.⁶⁵ It is likely that the deceased's siblings will inherit from their parents when the parents die.
- 6.66 We are not aware of any research into the distribution preferences of New Zealand will-makers when survived by parents and siblings but a public attitudes survey conducted in England and Wales revealed that people favoured equal sharing or giving priority to parents.⁶⁶

⁶⁴ Under the current law, siblings include half brothers and sisters. We do not propose any change to this.

⁶⁵ This includes England and Wales, Northern Ireland, all Australian states (although in Western Australia siblings get a share of the estate if it is over a certain value: see Administration Act 1903 (WA), s 14) and all common law Canadian provinces (in Québec, the estate is partitioned equally between the parents and siblings: see Civil Code of Québec CCQ-1991 § 674). In Scotland, a surviving parent or parents have the right to one half of the estate and any surviving siblings have the right to the other half: Succession (Scotland) Act 1964, s 2(1)(b).

⁶⁶ Alun Humphrey and others *Inheritance and the family: attitudes to will-making and intestacy* (National Centre for Social Research, August 2010) at 63; and Gareth Morrell, Matt Barnard and Robin Legard *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families* (Final Report, National Centre for Social Research, 2009) at 17–18. These preferences were also reflected in consultation responses to the New South Wales Law Reform Commission: see New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at [9.10].

6.67 In many cases, sharing the estate equally between siblings and parents would require dividing the estate between more people. In some estates, each beneficiary could receive very little. It may also be more complicated for administrators, particularly when property needs to be sold so that its value can be shared. Our preliminary view is that equal sharing should only be considered further if submissions reveal overwhelming public support for it.

No partner, descendants or parents but siblings and nieces and nephews

6.68 Where the deceased is survived by siblings or nieces and nephews but no partner, descendants or parents, our preliminary preference is to retain priority for siblings over nieces and nephews. Administrators would benefit from the ease of transferring the estate to siblings given it is likely to be a smaller class of recipients than nieces and nephews. It also allows for a sibling's share to be distributed to their children if the sibling predeceased the deceased, which we discuss below when considering options for distribution as per stirpes (by family).

No partner, descendants, parents or siblings (or their descendants) but grandparents, aunts and uncles

6.69 Where the deceased is survived by grandparents or aunts and uncles, but no partner, descendants, parents or siblings (or their descendants), we suggest grandparents should continue to take priority over aunts and uncles. This is for the same reasons that we prefer prioritising siblings over nieces and nephews. It is likely to be a smaller class of recipients and it allows for distribution to aunts and uncles if the grandparents predeceased the deceased.

6.70 However, we are considering two alternative options about the method of distribution, either retaining the current law or a generational distribution.

Option One: retain the existing division between the parental lines

6.71 Under the current law, the estate is split equally between the maternal and paternal grandparents and aunts and uncles.⁶⁷ Priority is given first to grandparents and then to aunts and uncles. This means that a per stirpes distribution will apply. If there are no surviving aunts or uncles (or descendants) on one kinship line, the estate will pass to the other.

6.72 This approach is sometimes justified on the grounds that it avoids the entire estate going to next of kin on one side of the family when there are next of kin on both sides.⁶⁸

⁶⁷ Note that the maternal/paternal terminology does not recognise that legal parenthood does not require motherhood or fatherhood. It does not, for example, recognise the at least 1,476 same sex couples living with children recorded in the 2013 census: data included in Table 20: Family type with type of couple, available at Tatauranga Aotearoa | Stats NZ "2013 Census QuickStats about families and households" (4 November 2014) <www.stats.govt.nz>. See also Te Aka Matua o te Ture | Law Commission *Relationships and Families in Contemporary New Zealand* | *He Hononga Tangata, he Hononga Whānau i Aotearoa o Nāianei* (NZLC SP22, 2017) at 35. Our preference is to adopt a gender-neutral option. This would also have the benefit of future-proofing the legislation for the potential to have more than two legal parents: see Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [6.67].

⁶⁸ Manitoba Law Reform Commission *Report on Intestate Succession* (Report 61, 1985) at 32. See also Alberta Law Reform Institute *Reform of the Intestate Succession Act* (Report No 78, 1999) at 154–156.

6.73 However, it may also produce results that do not accord with public expectations. For example, in a situation where a deceased is survived by one maternal cousin and eight paternal cousins, the maternal cousin would take one half of the estate and the paternal cousins would share the other half meaning they would each take one sixteenth of the total estate.⁶⁹

Option Two: provide that aunts and uncles are entitled to the estate only when there is no partner, descendant, parent, sibling (or their descendant) or grandparent

6.74 Under this option, aunts and uncles would receive a share of the estate only where there were no living grandparents. Each generation of relatives would share evenly irrespective of the parental lines. That is, if there were four aunts, they would each get one-quarter of the estate and it would not matter that one was a maternal aunt and three were paternal.

6.75 Option Two may be considered simpler to understand and apply, and its equal treatment of relatives of the same generation might be more likely to reflect how most intestate people would distribute their estate in that situation.

6.76 However, unfairness may arise where the entire estate may devolve to a single branch of the family because there is one surviving relative of the ascendant generation. For example, a maternal grandmother could take everything when there are living paternal aunts and uncles.

6.77 Option Two may improve efficient estate administration but may also slow it down. For example, if there is a single surviving grandparent, an administrator does not need to identify each aunt or uncle, but if the paternal aunts and uncles were easily identifiable and the maternal aunts and uncles were not, this could delay the paternal aunts and uncles getting their share (a problem that would not arise under Option One).

No living grandparent, aunt, uncle, cousin or closer relative (bona vacantia estates)

6.78 When the deceased is not survived by a relative closer than a descendant of their grandparent, the estate would be considered ownerless and be taken by the Crown as bona vacantia.

6.79 We propose that the Crown retains its discretion to distribute any or all of a bona vacantia estate. Discretionary distribution provisions are a fair solution that reflects the practical difficulties involved in locating and making decisions in respect of other relatives.

6.80 However, we suggest that the current provision is amended to clarify that priority would be given to dependants of the deceased (whether kindred or not) followed by any organisation or person for whom the deceased might reasonably be expected to have made provision. Distribution could be made to trustees for these parties if necessary.

6.81 We are also considering whether the list should be extended to include any other organisation or person – something done in several Australian jurisdictions.⁷⁰ Our

⁶⁹ This was raised by the Manitoba Law Reform Commission when it reviewed its position in 2008: see Manitoba Law Reform Commission *Posthumously Conceived Children: Intestate Succession and Dependants Relief*; The Intestate Succession Act: Sections 1(3), 6(1), 4(5), 4(6) and 5 (Report 118) at 28.

⁷⁰ See for example s 38 of the Intestacy Act 2010 (Tas); and s 137 of the Succession Act 2006 (NSW). Both provisions were enacted following recommendation by Australia's National Committee and are modelled on s 20 of the Property

preliminary view is that the public would see benefit in having a broad list that allows charities, community groups, whānau, hapū or iwi groups or other organisations to utilise funds that would otherwise vest in the Crown. Presently, extending the list would be of little value because it is rare for estates to vest in the Crown as bona vacantia.⁷¹ However, this is not the case in all jurisdictions⁷² nor will it necessarily be the case in Aotearoa New Zealand in the future. For example, it is possible that lower birth rate trends could lead to more bona vacantia estates.

Statutory trusts for minors

- 6.82 In our preliminary view, the statutory trust regime for minors should continue.⁷³
- 6.83 There will be circumstances in which it is disadvantageous for the share of the estate to be held on trust, such as where the minor's share is of low value and the trust incurs professional management fees. A child's interests are generally best served by the person responsible for their daily care having sufficient cash assets or income. In such circumstances, trustees should have the discretion to distribute the capital. The ability to make such advancements is governed by sections 62–64 of the Trusts Act 2019.⁷⁴
- 6.84 Under the current law, if a beneficiary dies before turning 18, their share of an estate will be distributed to the deceased's next of kin as if the minor had predeceased the deceased.⁷⁵ This is a compelling argument for delaying absolute vesting in minors as the alternative might mean that a further grant of administration is required if the minor inherited more than \$15,000. Our preliminary view is that the current law should be retained.
- 6.85 However, several other jurisdictions provide for the absolute vesting of a minor's share at any age.⁷⁶ One of the justifications for absolute vesting at any age is that it allows a minor's share to pass to the minor's children if the minor dies before the age of 18.⁷⁷

Law Act 1974 (Qld): see New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at R39 and [10.38]–[10.40].

⁷¹ Only one estate, valued at approximately \$15,000, vested in the Crown between January 2017 and August 2020: email from Te Tai Ōhanga | The Treasury to Te Aka Matua o te Ture | Law Commission regarding bona vacantia estates (14 August 2020). No application had been made regarding that estate.

⁷² For example, in NSW in the period 2001–2005 the Public Trustee paid A\$24,289,946.86 into Treasury from 92 estates (averaging A\$264,000 each). During that period, the limit was set at aunts and uncles rather than first cousins or more remote relatives: see New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at [10.4].

⁷³ Note, we recommend in Chapter 18 that all new provisions should conform to modern drafting standards.

⁷⁴ Sections 62–64 replaced ss 40–41 of the Trustee Act 1956, which were overly complex and restrictive: see Te Aka Matua o te Ture | Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [6.11]–[6.15].

⁷⁵ This change came into force in 30 January 2021: see Trusts Act 2019, sch 4 pt 1. Previously those under 20 years or otherwise married or in a civil union could take an absolute interest: Trustee Act 1956, s 40.

⁷⁶ For example, NSW, Tasmania, Western Australia, South Australia, Queensland and Victoria: see Succession Act 2006 (NSW), s 138; Intestacy Act 2010 (Tas), s 39; Administration Act 1903 (WA), s 17A; South Australian Law Reform Institute *South Australian Rules of Intestacy* (Report 7, 2017) at [4.7.1]; and New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at [12.9].

⁷⁷ South Australian Law Reform Institute *Cutting the cake: South Australian rules of intestacy* (Issues Paper 7, 2015) at [298].

Property outside the estate

- 6.86 Our preliminary view is that the intestacy regime should continue to take no account of property that does not fall into the estate.
- 6.87 Any system that seeks to take account of gifts made before the deceased's death or assets that pass by survivorship would be complicated. International approaches vary. Some jurisdictions require administrators to take account of lifetime gifts made within a certain time period (normally five years) unless a contrary intention can be proved.⁷⁸ Other jurisdictions require administrators to take lifetime gifts into account only where there is evidence that the deceased intended the gift to be an advancement on the recipient's share of the estate.⁷⁹ Such provisions are generally aimed at achieving fairness or equality. However, they may not reflect the deceased's intention because, for example, the deceased may have intended jointly owned property to pass by survivorship on their death. It may be a considerable task for an administrator to scrutinise transactions the deceased made in the five years before death. Disputes may also occur about the value of the advancement or whether any oral or written statement made by the deceased is sufficient proof of the deceased's intention.
- 6.88 Many jurisdictions have done away with these types of provisions, and this has commonly been the recommendation of law reform bodies, including the Australian National Committee for Universal Succession Laws, the South Australian Law Reform Institute, the Law Commission of England and Wales, and the Law Reform Commission of British Columbia.⁸⁰
- 6.89 The intestacy regime's function is to distribute property that the deceased did not dispose of through a will. It seems contrary to this function to unwind dispositions or survivorship arrangements made before death.
- 6.90 Mechanisms such as family provision claims and anti-avoidance mechanisms protect beneficiaries to whom the deceased owed a duty.⁸¹ Surviving family members could continue to agree to a different distribution if they consider the statutory distribution unjust (we discuss agreements in Chapter 11).

⁷⁸ See for example Australian Capital Territory, Northern Territory and South Australia: Administration and Probate Act 1929 (ACT), s 49BA; Administration and Probate Act 1969 (NT), s 68(3); Administration and Probate Act 1919 (SA), s 72K.

⁷⁹ This is common in Canadian provinces: see The Intestate Succession Act CCSM 1990 c 185, s 8; Wills, Estates and Succession Act SBC 2009 c 13, s 53; Wills and Succession Act SA 2010 c W-12.2, ss 109 and 110; Intestate Succession Act RSNWT 1988 c I-10, s 11; Estates Administration Act RSO 2014 c E.22, s 25; Devolution of Estates Act RSNB 1973 c D-9, s 73; Intestate Succession Act RSNS 1989 c 236, s 13; Estate Administration Act RSY 2002 c 77; and Intestate Succession Act RSNWT (Nu) 1988, c I-10, s 11.

⁸⁰ New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at R43; South Australian Law Reform Institute *South Australian Rules of Intestacy* (Report 7, 2017) at R43–R44; Law Commission of England and Wales *Family Law: Distribution on Intestacy* (LC187, 1989) at [62]; Law Reform Commission of British Columbia *Report on Statutory Succession Rights* (LRC 70, 1983) at 38–39.

⁸¹ See Chapters 4 and 9.

Distributing to descendants when their parent predeceased the deceased

6.91 We are considering two options for distributing an intestate estate where the family member of the deceased who would otherwise receive a share has died but has descendants. The options would apply to lineal descendants of the deceased (the deceased's children, grand or great-grandchildren) and to lineal descendants of the deceased's siblings (the deceased's nieces and nephews, grand or great-grand nieces and nephews) or the deceased's aunts and uncles' lineal descendants (cousins of all degrees).

Option One: retaining the per stirpes (by family) distribution

6.92 The per stirpes (by family) distribution is the current mechanism. It works by dividing a parent's share in equal portions among their living children.

6.93 The per stirpes method is usually justified on the grounds that it will replicate the distribution that would generally occur if the person entitled had died after the deceased (that the parent would have passed on their inheritance to their children).⁸² It may also promote efficient administration, particularly as administrators are able to make distributions to known relatives while they reserve the shares of unidentified relatives.⁸³

Option Two: introducing a limited per capita (by head) distribution at each generation

6.94 Introducing a limited per capita (by head) distribution would mean that when some but not all of one generation has predeceased the deceased, they take on a per stirpes basis but when an entire generation has predeceased the deceased, the descendants take on a per capita basis.⁸⁴

6.95 For example, the deceased had two children, neither of whom survived her. Six grandchildren survive the deceased: son A's four children and son B's two children. The six grandchildren would each get one sixth of the whole estate. However, if only son B had died before the deceased, son A's four children would each get one quarter of their father's half of the estate.

6.96 It may be seen as fairer to treat all of one generation equally (for example, grandchildren) when none of their parents (for example, the deceased's children) are alive and may better reflect the presumed wishes of most people who die intestate.⁸⁵ However, the method may involve a degree of complexity and delay where there is difficulty tracing members of a generation.

⁸² New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at [8.17]; and Alberta Law Reform Institute *Reform of the Intestate Succession Act* (Report No 78, 1999) at 139–140.

⁸³ New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at [8.17]; and South Australian Law Reform Institute *South Australian Rules of Intestacy* (Report 7, 2017) at [4.6.3].

⁸⁴ This approach is taken in Scotland: see Succession (Scotland) Act 1964, s 6. The Scottish Law Commission reviewed the process in 2009 and recommended retaining it: see Scottish Law Commission *Report on Succession* (Scot Law Com No 215, 2009) at [2.43]. It is also the method used in South Australia: see Administration and Probate Act 1919 (SA), ss 72I and 72J. In 2017 the South Australian Law Reform Institute recommended it be continued for grandchildren but that in other cases distribution should be per stirpes: see South Australian Law Reform Institute *South Australian Rules of Intestacy* (Report 7, 2017) at R25.

⁸⁵ Australia's National Committee believed a majority of Australians would prefer this method: see New South Wales Law Reform Commission *Uniform succession laws: intestacy* (R116, 2007) at [8.32].

SUMMARY OF PROPOSALS FOR REFORM

- The intestacy regime should be designed to replicate what most intestate people would have done had they made a will. The rules should be simple to understand and apply, and be consistent with relationship property entitlements and rights to claim family provision under the new Act.
- Two options are presented for where the new provisions should sit:
 - Option One — in the new Act.
 - Option Two — remaining in the Administration Act.
- The definition of “issue” (or “descendants” if the term is preferred) should include only the deceased’s biological children or adopted in accordance with the Adoption Act. However, two options are presented in relation to whāngai:
 - Option One — exclude whāngai from the descendants entitled to inherit in intestacy.
 - Option Two — allow provision for whāngai depending on the tikanga of the relevant whānau or hapū.
- Two options are presented in relation to children born from posthumous reproduction:
 - Option One — retain the current law excluding children from posthumous reproduction.
 - Option Two — amend the law to include children from posthumous reproduction subject to notice requirements and a time limit.
- Changes are also proposed to clarify and modernise the definitions of personal chattels and qualifying relationships.
- The prescribed amount for partners should be repealed.
- Where the deceased is survived by a partner and no descendants, the partner should take entirely. A parent should no longer receive any of the estate.
- Three options are presented for where the deceased is survived by a partner and descendants:
 - Option One — a partner takes the entire estate where the descendants are of that relationship. Where there is at least one descendant of another relationship, the partner takes the personal chattels and half of the remaining estate with the rest shared equally among the descendants.
 - Option Two — a partner takes the personal chattels, and two-thirds of the remaining estate where there is one child (or descendants of that child) or one half where there are two or more children (or their descendants).
 - Option Three — a partner takes the personal chattels and half of the remaining estate irrespective of the number of children.
- Where the deceased is survived by no partner but descendants, the current law that the children (or their descendants) share the estate should remain.
- Where the deceased is survived by no partner or descendants but by parents and siblings, the priority in favour of parents should remain.

- Two options are presented for the distribution to grandparents, aunts and uncles:
 - Option One – retain the current division between parental lines.
 - Option Two – provide that aunts and uncles only inherit when there is no living grandparent.
- The Crown should have a wider discretion to distribute bona vacantia estates.
- Minor beneficiaries should continue to take a vested interest held on trust until they reach 18 years of age.
- The intestacy rules should continue to take no account of property outside the estate.
- Two options are presented regarding the method of distribution to descendants where their parent predeceased the deceased:
 - Option One – retain the per stirpes (by family) distribution.
 - Option Two – introduce a limited per capita (by head) distribution at each generation.

QUESTIONS

Q21

Do you agree with the issues we have identified?

Q22

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

Q23

What are your views on the proposals for reform?

Q24

Do you have any other suggestions for reform?

CHAPTER 7

Succession and taonga

IN THIS CHAPTER, WE CONSIDER:

- the nature of taonga, including whenua Māori;
- how taonga might be defined in a succession context; and
- whether taonga should not be subject to general succession law and instead be governed by tikanga Māori.

INTRODUCTION

7.1 This chapter considers whether state succession laws should expressly provide that those laws would not apply to taonga but that tikanga Māori should instead apply.

WHENUA MĀORI

7.2 Whenua Māori holds a central place in Māori cultural practices and law.¹ The whakataukī “Te toto o te tangata he kai; te oranga o te tangata he whenua” (Food is the blood of a person, but the well-being of a person lies in the land)² demonstrates the importance of whenua to Māori. Every Māori shares descent lines to Papatūānuku and so has a whakapapa relationship with whenua.³

7.3 Prior to the introduction of Pākehā law, Māori had an established system of land tenure grounded in tikanga Māori.⁴ Today, succession to whenua Māori is determined by a

¹ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 25.

² This is the translation used in Jacinta Ruru and Leo Watson “An Introduction to Māori land, Taonga and the Māori Land Court” (paper presented to Property Law Conference – Change, it’s inevitable!, Auckland, 28 June 2018) at 2.

³ See Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 13–15; and Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Auckland, 1994) at 171–175.

⁴ See generally IH Kawharu *Māori Land Tenure: Studies of a Changing Institution* (Clarendon Press, Oxford, 1977); George Asher and David Naulls *Māori Land* (New Zealand Planning Council, Wellington, 1987); and Caren Wickliffe, Stephanie Milroy, Matiu Dickson *Laws of New Zealand Māori Land* (online ed). This system may still be practised today, although it is not recognised by state law.

special legislative regime under Te Ture Whenua Maori Act 1993 (TTWMA) that, in theory, allows succession to whenua Māori in a way that reflects tikanga Māori.⁵ However, succession to all other property owned by Māori is determined by general succession law.⁶

- 7.4 This chapter assumes the continuation of TTWMA for whenua Māori and asks whether there are other taonga that should also be excluded from the general law of succession. If such taonga are to be so excluded and instead governed by tikanga, how should this be expressed in legislation?

TTWMA

- 7.5 TTWMA is the first piece of Māori land legislation that seeks to retain, rather than alienate, Māori interests in their whenua.⁷ Its enactment represented a substantial shift in recognition of the centrality of whenua Māori to the well-being of Māori generally. TTWMA applies to the remaining five per cent of whenua in Aotearoa New Zealand that is Māori freehold land.⁸
- 7.6 TTWMA recognises that whenua Māori is a taonga tuku iho (something of value passed down through generations) of special significance to Māori.⁹ It controls the determination of land as whenua Māori and places restrictions on dealing with it, including through succession.¹⁰ The regime under TTWMA restricts alienation of whenua Māori to those who have a close whakapapa connection to the whenua.¹¹ In doing so, it recognises the tikanga of maintaining land within the whakapapa lines of the deceased and their whānau.¹²

Recent changes to TTWMA

- 7.7 Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Act came into force on 6 February 2021. The amendments are intended to reduce the complexity and compliance requirements faced by Māori when they engage with the courts. Changes include the following:¹³
- (a) Simple and uncontested succession and trust applications can now be heard by the registrar.¹⁴

⁵ *Appeal by Ngahuia Tawhai* [1998] NZAR 459 at 469 (Māori Appellate Court).

⁶ Te Ture Whenua Maori Act 1993, ss 100–103 and 110.

⁷ Caren Wickliffe, Stephanie Milroy and Matiu Dickson *Laws of New Zealand Māori Land* (online ed) at [11].

⁸ Te Ture Whenua Maori Act 1993: An Introduction (Te Puni Kōkiri, Wellington, 1993) at 9.

⁹ Te Ture Whenua Maori Act 1993, preamble and s 2.

¹⁰ Te Ture Whenua Maori Act 1993, pts 4 and 6.

¹¹ A whāngai is also able to succeed under Te Ture Whenua Maori Act 1993, s 115.

¹² *Appeal by Ngahuia Tawhai* [1998] NZAR 459 at 469 (Māori Appellate Court).

¹³ Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill 2019 (179-2) (select committee report) at 1.

¹⁴ Te Ture Whenua Maori Act 1993, s 113A.

- (b) The determination of whāngai for the purposes of succeeding to whenua Māori must be made in accordance with the tikanga of the relevant iwi or hapū.¹⁵
- (c) It is no longer possible to leave a life interest in Māori freehold land to a partner in a will. 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. A similar change has been made in relation to intestate estates. This means the descendants of the deceased immediately succeed to the beneficial interest in the property.¹⁶
- (d) Parties may now elect to mediate any dispute over which te Kooti Whenua Māori | the Māori Land Court (the Māori Land Court) has jurisdiction. The new dispute resolution process is designed to resolve disputes:¹⁷
 - as far as possible, in accordance with the relevant tikanga of the whānau or hapū with whom they are affiliated, for both the process and the substance of the resolution.
- (e) The Māori Land Court must now hear all Family Protection Act 1955 (FPA) and Law Reform (Testamentary Promises) Act 1949 (TPA) claims if the claim relates only to Māori freehold land.¹⁸

7.8 In its review of the Property (Relationships) Act 1976 (PRA), the Commission considered the issues relating to family homes on whenua Māori and recommended that the Government should consider providing remedies in relation to family homes built on whenua Māori through TTWMA.¹⁹ We are unsure whether the changes to TTWMA have resolved these issues in practice and seek feedback on this question.

Land lost following the 1967 amendments to the Māori Affairs Act 1953

7.9 During our preliminary consultation with Māori, a recurring concern was the effect of the 1967 amendments to the Māori Affairs Act 1953.²⁰ Those amendments allowed the registrar of the Māori Land Court to change the status of Māori freehold land to general land if it had fewer than five owners.²¹ This resulted in much of the land being removed from the appropriate whakapapa line by sale or transfer to those who did not whakapapa to the land. This commonly happened through succession, as on intestacy, the owner's interest would pass to their partner who was not a descendant of the land. We received similar feedback in the PRA review.²²

¹⁵ Te Ture Whenua Maori Act 1993, s 114A.

¹⁶ Te Ture Whenua Maori Act 1993, ss 108A and 109AA.

¹⁷ Te Ture Whenua Maori Act 1993, pt 3A.

¹⁸ Family Protection Act 1955, s 3A; and Law Reform (Testamentary Promises) Act 1949, s 5.

¹⁹ See Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R80 and [14.29]–[14.30].

²⁰ Maori Affairs Amendment Act 1967.

²¹ Maori Affairs Amendment Act 1967, pt 1.

²² Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [14.43].

- 7.10 There is a mechanism for changing the status of land from general land to Māori freehold land under TTWMA.²³ Although it can be difficult to achieve as the court must be satisfied there is sufficient agreement among owners, it provides an avenue for those who have interests in land affected by the 1967 amendments to change the land back into Māori freehold land if they wish. The remedy for land that has passed outside the appropriate whakapapa line because of the 1967 amendments is not something we can address in this review. We think it may be better suited to separate consideration by Māori and the Crown.

SUCCESSION TO TAONGA OTHER THAN WHENUA MĀORI

Taonga

- 7.11 Items that from an ao Māori perspective are of particular concern to a whānau or hapū or iwi could be excluded from the application of general succession law. Items that are highly prized by the collective on succession might be items that:²⁴
- (a) are held communally on behalf of whānau, hapū or iwi;
 - (b) have been inherited from ancestors;
 - (c) were received through tuku (gifts);
 - (d) have mana or tapu connotations;
 - (e) change culturally after death, for example body parts; or
 - (f) can otherwise be subsumed under the term taonga.
- 7.12 Items that fall under these categories arguably ought not to be treated as personal property of the deceased as the deceased is not an owner in the ordinary sense, but rather holds a kaitiaki role over these items on behalf of a whānau or hapū. Any new kaitiaki of such items may be outside the immediate family of the deceased and not necessarily of the deceased's choosing.²⁵ Examples may include korowai (cloaks), whakairo (carvings), items closely associated with the deceased that become more tapu after they have died, or whenua Māori that is not Māori freehold land. Although we recognise taonga may hold a wider meaning, for the purposes of this chapter, we will use the word to describe tangible items that are highly prized by the collective.

Removing taonga from the general law of succession

- 7.13 If taonga were to be clearly exempt from the general law of succession, there would need to be express statutory provisions to that effect. This might be achieved through amending the definition of "estate" in the Administration Act 1969 and the definition of "property" in section 8(5) of the Wills Act 2007 to exclude taonga. Taonga would also

²³ Te Ture Whenua Maori Act 1993, s 133.

²⁴ See Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 35.

²⁵ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 46; and Jacinta Ruru "Taonga and family chattels" [2004] NZLJ 297 at 298.

need to be excluded from property that may be available to satisfy claims against an estate under the new Act.²⁶

- 7.14 We have heard during our preliminary consultation that disputes over taonga do not usually make their way into the courts.²⁷ Tikanga operates on a day-to-day basis in Aotearoa New Zealand and disputes involving taonga are usually resolved within the whānau or hapū to which they belong. It is possible that creating a statutory exclusion of these items would simply recognise what is already happening in practice: that taonga are being succeeded to according to tikanga outside the general law of succession.

Defining taonga

- 7.15 If removing taonga from the general law of succession is desirable, taonga would need to be defined within general succession law to exclude it. This could be done by defining taonga according to the tikanga of the relevant whānau or hapū. Under this approach tikanga would determine whether or not an item was subject to the general rules of succession. Professor Jacinta Ruru suggested the following definition in 2004:²⁸

[A] valued possession held in accordance with tikanga Maori and highly prized by the whanau, hapu or iwi.

- 7.16 In the PRA review, the Judges of the Māori Land Court commented that, if taonga was to be defined, the Waitangi Tribunal's definition of "taonga work" in its *Ko Aotearoa Tēnei* (Wai 262) Report may be useful to consider in this context:²⁹

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

- 7.17 Alternatively, a more prescriptive definition might be adopted. Such an approach may assist decision-makers who have to determine whether an item is a taonga. However, there are known risks with a prescriptive definition that have been demonstrated by the inclusion of kupu Māori (Māori words) in other statutes.³⁰

²⁶ This would include relationship property entitlements, family provision and contribution claims, and claims by unsecured creditors.

²⁷ Although, they are sometimes subject to agreements between the parties that may be reached through whānau hui or whānau mediation facilitated by the Māori Land Court.

²⁸ Jacinta Ruru "Taonga and family chattels" [2004] NZLJ 297 at 298.

²⁹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuatahi* (Wai 262, 2011) at 54; and Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [14.42].

³⁰ Examples include the use of "kaitiakitanga" in the Resource Management Act 1991 and "whanaungatanga" in the Oranga Tamariki Act 1989. See for example *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 (HC); *Tautari v Northland Regional Council* [1996] NZPT 172; and *Minhinnick v Minister of Corrections* [2004] EnvC 109. The inclusion of whanaungatanga within the Oranga Tamariki Act 1989 is a recent development and has not yet fully been tested in the courts.

Should taonga be limited to items that hold cultural significance for Māori?

- 7.18 “Taonga” is a kupu Māori that originates from a Māori perspective. Arguably, items that in practice have similar properties as taonga should not be considered taonga if they have no connection to Māori culture. For example, an item may be a gift handed down, hold special significance and carry with it communal obligations but was not owned, held, or made by a Māori person or have any Māori association or content.³¹ Under this view such items are not taonga.
- 7.19 Another view would be that taonga may have a much broader definition not limited to items that have a connection to Māori culture. This view arose in the context of the PRA, where section 2 of the Act excludes taonga from the definition of family chattels but does not define taonga. The courts initially took a broad interpretation to taonga in the PRA context and this interpretation was not Māori-specific.³² In *Page v Page*, Durie J commented that the “ordinary and everyday use” of taonga would encompass “without difficulty” the artworks of a non-Māori person’s mother that the plaintiff had inherited.³³ This approach to taonga would include items that had no connection with Māori culture. It may be that, to be a taonga under this view, an item must have certain properties that are inherently Māori, even though these are not recognised by the possessor. Or it may extend to items that from a Māori perspective do not have any mauri, tapu, or other intrinsic properties that may contribute to a Māori understanding of taonga.
- 7.20 In a 2012 case under the PRA, *te Kōti Whānau | the Family Court* concluded that taonga should be defined within a tikanga Māori construct but the concept could be applied pan-culturally provided the central elements of tikanga were shown to exist.³⁴ The Court relied on evidence from Professor Paul Tapsell that for an item to become taonga, it must be accompanied, through a marae or marae-like setting, with elements of whakapapa, mana, tapu and kōrero.³⁵
- 7.21 In the PRA review, the Commission recommended that the new Relationship Property Act should ensure that taonga cannot be classified as relationship property in any circumstances and that a court cannot make orders requiring a partner to relinquish taonga as compensation to the other partner.³⁶ This recommendation was made to

³¹ See Jacinta Ruru “Taonga and family chattels” [2004] NZLJ 297 for a wider discussion of taonga within the context of the PRA.

³² *Page v Page* [2001] NZHC 592, (2001) 21 FRNZ 275; *Perry v West* (2002) 21 FRNZ 575 (DC); and *Perry v West* [2004] NZFLR 515 (HC).

³³ *Page v Page* [2001] NZHC 592, (2001) 21 FRNZ 275 at [46]. Note that this was obiter dicta and the Judge also stated he had not considered the meaning of “taonga” in the context of the PRA.

³⁴ *S v S* [2012] NZFC 2685 at [54(b)] and [58].

³⁵ *S v S* [2012] NZFC 2685 at [57]. Professor Jacinta Ruru and Leo Watson have observed that *S v S* has “provided a more Māori-aligned precedent for understanding taonga”: Jacinta Ruru and Leo Watson “Should Indigenous Property be Relationship Property?” in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance* (Intersentia, Cambridge, 2017) 203 at 218.

³⁶ *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R82 and [14.46].

recognise that kaitiakitanga should be prioritised over division of taonga, in accordance with the Māori worldview.³⁷

- 7.22 The Commission also recommended that taonga should be statutorily defined within a tikanga Māori construct but the definition should exclude land. We concluded that treating land that does not have the status of Māori land under TTWMA as taonga and excluding it from division under the new relationship property statute would exceed the protections given to it under TTWMA.³⁸ We also suggested that Māori should be consulted to inform the drafting of any definition of taonga.³⁹
- 7.23 We discuss tikanga and the resolution of succession disputes in Chapter 15.

QUESTIONS

Q25

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

Q26

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?

Q27

Should taonga be excluded from general succession law?

Q28

Should taonga be subject to tikanga to determine how it is succeeded to? If so, how should this be given effect?

Q29

Should taonga, or some other appropriate kupu, be defined by reference to tikanga Māori? If so, should the relevant tikanga be that of the relevant whānau, hapū or iwi?

Q30

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

³⁷ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [14.47].

³⁸ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R81 and [14.43]. Although TTWMA does not specifically protect general land owned by Māori, there are mechanisms for converting it into Māori freehold land.

³⁹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [14.44].

CHAPTER 8

Weaving new law

IN THIS CHAPTER, WE CONSIDER:

- how responsible kāwanatanga involves recognising and providing for Māori perspectives in state law; and
- how tikanga might recognise and respond to the expression of testamentary wishes, intestacy, obligations to a surviving partner and other family members (particularly children), and obligations to someone who has contributed to the deceased or the estate

INTRODUCTION

- 8.1 The Treaty contemplates not only the exercise of tino rangatiratanga by Māori on a daily basis, independently of state law, but also the exercise of kāwanatanga by the Crown. We suggest that responsible kāwanatanga involves recognising and providing for Māori perspectives in the development of state law.¹ This involves considering tikanga Māori in both defining and responding to the “problem” rather than just incorporating tikanga into a pre-existing model of law.
- 8.2 To develop this approach, we ask in this chapter how tikanga might recognise and respond to:
- (a) the expression of testamentary wishes;
 - (b) the distribution of property when there is no expression of testamentary wishes;
 - (c) a deceased’s obligations to a surviving partner on their partner’s death;
 - (d) a deceased’s obligations to other family members, particularly tamariki (children); and
 - (e) a deceased’s obligations to someone who has contributed to the deceased or the estate.
- 8.3 To provide context to these questions, and to facilitate feedback, we have sought in this chapter to identify key tikanga perspectives as well as highlighting the relevant state law.

¹ See the discussion in Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Waikato L Rev 1 at 12; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuatahi (Wai 262, 2011) at 246.

These questions address the rights and obligations at the heart of this review, and they have already been considered from a state law perspective in Chapters 2–6.

- 8.4 We recognise too the importance of weaving tikanga into the matters we discuss in Part 3 in relation to making and resolving claims. We discuss tikanga and dispute resolution in Chapter 15. However, tikanga may affect other matters, such as the role of personal representatives when succession disputes arise among whānau members. We welcome feedback on any other areas where state law ought to recognise and respond to tikanga and any kawa (protocols) necessary to enliven that tikanga.
- 8.5 It is important to recognise and acknowledge the risk in attempting to reconcile tikanga and the values reflected in current state law, given its largely British origins. The two different systems are born from different societal and cultural roots.² Care must be taken not to assume likeness where it does not exist and to recognise that certain tikanga concepts may lose their meaning when divorced from those cultural roots.³ On the other hand, there may be similarities, the values may enrich each other and they may co-exist to contribute to the making of better law.⁴ We seek to mitigate the risks by looking at these issues from first principles. We are also mindful of the need to contemplate tikanga operating in a contemporary context.
- 8.6 In chapter 1 we outline criteria for good succession law. In summary, the criteria are to:
- (a) sustain property rights and expectations;
 - (b) promote positive outcomes for families and whānau in Aotearoa New Zealand; and
 - (c) assist efficient estate administration and dispute resolution.
- 8.7 In our view, these criteria are valuable from both Māori and non-Maori perspectives. We do recognise, however, that sometimes they may not all be able to cohabit in the same space, and Māori may afford different priorities to certain objectives where they are in tension with one another.

TIKANGA AND TESTAMENTARY FREEDOM

- 8.8 We know little about the place of testamentary freedom within contemporary Māori values. Many Māori may value their individual property rights and see testamentary freedom as a further expression of their mana. Other Māori, however, may see communal obligations as paramount and place less weight on their own personal choices regarding their property. Often, these two views may be held in tension.

² See generally Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996); Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Waikato L Rev* 1; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262); Anne Salmond *Tears of Rangī: Experiments Across Worlds* (Auckland University Press, Auckland, 2020); Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016).

³ See Annette Sykes “The myth of Tikanga in the Pākehā Law” (Nin Tomas Memorial Lecture 2020, Te Whare Wānanga o Tāmaki Makaurau | University of Auckland, Auckland, 5 December 2020).

⁴ See Nin Tomas “Maori Concepts of Rangatiratanga, Kaitiakitanga, the Environment, and Property Rights” in David Grinlinton and Prue Taylor (eds) *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff Publishers, Leiden, 2011) 219 at 240–241.

- 8.9 In the Succession Survey, when asked whether a person should be allowed to leave family members out of their will, 82 per cent of Māori respondents agreed.⁵ This was higher than 80 per cent of the overall population who agreed but close to the 83 per cent of those agreeing who identified as European.⁶ These findings suggests that Māori, like other groups, value testamentary freedom.
- 8.10 The significance of testamentary freedom emerges in the following discussion, particularly in considering how tikanga might operate to alter the wishes expressed in a will or the rules of intestacy.

QUESTIONS

Q31

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

ŌHĀKĪ

- 8.11 Ōhākī may be understood loosely as an oral will.⁷ The physical act of giving an Ōhākī is something close to a “deathbed declaration”, which is made as a person recognises the signs of oncoming death.⁸ It is ideally made in the kāinga of the person dying, in the presence of their whānau.⁹ The whānau recognise the situation and treat it with appropriate respect.¹⁰
- 8.12 Ōhākī must be understood within the particular context in which it is practised.¹¹ There is no universal approach or standardised practice for Ōhākī, although similar tikanga values are present throughout. The person giving the Ōhākī usually has a heightened tapu because they are close to death.¹² Whanaungatanga plays an important role, as the Ōhākī

⁵ Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [96].

⁶ Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [96].

⁷ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 31.

⁸ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 119–120.

⁹ Norman Smith *Maori Land Law* (AH & AW Reed, Wellington, 1960) at 59.

¹⁰ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 120.

¹¹ A review of the available literature reveals different approaches to Ōhākī. In our preliminary consultation with Māori we heard stories about how Ōhākī was practised and understood in different ways within different whānau.

¹² Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 54.

is given and validated in the presence of the whānau. Mana can help determine the weight attributed to an ōhākī.¹³

- 8.13 It is unclear exactly how long ōhākī has been practised, but it is a Māori practice that predates European contact. In 1895, ōhākī were recognised by the Native Appellate Court.¹⁴ Within the year, legislative action was taken to abolish ōhākī as a legally recognised custom.¹⁵ However, judges continued to give it effect for some years after 1895.¹⁶
- 8.14 Today, ōhākī remain unrecognised by state law. Certain requirements under the Wills Act 2007 prevent ōhākī from operating as a means of testamentary disposition within current state law.¹⁷ Māori may wish to have the choice to make either a written will or an ōhākī and have the ōhākī enforced under state law. During the passage of the Wills Act through Parliament, ōhākī were discussed many times by members of the Māori Party, who expressed a wish for them to be recognised within the law.¹⁸
- 8.15 If ōhākī were to be recognised in state law, consideration would need to be given to how their terms would be established. This may require whānau members present providing some evidence of what the deceased said.

QUESTIONS

Q32

Should ōhākī 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 ōhākī?

Q33

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

¹³ See the example given by the Hon Dr Pita Sharples concerning the second Māori king, Tāwhiao: (10 October 2006) 634 NZPD 5565.

¹⁴ “Native Land Court and Native Appellate Court: (Decisions of) Relative to Wills in Favour of Europeans and the Adoption and Succession of Children” [1907] III AJHR G-5 at 11.

¹⁵ The Native Land Laws Amendment Act 1895, s 33.

¹⁶ Tom Bennion and Judi Boyd *Succession to Maori Land, 1900–52* (Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal, Rangahaua Whanui National Theme P, 1997) at 12–13 and 36. See Chapter 15 for further discussion of the role of te Kooti Whenua Māori | the Māori Land Court and its predecessors in succession law.

¹⁷ See Wills Act 2007, ss 6, 8 and 11. In effect, these mean that a will must be in writing, signed and witnessed to have effect as a testamentary instrument. But see *Pfaender v Gregory* [2018] NZHC 161 at [30]–[32], where the Court validated a transcript of an audio recording under s 14.

¹⁸ (10 October 2006) 634 NZPD 5565; (8 May 2007) 639 NZPD 9003–9005; (23 August 2007) 641 NZPD 11458–11460.

INTESTACY

Rates of will-making among Māori

- 8.16 Māori are more likely than non-Māori to die without making a will.¹⁹ Current state law provides that the property of anyone who dies intestate will be distributed according to the rules of the Administration Act 1969 or of Te Ture Whenua Maori Act 1993 (TTWMA), if it is Māori land. There are many factors that influence the low rate of will-making among Māori, including the costs involved and the apprehension that will-making is a karanga mate (call to death).
- 8.17 Māori rates of will-making may also be affected by the lack of recognition given to ōhākī within state law, as discussed above.²⁰

Recognition of indigenous laws in overseas intestacy legislation

- 8.18 Several Australian state or territory jurisdictions have a statutory right under which indigenous people may make an application to the courts to have an intestate estate distributed according to a “plan of distribution” that reflects the traditions of the community or group to which the deceased belonged.²¹ The regimes have been rarely used. We are only aware of one case in the Northern Territory and three in New South Wales as of 2021.²² Victoria considered and rejected adopting similar legislation on the basis that it “does not provide a different starting point for Indigenous people.”²³
- 8.19 The Law Reform Commission of Western Australia took a different approach, recommending:²⁴

That the list of persons entitled to claim against a testate or intestate estate of an Aboriginal person under s 7 of the Inheritance (Family and Dependents Provision) Act 1972 (WA) be extended to include a person who is in a kinship relationship with the deceased

¹⁹ Based on data included in an email from Commission for Financial Capability to Te Aka Matua o te Ture | Law Commission regarding data on wills (4 October 2019). This does not suggest that more Māori than non-Māori die without expressing their testamentary wishes, only that more Māori than non-Māori die without a valid will under the Wills Act 2007. In the Succession Survey, 41 per cent of Māori respondents said they had a will, compared with 64 per cent of New Zealand Europeans: Ian Binnie and others *Entitlements to deceased people’s property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021).

²⁰ The requirements under the Wills Act 2007 that a will must be in writing, signed and witnessed prevent ōhākī from being a valid testamentary instrument under that Act.

²¹ See for example Succession Act 2006 (NSW), ss 133–135; and Intestacy Act 2010 (Tas), ss 34–36. Northern Territory incorporated provisions specific to intestate Aboriginals into its Administration and Probate Act in 1979: see Administration and Probate Act 1969 (NT), ss 71–71F.

²² *Application by the Public Trustee for the Northern Territory* [2000] NTSC 52; *Re Estate Wilson, Deceased* [2017] NSWSC 1, (2017) 93 NSWLR 119; *Re Tighe* [2018] NSWSC 163; and *Re Estate Jerrard, deceased* [2018] NSWSC 781, (2018) 97 NSWLR 1106.

²³ Victorian Law Reform Commission *Succession Laws* (Report, 2013) at [5.172]. South Australia also did not adopt similar laws, on the basis that further research was needed: see South Australian Law Reform Institute *‘Distinguishing between the Deserving and the Undeserving’: Family Provision Laws in South Australia* (Report 9, 2017) at R28.

²⁴ Law Reform Commission of Western Australia *Aboriginal Customary Laws: The interaction of Western Australia law with Aboriginal law and culture* (R94, 2006) at 242 (emphasis removed).

which is recognised under the customary law of the deceased and who at the time of death of the deceased was being wholly or partly maintained by the deceased.

8.20 The recommendations have not been adopted into legislation.²⁵

Intestacy rules and our preliminary views on reform

8.21 The current rules in the Administration Act prioritise the deceased person’s partner and issue (descendants), followed by parents, siblings, grandparents, aunts and uncles, with the intention of reflecting what it is thought most intestate people would have done had they made a will.²⁶ A surviving partner takes the personal chattels. These rules apply to all property in an intestate estate besides Māori land. Whāngai children are not eligible to inherit under these rules.

8.22 In Chapter 6, we present three reform options for how to prioritise partners and descendants, and three reform options for how to prioritise parents and siblings where there is no partner or descendant. We have expressed a preliminary view that taonga be excluded from the definition of personal chattels under the intestacy rules. In Chapter 7, we consider whether taonga should be further protected.

8.23 In Chapter 6, we present two options regarding whāngai and the intestacy regime. The first is to exclude whāngai from being eligible under the regime to avoid litigation over intestate estates for Māori and because a will can be made to include whāngai. The second is to allow provision to be made for whāngai depending on the tikanga of the relevant whānau or hapū.

8.24 There are unique intestacy provisions in Te Ture Whenua Maori Act 1993 that apply to Māori land. Section 109 provides that the persons entitled to inherit upon intestacy are the deceased’s children in equal shares and, if there are no children, the brothers and sisters of the deceased.²⁷ Section 115 of the TTWMA allows the Māori Land Court to make provision for whāngai according to the tikanga of the relevant hapū or iwi.

Intestacy and tikanga

8.25 The intestacy regime operates as a default distribution of property where the deceased left no valid will. Before asking how tikanga might shape the appropriate distribution of property in the intestacy regime, it may be better to ask whether tikanga would even support a default system of distribution.²⁸ It may be more appropriate for the distribution of the deceased’s property to be subject to collective debate and decision-making amongst the whānau rather than prescribed by a fixed set of rules in state law.²⁹

²⁵ The Inheritance (Family and Dependents Provision) Act 1972 (WA) does not make any mention of kinship relationships.

²⁶ See s 77 of the Administration Act 1969; and the speech of Hon Rex Mason when introducing the Administration Bill: (23 November 1944) 267 NZPD at 288–289. We outline the intestacy rules in detail in Chapter 6.

²⁷ If any children of the deceased have died, their issue take their parent’s share in equal parts. If there are no children or siblings, the person “nearest in the chain of title” succeeds.

²⁸ See Nicolaas Platje “Te Ao Māori, Whāngai, and the Law of Intestacy: A Principled Proposal” (LLB Research Paper, Te Herenga Waka | Victoria University of Wellington, 2020) at 17–18.

²⁹ See descriptions of the roles of whānau in Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Waikato L Rev 1 at 23–24; Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th

- 8.26 If there is support among Māori for the intestacy regime to respond to tikanga, the question becomes how tikanga might shape the entitlements within it. The intestacy regime is designed to reflect what most intestate people would have done if they had made a will, and the entitlements flow from that. Tikanga may reveal a different basis on which entitlements should be based and therefore have different priorities than those in current state law. Different classes of people than those currently recognised in the regime may be included, or some who are currently entitled may be omitted. The approach to proportions given to different classes may also differ or tikanga may suggest that a discretionary approach is required in each individual situation rather than a focus on fixed entitlements.
- 8.27 There were no statistically significant differences between Māori and non-Māori in the various intestacy scenarios posed in the Succession Survey.

QUESTIONS

Q34

How does tikanga respond to a situation where someone dies without expressing any testamentary wishes?

Q35

Does a default system of rules for the distribution of property when a person dies intestate accord with tikanga?

Q36

If so, should the purpose of the intestacy regime be to replicate what most intestate people would do if they had made a will?

Q37

Do the current rules or one or more of our reform proposals set out in Chapter 6 reflect tikanga and/or what Māori think about who should receive their estate if they die without a will?

Q38

Is there merit in a statutory approach that allows Māori to request that an intestate estate be distributed in accordance with tikanga? Do any of the approaches taken in Australia have merit from a tikanga perspective?

Q39

Should whāngai be eligible to succeed in an intestacy regime? Should eligibility be determined in accordance with the tikanga of the relevant whānau or hapū?

ed, LexisNexis, Wellington, 2020) 57 at 59–60; Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 30–31. See also Joan Metge “Succession Law: Background Issues Relating to Tikanga Maori” (paper prepared for Te Aka Matua o te Ture | Law Commission, 1994) at 8.

OBLIGATIONS TO SURVIVING PARTNERS

Customary marriage

- 8.28 The traditional roles of men and women in Māori society can only be understood in the context of the Māori world view.³⁰ Traditionally, marriage was not a formal ceremony but relied upon the public expression of whānau approval for validity.³¹ Marriage was a relationship of importance for the whānau and hapū as much as the spouses because it provided links between different whakapapa lines and gave each new generations.³² However, while marriage was highly valued, it was not given absolute precedence over other relationships because of the importance of whakapapa.³³ Māori hold commitment to partner and commitment to descent in tension.³⁴
- 8.29 Men and women are considered an essential part of the collective whole, with women playing a particular role in linking the past, present and future.³⁵ Women were nurturers and organisers, valued within their whānau, hapū and iwi.³⁶ Women of rank maintained powerful positions within the social and political organisations of their tribal nations.³⁷ Both men and women had the capacity to hold property, in contrast to that of their Pākehā contemporaries.³⁸ Marriage did not change this, as women continued to hold land that they held prior to marriage and decisions regarding it were theirs to make, subject to the wider community interests.³⁹

³⁰ Annie Mikaere “Māori Women: Caught in the Contradictions of a Colonised Reality” (1994) 2 Waikato L Rev 125 at 125; and Jacinta Ruru “Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand” (2005) 19 IJLPF 327 at 327.

³¹ See Te Aka Matua o te Ture | Law Commission *Justice: The Experiences of Māori Women | Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 19; Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 62.

³² Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 62; and Donna M Tai Tokerau Durie-Hall “Māori Marriage: Traditional marriages and the impact of Pākehā customs and the law” in Sandra Coney (ed) *Standing in the Sunshine: A History of New Zealand Women Since They Won the Vote* (Viking, Auckland, 1993) 186 at 186–187, citing Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992).

³³ Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 62.

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

³⁵ Annie Mikaere “Māori Women: Caught in the Contradictions of a Colonised Reality” (1994) 2 Waikato L Rev 125 at 125; and Jacinta Ruru “Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand” (2005) 19 IJLPF 327 at 330.

³⁶ Te Aka Matua o te Ture | Law Commission *Justice: The Experiences of Māori Women | Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 11.

³⁷ Te Aka Matua o te Ture | Law Commission *Justice: The Experiences of Māori Women | Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 14.

³⁸ Angela Ballara “Wāhine Rangatira: Māori Women of Rank and their Role in the Women’s Kotahitanga Movement of the 1890s” (1993) 27 NZJH 127 at 133–134.

³⁹ Angela Ballara “Wāhine Rangatira: Māori Women of Rank and their Role in the Women’s Kotahitanga Movement of the 1890s” (1993) 27 NZJH 127 at 134; Jacinta Ruru “Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand” (2005) 19 IJLPF 327 at 330.

- 8.30 The primary social unit for Māori is the whānau.⁴⁰ Professor Jacinta Ruru notes two distinct views on defining whānau membership.⁴¹ The first is a “descent”-based view, whereby membership is limited exclusively by descent and excludes most husbands and wives. The word whānau shares a meaning with the word whānau (to give birth), which accords with this descent-based view.⁴² The second is an extended view whereby those who participate in whānau activities are included. Although both views must be held for an understanding of whānau, the descent-based view comes to the fore in connection with the management of group property and the passing down of mana, land rights and the trusteeship of taonga.⁴³ We have heard during our preliminary engagement views that someone may be considered whānau and participate in whānau activities, but they should not succeed to property due to lack of whakapapa connections. Professor Ruru also notes the varying degrees to which Māori nuclear families remain part of a wider whānau.⁴⁴
- 8.31 Māori customary marriage does not carry with it rights to property held by the other spouse,⁴⁵ yet if a couple in a customary marriage are deemed to be in a de facto relationship for the purposes of the Property (Relationships) Act 1976 (PRA), they may have rights to property they would not otherwise have under tikanga. In our PRA review, we did not recommend reform to recognise or provide specific rules for Māori customary marriage in new relationship property law. We concluded that this is an important issue with broader significance requiring further consultation with Māori.⁴⁶
- 8.32 While we have not found any specific written discussion of obligations to a surviving spouse besides those concerning whenua Māori, the operation of whanaungatanga, aroha and manaakitanga mean whānau take care of their members, including undoubtedly a bereaved partner. This is likely to manifest itself in care not only for the partner but for any children of the relationship and likely involve whānau of both partners. We would like to learn more about how tikanga might affect ownership or use of property (other than whenua Māori) for a surviving partner.

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

⁴¹ Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 59–60.

⁴² Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 30; HW Williams *A Dictionary of the Maori Language* (7th ed, Government Printer, Wellington, 1971) at definition of “whānau”; and Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 41.

⁴³ Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 59–60.

⁴⁴ Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 60–61.

⁴⁵ Jacinta Ruru “Implications for Māori: Historical Overview” in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Reuters, Wellington, 2004) 445 at 450–451.

⁴⁶ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [14.4] and [14.19].

Equal sharing of relationship property

- 8.33 The PRA regime is underpinned by a strong presumption of equal sharing of relationship property.⁴⁷ Māori land is excluded from the regime, and so is not available to be divided as relationship property.⁴⁸ This is generally aligned with Māori thinking.⁴⁹ Taonga that fall under the definition of family chattels are also excluded.⁵⁰ However, aside from these two exceptions the presumption of equal sharing of relationship property applies.
- 8.34 In our review of the PRA, we asked whether there should be a separate regime for property division according to tikanga. We received very few submissions on this point, and in our final report, we recommended that the framework of the new Relationship Property Act for division of property on separation should continue to accommodate and respond to matters of tikanga.⁵¹ We also recommended that taonga be defined within a tikanga construct, excluded from relationship property and not made available to be awarded as compensation to the other partner.⁵² We did not recommend reform to recognise or provide specific rules for Māori customary marriage.⁵³
- 8.35 We do not suggest that the contributions to a relationship that give rise to a presumption of equal sharing under state law are not given equal weight from a Māori perspective. In fact, traditionally, Māori valued the contributions of women much more than their colonial counterparts.⁵⁴ However, whether those contributions should give rise to a legal presumption of equal sharing may be less clear if more weight is afforded to descent lines. This may also be affected by the nature of the property being considered.

⁴⁷ Under the Property (Relationships) Act 1976, certain property a person owns is classified as “relationship property” which is divided equally between partners upon separation. Broadly, “relationship property” captures property acquired or produced by either partner during the relationship, the family home and chattels, and property acquired for the common use or benefit or both partners. See Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [3.12]–[3.12].

⁴⁸ Property (Relationships) Act 1976, s 6. We supported this position in our review of the PRA: see Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143) at [14.23]. Although note the recent amendments to Te Ture Whenua Māori Act contemplate a surviving partner being able to live on a principal family home on Māori land along with receiving income in relation to the deceased’s interest in land: Te Ture Whenua Māori Act 1993, ss 108A and 109AA.

⁴⁹ Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 90.

⁵⁰ Property (Relationships) Act 1976, s 2 definition of “family chattels”.

⁵¹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R79 and [14.59]. We acknowledged that the limited number of submissions the Commission received did not mean that Māori do not have anything to say about the PRA, nor does it indicate that the current rules work satisfactorily for Māori.

⁵² Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R82.

⁵³ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [14.19].

⁵⁴ See generally Angela Ballara “Wāhine Rangatira: Māori Women of Rank and their Role in the Women’s Kotahitanga Movement of the 1890s” (1993) 27 NZJH 127; Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 29–30; and Te Aka Matua o te Ture | Law Commission *Justice: The Experiences of Māori Women | Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999).

8.36 In the Succession Survey, respondents were given a scenario where the deceased was survived by a wife. In his will, the deceased left the home to his children even though, had the couple divorced, the wife would have been entitled to a half share of the home. Over 75 per cent of respondents either agreed or strongly agreed that the wife should be entitled to at least a half share of the home regardless of what the will said.⁵⁵ There was no statistically significant difference between the views of Māori.⁵⁶

The choices when a partner dies

8.37 Under the PRA, a partner may accept what their deceased partner has left them under their will or choose to receive the share of relationship property they would have received had the couple separated while both were alive.⁵⁷ This is based on the “no worse off” principle. That is, a surviving partner should be no worse off on the death of their partner than if they had hypothetically separated while both parties were alive. Leaving aside the entitlement to share relationship property, as discussed above, this raises a further question about how tikanga articulates responsibility to the surviving partner.

Sections 18 and 19 of the Wills Act

8.38 We discuss the nature of Māori customary marriage above. Sections 18 and 19 of the Wills Act set out the effect of entering and ending relationships on the wills of spouses and partners. These provisions are discussed in Chapter 18. To summarise, section 18 revokes a person’s will when they marry or enter a civil union. Section 19 revokes those parts of a person’s will that make provision to a former spouse or civil union partner when the marriage or civil union has been formally dissolved. In Chapter 18, we note our preliminary view that section 18 should be repealed and ask for feedback on whether section 19 needs to change. If customary marriages are recognised separately from meeting the requirements of a de facto relationship, there may be questions about the relevance and application of sections 18 and 19 to them.

⁵⁵ Ian Binnie and others *Entitlements to deceased people’s property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [148] and figure 13.

⁵⁶ Seventy-four per cent of Māori respondents agreed or strongly agreed that the wife should be entitled to a half share of the home: Ian Binnie and others *Entitlements to deceased people’s property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [149].

⁵⁷ Property (Relationships) Act 1976, s 61.

QUESTIONS

Q40

Should Māori customary marriage be recognised in state law separately from meeting the requirements of a de facto relationship?

Q41

Do obligations sourced from tikanga exist from a deceased partner to a surviving partner in relation to property and, if so, how might they be expressed?

Q42

Does the presumption of equal sharing of relationship property in the PRA accord with tikanga?

Q43

If not, how might tikanga respond to the division of property between partners when one has died?

Q44

Are our reform options in relation to sections 18 and 19 of the Wills Act 2007 problematic for Māori customary marriages?

FAMILY PROVISION

Whānau obligations

8.39 We have already outlined the importance of whānau for Māori. Williams J, in extrajudicial writing, has said that “[w]ithout whānau, being Māori is a mere abstraction”.⁵⁸ Being part of a whānau involves rights and obligations that are sourced from whanaungatanga, manaakitanga and aroha.⁵⁹ These obligations can include financial and moral support as well as an obligation to take responsibility for each other’s actions.⁶⁰ The whānau is also crucial for discussing and settling familial issues relating to child rearing and succession.⁶¹ Professor Patu Hohepa has said that “[a]ll members must ideally share compassion

⁵⁸ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Waikato L Rev 1 at 23.

⁵⁹ Joan Metge “Succession Law: Background Issues Relating to Tikanga Maori” (paper prepared for Te Aka Matua o te Ture | Law Commission, 1994) at 2–4; Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 32–33; Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 20–21; Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 60.

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

⁶¹ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 20.

(aroha), trust (pono), truthfulness (tika) with each other”.⁶² The whānau also acts as a first line of defence when there is trouble with an individual or group within a wider whānau.⁶³

8.40 Williams J in extrajudicial writing has described the whānau and the rights and obligations of its members:⁶⁴

Traditionally the whanau ... was the centre of Māori life. It was the primary unit of close identity and belonging, the primary unit of social rights and obligations and, at a practical level at least, the primary unit of economic rights and obligations.

8.41 Although all those within a whānau carry these obligations towards each other, arguably the primary obligations of the whānau as a whole are to the tamariki Māori and mokopuna Māori.⁶⁵

8.42 The obligations that exist under the Family Protection Act 1955 (FPA) are discussed in Chapter 4. This law reflects the idea of a moral duty to provide for some family members where the terms of a will or the intestacy regime do not adequately provide for them. Deciding who might properly claim against an estate may be a difficult decision and we explore here how tikanga might approach this question.

8.43 In the Succession Survey, 67 per cent of Māori interviewed agreed that, in a scenario where a deceased left their entire estate to charity, the deceased’s adult child should be able to challenge the will and get a share of the estate. The proportion of Māori who agreed was higher than all respondents, of which 56 per cent agreed.⁶⁶ Similarly, 70 per cent of Māori respondents thought that an adult child should be able to challenge a will which gives the entire estate to another adult child, compared with 62 per cent of all respondents.⁶⁷ Sixty-five per cent of Māori who responded said that the deceased’s children should be able to challenge a will which gives the estate to the deceased’s second wife, compared with of 57 per cent of all respondents.⁶⁸ These results suggest that Māori may place more value on familial obligations when compared with testamentary freedom than the overall population.

⁶² Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 20 (emphasis removed).

⁶³ Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 61.

⁶⁴ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Waikato L Rev* 1 at 23.

⁶⁵ Ranginui Walker *Ka Whawhai Tonu Matou: Struggle Without End* (Penguin Books, Auckland, 1990) at 64; and The Maori Perspective Advisory Committee *Puao-Te-Ata-Tu (day break): The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (September 1988) at 29–30 and 74–75.

⁶⁶ Ian Binnie and others *Entitlements to deceased people’s property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Otākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [135].

⁶⁷ Ian Binnie and others *Entitlements to deceased people’s property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Otākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [142].

⁶⁸ Ian Binnie and others *Entitlements to deceased people’s property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Otākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [136].

Partners and children

- 8.44 As we understand whanaungatanga, aroha and manaakitanga, they would ensure that a surviving partner and any children of the relationship are cared for by whānau. We would like to learn more about how tikanga might promote the transfer of ownership or the use of property where a will or ōhākī does not provide appropriately for the surviving partner or children or where someone dies intestate.

Whāngai

- 8.45 Whāngai⁶⁹ is a customary Māori practice where a child is raised by someone other than their birth parents, usually another relative.⁷⁰ Rather than being a way of dealing with children who lack parents, the concept and practice of whāngai is firmly planted within whanaungatanga.⁷¹ The term “whāngai” is often associated with the Pākehā tradition of adoption. However, whāngai does not have the same features or consequences as a legal adoption.⁷² If a Pākehā equivalent must be sought, the idea of guardianship is closer to whāngai than adoption but is not an equivalent.⁷³ Whāngai:⁷⁴

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

- 8.46 The origins of whāngai are found in an account of Māui-tikitiki-a-Taranga.⁷⁵ Taranga, Māui’s mother, miscarried Māui, her youngest child. Believing him to be stillborn, she cut off her topknot, wrapped him in it and cast him into the sea. Māui became entangled in seaweed and as a result remained afloat until he was washed ashore and found by his grandparent, Tama-nui-ki-te-rangi, who then raised him. Later, Māui returned to his

⁶⁹ The term whāngai is also the verb “to feed”. Some hapū prefer the term “atawhai”: see Professor Milroy’s explanation in *Hohua – Estate of Tangi Biddle* (2001) 10 Rotorua Appellate MB 43 (10 APRO 43).

⁷⁰ See generally Merata Kawharu and Erica Newman “Whakapaparanga: Social Structure, Leadership and Whāngai” in Michael Reilly and others (eds) *Te Kōparapara: An Introduction to the Māori World* (Auckland University Press, Auckland, 2018) 48 at 59–63; Geo Graham “Whangai Tamariki” (1948) 57 *Journal of the Polynesian Society* 268; Mihiata Pirini “The Māori Land Court: Exploring the Space between Law, Design, and Kaupapa Māori” (LLM Dissertation, Te Whare Wānanga o Ōtākou | University of Otago, 2020) at 18–21; Michael Sharp “Māori Estates: Wills” in *Wills and Succession* (online looseleaf ed, LexisNexis) at [16.12]; and Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Waikato L Rev* 1 at 5.

⁷¹ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Waikato L Rev* 1 at 5.

⁷² Te Aka Matua o te Ture | Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000) at 73.

⁷³ Department of Social Welfare *Review of Adoption Law: Adoption by Maori – A Consultation Paper* (Social Policy Agency, Department of Social Welfare, Wellington, 1993) at 7 and 10.

⁷⁴ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Waikato L Rev* 1 at 5.

⁷⁵ Merata Kawharu and Erica Newman “Whakapaparanga: Social Structure, Leadership and Whāngai” in Michael Reilly and others (eds) *Te Kōparapara: An Introduction to the Māori World* (Auckland University Press, Auckland, 2018) 48 at 59–60.

biological parents and identified himself by reciting his whakapapa to his family, who then welcomed and accepted him and continued to raise and nurture him.

- 8.47 The right of whāngai to succeed according to tikanga varies amongst whānau, hapū and iwi.⁷⁶

The FPA and our preliminary views on reform

- 8.48 The FPA contemplates claims by family members of the deceased to seek further provision from an estate if adequate provision has not been made for the family member's "proper maintenance and support".⁷⁷ The majority of FPA claims are made by independent adults, not all of whom are in any financial need. This is possible because the courts have interpreted the word "support" to include a moral obligation to provide for certain family members in the will to recognise their familial relationship.⁷⁸ Whāngai are not considered "children of the deceased" under the FPA.⁷⁹
- 8.49 Several cases have considered the application of the FPA where elements of tikanga are at play.⁸⁰ The cases largely demonstrate the difficulty of applying tikanga concepts within the scope of family protection legislation based upon non-Māori notions of family and familial obligations.⁸¹
- 8.50 We ask in Chapter 4 whether only the partner and children under a prescribed age should be able to seek family provision in such circumstances. An alternative approach would include dependent adult disabled children. We also ask whether there continues to be value in recognition awards for children of all ages to acknowledge the parent-child relationship and that they belong to the family. Our preliminary view is that family provision should be limited to partners and children under a prescribed age.⁸² We also

⁷⁶ See for example *Hohua – Estate of Tangi Biddle* (2001) 10 Rotorua Appellate MB 43 (10 APRO 43); *Pomare – Estate of Peter Here Pomare* (2015) 103 Taitokerau MB 95 (103 TTK 95); and *Retemeyer v Loloa – Estate of Tahuaka Waipouri* (2016) 129 Taitokerau MB 288 (129 TTK 288).

⁷⁷ Family Protection Act 1955, s 4(1).

⁷⁸ *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [52].

⁷⁹ Family Protection Act 1955, s 3; and *Keelan v Peach* [2003] 1 NZLR 589 at [43]. However, the most recent amendments to the TTWMA include an amendment that te Kooti Whenua Māori | the Māori Land Court may determine whether someone is a whāngai for the purposes of a claim under the FPA that relates to Māori freehold land: see Te Ture Whenua Maori Act 1993, s 115.

⁸⁰ See for example *Re Stubbing* [1990] 1 NZLR 428 (HC); *Re Ham* (1990) 6 FRNZ 158 (CA); *van Selm v van Selm* [2015] NZFC 3242, [2015] NZFLR 693 (this case concerned general land owned by Māori that had been changed under the 1967 amendments to the Maori Affairs Act 1953); and *Sainsbury v Graham* [2009] NZFLR 173 (HC).

⁸¹ For example, in *van Selm v van Selm* [2015] NZFC 3242, [2015] NZFLR 693, the deceased gave one of her three children a farm in her will. The other two children claimed further provision from the estate. The child that inherited the farm argued that the case should be determined according to tikanga Māori rather than current social attitudes. In particular, he argued that the Court should respect the deceased's wishes that the farm should stay in the whānau. He also noted that the origins of the land were as Māori land. The Court held that the three children did not operate as a whānau and tikanga Māori did not seem particularly important in the family. The Court held (at [152]–[156]) that any considerations of tikanga Māori in this particular case did not outweigh the deceased's moral duty to each of her children.

⁸² In the Succession Survey, 80 per cent of all respondents agreed that it is okay to cut family members out of a will, and similar results applied for Māori respondents: Ian Binnie and others *Entitlements to deceased people's property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [96] and figure 1. However, 60 per cent of all respondents thought that surviving partners and children (of any age) should be able to challenge a will if they are not included in it: at figure 4. Māori respondents (67 per cent) were more likely than non-

express a preliminary view that the definition of “child” within the proposed new Act should be broadly defined to include “accepted children”, with the intention that whāngai could fall under this and be eligible to make a claim.

Family provision and tikanga

- 8.51 The FPA may be seen as a limit on testamentary freedom in order to recognise a deceased’s obligations to their family.⁸³ We outline above some possible tensions Māori may face balancing individual rights and communal obligations. These tensions are especially relevant in a family provision context.
- 8.52 Whānau Māori and non-Māori notions of family share some common values. When both are fully functional, the connections one shares with one’s whanaunga (relatives) matter to the individual and to the collective. An estranged family member hurts the individual, the family and the whānau. When a family or whānau member is in trouble, the whānau and family may rally around them to provide support. Compassion, trust and honesty are valued amongst family members and whānau.⁸⁴ The actions of an individual member can impact on and reflect on others in a family or whānau. In some cases, a family or whānau may choose to bear responsibility for the actions of a member.
- 8.53 The policy behind the FPA itself may reflect ideas that are recognisable through a tikanga lens. Awards are frequently made on a recognition basis. That is, to recognise:⁸⁵
- A child’s path through life is supported not simply by financial provision to meet economic needs and contingencies but also by recognition of belonging to the family and of having been an important part of the overall life of the deceased.
- 8.54 The law has recognised that at least part of the justification for having a legal remedy against disentitlement is the family connection with the deceased. However, Professor Ruru’s articulation of the dual views of whānau must be considered here as the descent view may take precedence over the extended view when considering legal entitlements to property.⁸⁶ This would mean more or less weight may be placed on those who have whakapapa connections to the deceased depending on the context. Consideration must also be given to the mana of the deceased. A well-respected rangatira’s wishes may be less likely to be challenged than others with less mana.
- 8.55 The concepts of whanaungatanga, manaakitanga and aroha may inform the legal right to seek provision from a relative’s estate. The current state law broadly recognises protection, recognition and reward/compensation as bases for a family provision claim. 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.

Māori respondents to agree that an adult child should be allowed to challenge a will which leaves the estate to charity: at [135].

⁸³ Rosalind Atherton “The Concept of Moral Duty in the Law of Family Provision – A Gloss or Critical Understanding?” (1999) 5 *Austl J Legal Hist* 5 at 22–25. However, the FPA also applies on intestacy.

⁸⁴ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 20.

⁸⁵ *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [52].

⁸⁶ Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 59–60.

QUESTIONS

Q45

What does tikanga have to say about the rights of whānau members to challenge a deceased's testamentary wishes?

Q46

Are our preliminary views on family provision (expressed in Chapter 4) consistent with tikanga? If so, what factors are relevant in determining the outcome of a family provision claim? If not, what would an approach to family provision based on tikanga look like?

Q47

How should whāngai be treated in this context?

CONTRIBUTION CLAIMS

Reciprocity, balance, and utu

- 8.56 Utu is concerned with “the maintenance of relationships and balance within Māori society”.⁸⁷ Life is kept in balance by the principle of utu, which operates in relation to individuals, groups and ancestors.⁸⁸ An understanding of utu can only be achieved by placing it within the context of mana and tapu, as utu governs relationships where a breach of tapu or an increase or decrease in mana has occurred.⁸⁹
- 8.57 Utu is not about trusting the receiver's goodwill or determination to return an action in kind. In te ao Māori, the consequences are much more real than that.⁹⁰ Professor Hohepa describes life as being in a careful balance of tika, pono and aroha, and any deviation from these things requires utu or reciprocal payment.⁹¹ One kaumātua has simply said, “Reciprocity is how we survive”.⁹²
- 8.58 One Māori historical account uses the concept of utu to explain why the elements sometimes rage against the land and the sea. When the children of Ranginui and

⁸⁷ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 67.

⁸⁸ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 23.

⁸⁹ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 68.

⁹⁰ ET Durie “Will the Settlers Settle? Cultural Conciliation and Law” (1996) 8 Otago LR 449 at 455–456; Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 68.

⁹¹ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 19.

⁹² Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 68.

Papatūānuku agreed they should separate their parents to end te pō (the night, darkness, ignorance), one sibling, Tāwhirimātea, disagreed with the idea. When Tāne succeeded in separating his parents, Tāwhirimātea sought utu against his siblings by using his power over the elements to attack them. This is why the winds often rage against the land and the ocean.

Take-utu-ea

- 8.59 As well as being a stand-alone principle, utu can sit within the take-utu-ea framework.⁹³ This is a framework for assessing breaches of tikanga and what the appropriate utu is to reach a state of ea, or resolution. The breach of tikanga becomes the take (cause), which upsets the natural balance of things and requires action to be taken. Both parties usually have to agree that there is a take. The appropriate response is the utu, which is done to reach a resolution that satisfies all parties. The state of resolution at the end of the process is ea.

Contributions and our preliminary views on reform

- 8.60 In Chapter 5, we outline the various claims a person may make against an estate based upon contributions they have made to the deceased or their estate. These are all concerned with situations where the court may order a transfer of property or money from the estate to someone based upon contributions they have made. We point out that, with the increasing life expectancy of New Zealanders, people of older age may increasingly rely on informal care arrangements and contribution claims may become more common.
- 8.61 In Chapter 5, we also set out our preliminary view for reform, which is to amalgamate these various claims into a single statutory cause of action. At its core, the proposed statutory cause of action would allow the court to order compensation in return for benefits someone has provided to a deceased or their estate where the benefits were not provided as a gift or pursuant to a contractual, legal or equitable obligation.

Contribution claims and tikanga

- 8.62 At the outset, it is important to acknowledge that Māori ideas of reciprocity, balance and utu are about the maintenance of relationships and governing people's behaviour towards each other.⁹⁴ The various claims we outline in Chapter 5 are concerned with the appropriate allocation of individual property rights, and most have their roots in contract. They therefore serve very different purposes and are born from different societal and cultural roots.
- 8.63 Nevertheless, the concepts of utu, balance and reciprocity may help shape the appropriate legal response to contributions someone may make to a person who has since died or their estate. The current state law is focused on determining when a contributor ought to receive something in return for the contributions they have made. Arguably, there is little focus on the relationships between the contributor and the deceased's whanaunga (of which the contributor may be one). It may be more

⁹³ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 31.

⁹⁴ Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 67–68.

appropriate to ask, for example, what needs to be done in order to manage and preserve the relationships between the affected parties. Where contributions have been made to the deceased that affect their mana or the mana of their whānau, it may be appropriate for the deceased's whānau or the estate to respond and ensure that a state of ea is reached between the parties.

- 8.64 A response based in reciprocity and utu may be more appropriate where the contributor and the deceased shared a close relationship, where there is the potential for family or whānau members to be affected by the outcome or where obligations arising from manaakitanga, aroha or whanaungatanga are involved. A law focused on the appropriate allocation of property rights may be more appropriate where the parties are not concerned with maintaining a relationship. However, the two approaches need not be mutually exclusive, and the value in each approach may depend on the overall context of any situation.

QUESTIONS

Q48

What role might the concepts of utu play in understanding how contributions to a deceased or their estate should be treated?

Q49

Are there other tikanga concepts that might assist?

Q50

How might tikanga respond to a situation where someone has contributed significantly to someone who has since died or to their estate?

Q51

Is our approach to contribution claims (as set out in Chapter 5) consistent with tikanga?

Part Three

Making and Resolving Claims



CHAPTER 9

Awards, priorities and anti-avoidance

IN THIS CHAPTER, WE CONSIDER:

- the property from which a court can make awards when someone claims against an estate;
- the respective priority of awards from an estate;
- the powers the court has to make awards from property outside an estate (anti-avoidance mechanisms); and
- issues with the current law and proposals for reform.

THE CURRENT LAW

- 9.1 The terms of a will determine the distribution of the will-maker's estate. Where there is no will, the intestacy regime in the Administration Act 1969 governs how the deceased's estate is to be distributed.
- 9.2 A court may make awards under the Family Protection Act 1955 (FPA) and Law Reform (Testamentary Promises) Act 1949 (TPA) from the property of the deceased's estate.¹ Claims under the FPA are made from the net estate after creditors' claims have been satisfied,² while claims under the TPA can be made from the gross estate.³

¹ Family Protection Act 1955, s 4 (for the purposes of the Act, an estate is deemed to include all property that is subject of a donation mortis causa); and Law Reform (Testamentary Promises) Act 1949, s 3(5).

² Bill Patterson *Law of Family Protection and Testamentary Promises* (4th ed, LexisNexis, 2013) at 211; and *McCormack v Foley* [1983] NZLR 57 (CA) at 66.

³ Law Reform (Testamentary Promises) Act 1949, s 3(5). Case law has confirmed, however, that the courts will not interfere with the rights of secured creditors to the property of an estate when making TPA awards: *McCormack v Foley* [1983] NZLR 57 (CA) at 64.

- 9.3 A surviving partner's entitlements under the Property (Relationships) Act 1976 (PRA) are limited to the relationship property of the estate.⁴ The PRA provides that the rights of creditors generally continue as if the PRA had not been enacted,⁵ and each partner has the right to deal with their property before the court orders a relationship property division.⁶ The exceptions to this general rule include a partner's right to lodge a notice of claim over land in which they claim an interest under the PRA,⁷ and a partner's protected interest in the family home which takes priority over the other partner's unsecured creditors.⁸
- 9.4 Aside from creditors' claims, PRA claims on an estate take priority over FPA claims and TPA claims.⁹

Property may fall outside an estate

- 9.5 It is possible, however, that the property the deceased owned during their life will not fall into their estate. Property that may fall outside the estate includes:
- (a) property the deceased has gifted before they died, such as transferring their property to be held on trust;
 - (b) joint tenancy assets that pass by survivorship, such as a home that is jointly owned with a partner;
 - (c) a bank account or insurance policy for which the deceased has nominated a third-party beneficiary to receive property when they die;
 - (d) property that is the subject of a binding contract in which the deceased agreed to provide that property to the other party under their will;¹⁰ and
 - (e) powers of appointment or powers to control a trust that have not been exercised by the deceased during their lifetime.¹¹
- 9.6 Situations may arise when, due to the property falling outside the estate, the estate contains insufficient property to satisfy claims against it. The court has limited powers to bring the property into the estate in order to meet claims against the estate.

⁴ Property (Relationships) Act 1976, s 94(2).

⁵ Property (Relationships) Act 1976, s 20A.

⁶ Property (Relationships) Act 1976, s 19.

⁷ Property (Relationships) Act 1976, s 42. A notice lodged under s 42 has the effect of a caveat.

⁸ Property (Relationships) Act 1976, s 20B.

⁹ Property (Relationships) Act 1976, ss 58, 60(6) and 78(1)(c).

¹⁰ The current position is that the court has no jurisdiction to interfere with parts of a will that implement such a contract: see *Breuer v Wright* [1982] 2 NZLR 77 (CA).

¹¹ See *Re Kensington (Deceased)* [1949] NZLR 382 (CA). See also *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551, where the Kōti Mana Nui | the Supreme Court held Mr Clayton's collection of powers under the trust deed amounted to property.

Anti-avoidance mechanisms under the current law

- 9.7 The PRA contains some “clawback” mechanisms. The court can make an order to recover property when it was disposed of with intent to defeat a partner’s rights.¹² When a disposition of property to a trust or company has a defeating effect but there has been no intention to defeat, the court has limited powers to provide compensation to the affected partner.¹³
- 9.8 The PRA classifies property passing by survivorship to the surviving partner according to the status it would have had if the deceased had not died, meaning joint tenancy assets owned by the couple do not escape division.¹⁴ However, there is some uncertainty whether a court can recover property that has passed from the deceased partner to a third party through survivorship.¹⁵
- 9.9 The FPA and the TPA contain no mechanisms through which the court can award property outside the estate. However, there are ways claimants can access that property. In particular, section 88(2) of the PRA allows the personal representatives, with the leave of the court, to apply for a relationship property division on behalf of the estate. The purpose of division initiated by the personal representatives is usually to recover relationship property that was held as joint tenants with the deceased’s surviving partner that would otherwise pass to them through survivorship.¹⁶ In most cases, division is sought to increase the size of the estate to satisfy FPA claims,¹⁷ although leave has also been sought where there is insufficient property to meet gifts under the will.¹⁸ The estate’s rights to seek a relationship property division therefore operate as a clawback mechanism.
- 9.10 In recent cases, adult claimants have argued that their deceased parent owed them fiduciary duties to protect their economic interests, particularly by the deceased parent providing for the children from their estate.¹⁹ This is relevant because a court may remedy a breach of fiduciary duty by recognising a constructive trust in favour of a claimant. A fiduciary may pass property to a third party with the effect that the property would not form part of their estate when they die. If they passed property to a third party when the third party knew the disposition breached the fiduciary’s duties, a court may find the third

¹² Property (Relationships) Act 1976, s 44.

¹³ Property (Relationships) Act 1976, ss 44C and 44F.

¹⁴ Property (Relationships) Act 1976, s 83.

¹⁵ In *Hau v Hau* [2018] NZHC 881, [2018] NZFLR 464 the Court noted that the couple’s family home was relationship property even though it had passed to the deceased’s brother through survivorship. The Court noted, at [50], there was no express power under the Property (Relationships) Act 1976 for the Court to recover the property, but it held Parliament could not have intended the Act’s property regime to be automatically excluded by the operation of survivorship.

¹⁶ See Nicola Peart (ed) *Family Property* (online looseleaf ed, Thomson Reuters) at [PR88.05].

¹⁷ See for example *Public Trust v W* [2005] 2 NZLR 696 (CA).

¹⁸ See for example *Public Trust v Relfh* [2009] 2 NZLR 819 (HC); *Crotty v Williams* FC Hamilton FAM-2002-19-1082, 29 August 2005. Leave has also been sought when the surviving partner killed the deceased and the estate has sought to prevent the surviving partner from benefiting from their crime: *H v T* HC Christchurch CIV-2006-409-2615, 5 June 2007. The Succession (Homicide) Act 2007 now addresses this situation.

¹⁹ *A v D* [2019] NZHC 992, [2019] NZFLR 105; and *Rule v Simpson* [2017] NZHC 2154.

party holds the property subject to the constructive trust. Consequently, claimants can obtain priority to the property subject to the constructive trust whether it falls into the estate or not. To date, the courts have refused to strike out these claims, instead ordering the claim should be determined through trial.

RECOMMENDATIONS IN THE PRA REVIEW

- 9.11 In the PRA review, we made several recommendations regarding property and anti-avoidance, including the following:
- (a) The notice of claim procedure should be expanded to enable a partner to lodge a notice of claim on the title of land held on trust against which the partner claims under the PRA.²⁰
 - (b) The court's power to restrain dispositions of property made with intent to defeat a person's rights (section 43) should be replaced by a broad power for the court to make interim restraining orders consistent with the court's interlocutory injunction jurisdiction.²¹
 - (c) Sections 44 (empowering the court to recover property disposed of with the intention to defeat a person's rights under the PRA) and 44F (empowering the court to order compensation in respect of dispositions of property to a qualifying company with the effect of defeating rights under the PRA) should continue unchanged.²²
 - (d) Section 44C, applying to dispositions of property to trusts, should be replaced with a new provision that gives the court powers to grant relief in respect of trusts where it is "just" and:²³
 - (i) either or both partners disposed of property to a trust when the relationship was in reasonable contemplation or since the relationship began and that disposition has defeated the rights of either or both partners;
 - (ii) trust property has been sustained by the application of relationship property or the actions of either or both partners; or
 - (iii) any increase in value of the trust property or benefits derived from the trust property is attributable to the application of relationship property or the actions of either or both partners.

²⁰ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R65 and [11.107].

²¹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R92 and [15.67]–[15.70].

²² Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [11.102]–[11.106].

²³ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R58–R63 and [11.65]–[11.101].

ISSUES

Restricting entitlements and claims to estate property may limit their effectiveness

- 9.12 The PRA, FPA and TPA reflect policy choices as to whom the deceased owed duties to provide for on their death. However, the effectiveness of these entitlements and claims may be undermined if the deceased avoids those duties by taking steps to ensure property does not fall into their estate and instead passes to recipients of their choosing through other means.
- 9.13 There is no data available that directly indicates the extent of avoidance behaviour. However, there are some reasons to believe it is not uncommon:
- (a) Cases have come before the courts concerning estates that hold insufficient property to meet claims because the deceased's property passed to others without falling into the estate.²⁴
 - (b) Data from Toitū te Whenua | Land Information New Zealand shows that, in recent years, the number of transmissions of interests in land by survivorship is roughly equal to the number of transmissions to an executor or administrator (excluding interests in Māori land). This indicates it is common for the deceased's interests in land to pass by survivorship rather than fall into the estate.²⁵
 - (c) Responses to the survey we issued to lawyers in April 2020 and anecdotal feedback we have received indicate avoidance behaviour occurs.

The current clawback mechanisms are complex and burdensome

- 9.14 The mechanism in section 88(2) of the PRA is a multi-step process that can be convoluted and cause delay. Personal representatives must obtain leave and issue proceedings. If the personal representatives are unwilling to seek leave, a prospective FPA claimant might first apply to have the court replace the personal representatives.²⁶ If the personal representatives do seek leave and they are successful, the process of dividing relationship property can be long and complex. A full division of relationship property can be a disproportionate response when only a modest amount of property falling outside an estate is needed to satisfy obligations to beneficiaries or claimants. It can therefore frustrate the deceased's testamentary intentions and cause unnecessary costs to the estate. Personal representatives may find themselves in difficult situations having to disregard the will and seek division on behalf of claimants.

²⁴ See for example *Public Trust v W* [2005] 2 NZLR 696 (CA); *A v D* [2019] NZHC 992, [2019] NZFLR 105; and *Hau v Hau* [2018] NZHC 881, [2018] NZFLR 464.

²⁵ Email from Toitū Te Whenua | Land Information New Zealand to Te Aka Matua o te Ture | Law Commission regarding data on land transfers by survivorship (29 October 2019). Transmission instruments are lodged with Toitū Te Whenua | Land Information New Zealand to transfer property to an executor, administrator, or survivor.

²⁶ In a costs decision, *te Kōti Matua | the High Court* held it would be open for a Family Protection Act claimant to seek leave to divide relationship property as a derivative action if the personal representative neglected their duty of even-handedness to the claimant by failing to seek leave themselves under s 88(2) of the Property (Relationships) Act 1976: *Nawisielski v Nawisielski* [2014] NZHC 2039, [2014] NZFLR 973.

- 9.15 The recent cases concerning fiduciary duties owed to children to provide for them on death have left the law uncertain. In *A v D*, the Court applied conventional principles of fiduciary law in the context of an abusive parent-child relationship and knowing receipt by trustees.²⁷ The development of this area of law is likely to be quite specific and fall outside our review. *Rule v Simpson*, on the other hand, is not so limited and, if successful at trial, could establish much broader fiduciary duties on parents to provide for their children on death.²⁸

PROPOSALS FOR REFORM

- 9.16 Our proposals for reform start with our preliminary view as to what property should be available in the first instance to meet each entitlement and claim under the new Act. We then address how each should rank in priority to each other. Lastly, we consider what anti-avoidance mechanisms could be introduced.

Property claimable

Relationship property claims

- 9.17 We have expressed a preliminary view in Chapter 3 that a “top-up” approach is appropriate when a partner elects to take their relationship property entitlements on the death of their partner.²⁹ We propose that a court should source any property needed for the “top-up” from relationship property assets of the estate because this is the property attributable to the relationship. The court should also, however, be able to order that the award be met from the whole or part of the estate. A court could make awards from the property it recovers through its clawback powers depending on what anti-avoidance mechanisms are included in the new Act (see discussion on anti-avoidance mechanisms below).

Family provision claims

- 9.18 We propose that a court should be able to make family provision awards rateably against the whole estate or to order that family provision awards be met from only part of the estate. This is the position under the current law. It gives the court a high degree of flexibility to make awards from property in a way that is least likely to disrupt the other beneficiaries’ interests and the deceased’s testamentary intentions (where there is a will).
- 9.19 A court should be able to make awards from the property it recovers through its clawback powers depending on what anti-avoidance mechanisms are included in the new Act.

Contribution claims

- 9.20 Because the proposed statutory cause of action for contribution claims would encompass the types of property, work and services that might found a claim for a constructive trust

²⁷ *A v D* [2019] NZHC 992, [2019] NZFLR 105.

²⁸ *Rule v Simpson* [2017] NZHC 2154.

²⁹ If a partner elects to take their relationship property entitlements, they will receive their gifts under the will plus a “top-up” from the relationship property up to the value of their relationship property entitlements.

or quantum meruit, it is appropriate that the court has powers to make monetary awards and awards in relation to particular items of property.

- 9.21 Like family provision claims, we propose that a court should have power to make monetary awards rateably against the whole estate, but with flexibility to order that the award be met from only part of the estate. In addition, the court should be able to order a transfer of specific property in appropriate circumstances. For example, it may be that the claimant relied on a promise of specific property when performing services to the deceased or the claimant may have contributed to the acquisition, maintenance or improvement of specific property that would otherwise give rise to a constructive trust claim.
- 9.22 A court should be able to make awards from the property it recovers through its clawback powers depending on what anti-avoidance mechanisms are included in the new Act.

Intestacy

- 9.23 We propose that entitlements on an intestacy should not take into account dispositions of property the deceased made to the beneficiaries during their lifetime. Nor should entitlements be affected by other property of the deceased that falls outside the estate. This is for two reasons. First, as intestate estates are often of modest value, it is important to minimise administration costs. The inquiries administrators should be required to make should be kept to a minimum. Second, as we propose in Chapter 6, the intestacy regime should replicate what most intestate people would have done had they made a will. Where the deceased has structured their property affairs in a way so that certain individuals receive their property when they die, albeit not through their estate, the intestacy regime should respect those structures.
- 9.24 On this basis, there is no need under the intestacy regime to look beyond the property of the estate to meet entitlements. Claimants should, however, still be able to bring relationship property, family provision or contribution claims against an intestate estate through which property falling outside the estate could be recovered depending on what anti-avoidance mechanisms are included in the new Act.

Priorities

Relationship between creditors' rights and entitlements and claims against the estate under the new Act

- 9.25 We propose that creditors' rights should generally take priority over all claims under the new Act. This approach will extend the rule in the PRA that creditors' rights are generally unaffected by the PRA. It is also consistent with the current position that FPA awards are made from the net estate.
- 9.26 We propose two exceptions to this general rule. First, when making contribution awards, the court should have discretion to order that specific property of the estate be awarded to meet contribution claims in priority to unsecured creditors when:
- (a) the deceased promised to transfer that property to the claimant; or
 - (b) the property has been provided or improved by the claimant or it is the proceeds of sale or exchange of that property, or is property acquired with the proceeds of sale or exchange.

- 9.27 Second, in the PRA review, we recommended the Government should undertake further policy work in relation to the provision of a protected interest in the family home.³⁰ If the Government concludes that a partner should continue to have a protected interest in certain property that takes priority over unsecured creditors, we propose it should be available to a surviving partner under the new Act.

Priorities among the different claims in the new Act

- 9.28 If an estate has insufficient property to fully satisfy relationship property awards, family provision awards and contribution awards, we propose that the property of the estate should be applied to satisfy claims in the following order of priority:
- (a) To meet contribution awards.
 - (b) To meet relationship property awards.
 - (c) To meet family provision awards.
- 9.29 We consider contribution awards should take priority because a contribution award is designed to remedy the unremunerated benefits the claimant has provided to the deceased or the estate. The estate may be advantaged by having its property preserved or enhanced or from the savings the deceased made by not paying for the services the contributor provided. Denying the contributor priority may result in a windfall to other claimants. Lastly, contribution claims are intended to replace remedies through which the contributor may have been able to claim priority through a constructive trust. Giving priority to contribution claimants will be consistent with the rights they may have had under the current law.
- 9.30 Relationship property awards should rank higher than family provision awards. That is for several reasons:
- (a) Relationship property awards recognise the entitlement the surviving partner has in the couple's relationship property because of their contributions to the relationship. This entitlement should therefore qualify what property can legitimately be called the "deceased's property" from which family provision awards can be made.
 - (b) After a relationship property division, half the relationship property held in the estate should generally remain. Family provision claims can be met from this property.
 - (c) If the surviving partner is the parent of the deceased's children, the law imposes obligations on that partner to maintain the children while they are young. Giving the surviving partner priority is unlikely to result in the children going without provision. If the surviving partner is not the children's parent, the children could potentially look to their other parent or parents for maintenance in addition to whatever family provision awards can be made from the remaining estate.

³⁰ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [18.13]–[18.17]. We recognised the difficulties of the protected interest because it is available only to homeowners and it is questionable whether the extent of the interest provides effective protection.

(d) PRA awards currently rank higher than FPA awards.³¹ We are not aware of criticism of this approach.

9.31 If there are multiple contribution claims, those claims should rank equally with each other. If there are multiple family provision claims, our preliminary view is that it is best to state no order of priority. Rather, the court would need to make an assessment on the facts as to each claimant’s particular need for family provision from the estate, including whether a child’s need for family provision could be adequately addressed by provision to the surviving partner.

Anti-avoidance mechanisms

9.32 Anti-avoidance mechanisms must balance competing policy objectives:

(a) respecting the deceased’s right to structure their property affairs as they wish and third parties’ rights to rely on those structures; and

(b) ensuring sufficient property is available to meet entitlements and claims.

9.33 The extent of the anti-avoidance provisions in the new Act should reflect a decision as to which policy consideration is considered to be of greater importance. It is helpful to consider the different approaches taken by jurisdictions that Aotearoa New Zealand often compares itself with.

9.34 In Australia, the Uniform Succession Laws project³² recommended all states and territories adopt a “notional estate” approach whereby certain property falling outside the estate is deemed to be part of the estate for the purpose of meeting family provision claims.³³ However, to date, New South Wales is the only Australian state or territory that has adopted this recommendation.³⁴ Several other state law reform bodies have rejected it on the basis that there is insufficient evidence of a problem and a notional estate approach is a significant incursion into property rights.³⁵

9.35 In Canada, a small minority of jurisdictions have adopted a notional estate-style regime.³⁶ Most jurisdictions have limited or no mechanisms to claim against property outside an

³¹ Property (Relationships) Act 1976, s 78. But see *Hare v Hare* [2019] NZHC 2801, in which the Court held that a charging order the Commissioner of Inland Revenue had obtained in respect of a bankrupt’s unpaid child support over the bankrupt’s family home constituted security for a debt and thus took priority over the bankrupt’s wife’s protected interest in the home.

³² The Uniform Succession Laws project was initiated by the Standing Committee of Attorneys-General in Australia in 1991. Its brief was to review the laws in Australian jurisdictions relating to succession and to recommend model national uniform laws. The Queensland Law Reform Commission took responsibility for coordinating the project: National Committee for Uniform Succession Laws *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP28, 1997) at i.

³³ National Committee for Uniform Succession Laws *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP28, 1997) at 76–87 and 93–94.

³⁴ Succession Act 2006 (NSW), pt 3.3.

³⁵ Victorian Law Reform Commission *Succession Laws* (Report, 2013); South Australian Law Reform Institute *‘Distinguishing between the Deserving and the Undeserving’: Family Provision Laws in South Australia* (Report 9, 2017); and Tasmania Law Reform Institute *Should Tasmania Introduce Notional Estate Laws?* (Final Report No 27, 2019).

³⁶ Succession Law Reform Act RSO 1990 c S.26, pt V; and Dependents Relief Act RSY 2002 c 56.

estate. England and Wales have a fairly extensive notional estate-style regime,³⁷ but the Scottish Law Commission strongly recommended against it.³⁸

- 9.36 In light of the different approaches the new Act could adopt, we present three possible options for reform.³⁹

Option One: maintain the status quo

- 9.37 This option would continue the current position by restating the current law within the new Act. Awards would be limited to the property in the estate, although relationship property claimants could take advantage of the limited anti-avoidance mechanisms currently within the PRA noted above. Under this option, the personal representatives' rights to seek a division of relationship property would continue for the purpose of accessing relationship property assets from the surviving partner.
- 9.38 If this option is preferred, there is a question regarding what rights contribution claimants should have to property outside the estate. Under the current law, individuals claiming constructive trusts could claim against specific assets outside the estate. If contribution claims codify the law and prohibit claims except from those arising under the new Act, it may be that claims against specific assets not in the estate would have to exist outside the new Act, resulting in only partial codification.

Option Two: a limited clawback mechanism

- 9.39 Option Two is a limited clawback mechanism that would target dispositions of property the deceased made before their death and joint tenancy property passing by survivorship. It would apply where:
- (a) the deceased made the disposition with intent to defeat an entitlement or claim;
 - (b) the deceased made a disposition of property within five years of their death that had the effect of defeating an entitlement or claim;⁴⁰ or
 - (c) the deceased owned property as joint tenants with another and the deceased's interest has passed by survivorship on their death.
- 9.40 Third-party recipients from whom the property is sought would need to be joined as parties to the proceeding.⁴¹ The court should not make a clawback order if the recipient of the property received it in good faith and provided fully adequate consideration. The

³⁷ Inheritance (Provision for Family and Dependents) Act 1975 (UK), ss 8–13.

³⁸ Scottish Law Commission *Report on Succession* (Scot Law Com No 215, 2009) at [1.20].

³⁹ Based on our recommendations in the PRA review, these options all assume that s 182 of the Family Proceedings Act 1980 will not be in force. They also assume that, at a minimum, a partner should still be entitled to all the anti-avoidance mechanisms currently contained in the PRA.

⁴⁰ The five-year time limit reflects a period after which recipients of the property ought to be able to rely on the gift without fear that the transaction will be unwound, while balancing the needs to address transactions that have had a defeating effect. The five-year period is used for insolvent gifts under s 205 of the Insolvency Act 2006, and in respect of the means assessment for long-term residential care under sch 2 cl 4 of the Residential Care and Disability Support Services Act 2018, and reg 9 of the Residential Care and Disability Support Services Regulations 2018.

⁴¹ We propose that any party should be able to join the third-party recipients, including the personal representatives, a third-party recipient who has already been joined, or the court by its own initiative. This may prevent one party unfairly shouldering the burden when there are potentially multiple third parties who have received property against whom orders could be sought.

court would only recover the property necessary to satisfy the award it wished to make under the new Act.

- 9.41 In Chapter 11, we discuss contracting out and settlement agreements. These are agreements through which parties decide what provision someone receives from an estate, rather than the rules of the new Act. It is possible that, under an agreement, a party would receive more property than they would be entitled to had they claimed under the new Act. As a result, the agreement may have a defeating effect on other parties who would otherwise claim against the property disposed of under the agreement. We therefore propose that the anti-avoidance mechanism presented in this option apply to contracting out and settlement agreements to the extent property disposed of under an agreement has a defeating effect, even if the agreement conforms to the procedural requirements proposed in Chapter 11 for an agreement to be valid.
- 9.42 Under this option, claimants could apply to the court directly for clawback orders if there was insufficient property in the estate to meet their entitlement or claim. This would avoid the need for personal representatives to seek relationship property divisions to meet claims. We therefore propose the removal of personal representatives' rights under section 88 of the PRA to apply for a division of relationship property on behalf of the estate.
- 9.43 While we recognise personal representatives will sometimes seek division to ensure there is sufficient property in the estate for the gifts the deceased purported to make under their will, we do not consider a full division of relationship property is a principled or proportionate response. Rather, the better approach is for will-makers to ensure their wills provide gifts that are capable of being made from the estate. Education for will-makers and adequate professional advice should help (see our proposals in Chapter 18 regarding the need for education). Further, we do not consider it desirable to allow beneficiaries to claw back property if the gifts under the will cannot be made from the estate. Aspects of the deceased's succession planning regarding property outside their estate should not be undone to compensate for deficiencies in other aspects of their succession planning. Instead, the clawback mechanisms should only be available to claimants for whom the new Act has established a basis to recover property outside the estate despite the deceased's testamentary wishes.
- 9.44 A partner seeking relationship property division could apply for relief through the additional remedies in the PRA, including, if adopted, the revised section 44C in respect of dispositions to trusts recommended in the PRA review.⁴²

Option Three: comprehensive clawback mechanism

- 9.45 This option would comprehensively identify certain types of property that a claimant could have recourse to if there was insufficient property in the estate to meet entitlements and claims under the new Act (non-estate property). Non-estate property

⁴² We recognise that, under this option, the revised s 44C recommended in the PRA review would grant a partner remedies in respect of trusts that would not be available to family provision or contribution claimants. In the PRA review we identified the use of trusts as a particular issue that can frustrate the just division of relationship property: *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [11.15]–[11.17].

would be property that has passed, or passes on the death of the deceased, by reason of:

- (a) contracts to make provision in a will, including mutual wills arrangements;
- (b) contracts with a bank or other financial institution providing for the property in an account or policy to pass to a co-owner or nominated beneficiary on the death of the deceased;
- (c) gifts that the deceased made in contemplation of death (*donationes mortis causa*);
- (d) trusts settled by the deceased that were revocable by the deceased during their lifetime;
- (e) beneficial powers of appointment that were exercisable by the deceased during their lifetime, including any power the deceased had to appoint trust property to themselves;⁴³
- (f) joint tenancies held by the deceased and any other person;
- (g) dispositions by the deceased prior to their death with intent to defeat an entitlement or claim under the new Act; and
- (h) dispositions by the deceased within the five years prior to their death that have the effect of defeating an entitlement or claim under the new Act.⁴⁴

9.46 These categories are types of property that the deceased could have retained or reclaimed during their lifetime so that the property would have been available to meet claims against their estate when they died. Like Option Two, the categories would apply to any contracting out or settlement agreement entered under the new Act that had the effect of defeating a right or claim under the new Act.

9.47 The court would have power to order the transfer of the non-estate property or a sum representing its value to the estate. Third-party recipients of non-estate property from whom the property is sought would need to be joined as parties to the proceeding.⁴⁵ The holder of non-estate property should not be required to relinquish the property if they received it in good faith and for fully adequate consideration.

9.48 Claimants could apply directly to the court for orders in respect of non-estate property. Like Option Two, we propose the removal of personal representatives' rights to seek relationship property division on behalf of the estate. Again, we do not see a reason for personal representatives' rights to seek a division to continue alongside this option.

9.49 Relationship property claimants could also apply for relief under the additional remedies in the PRA, including, if adopted, the revised section 44C in respect of dispositions to trusts recommended in the PRA review.

⁴³ This category is intended to capture the kinds of powers the settlor held in *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551.

⁴⁴ See the explanation above for the five-year period.

⁴⁵ We propose that any party should be able to join the third-party recipients, including the personal representatives, a third-party recipient who has already been joined, or the court by its own initiative. This may prevent one party unfairly shouldering the burden when there are potentially multiple third parties who have received property against whom orders could be sought.

Notices of claim

- 9.50 There is a case for allowing claimants under the new Act generally to lodge notices against land in the estate. It would continue the rights that certain claimants currently enjoy under the PRA and in equity and expand them to all claimants under the new Act.
- 9.51 On the other hand, notices of claim can prevent dealings with the land and delay the administration of the estate, thereby affecting the rights of beneficiaries and other claimants.
- 9.52 Our preliminary view is that only partners should be able to lodge a claim in respect of relationship property claims under the new Act. The notice could be lodged against land of the estate and land that could be recovered through an anti-avoidance mechanism (depending on which option is preferred). However, the arguments are finely balanced.

SUMMARY OF PROPOSALS FOR REFORM

Property available to make awards

- Relationship property awards should be made from the parts of the estate comprising relationship property.
- Family provision awards should fall rateably across the whole estate.
- 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.
- For all claims, the court should have discretion to order that the award be sourced only from particular parts of the estate.
- The intestacy provisions should apply only to the distribution of the property of the estate.

Priorities

- Creditors' rights should generally take priority over all claims under the new Act. Exceptions to this general rule should be:
 - providing the court with discretion to make contribution awards in relation to specific property in priority to unsecured creditors; and
 - enabling the surviving partner to claim a protected interest if, after consideration of the recommendations from the PRA review, the Government considers the protected interest mechanism should continue.
- If an estate has insufficient property to fully satisfy awards under the new Act, the property of the estate should be applied to satisfy claims in the following order of priority:
 - to meet contribution awards
 - to meet relationship property awards
 - to meet family provision awards.

Anti-avoidance mechanisms

- We present three options for reform.
- Option One is to maintain the status quo by restating the current law within the new Act.
- Option Two is to provide for a limited clawback mechanism targeted at:
 - dispositions of property the deceased made with intent to defeat an entitlement or claim;
 - dispositions of property the deceased made within five years prior to their death that had the effect of defeating a claim; and
 - the deceased's interest in a joint tenancy that has passed by survivorship.
- Option Three is to introduce a mechanism that comprehensively identifies the types of property the court can recover in order to meet claims against an estate (non-estate property).
- For both the second and third options, the personal representatives' rights to seek a relationship property division on behalf of the estate would be removed.
- Partners should be able to lodge a notice of claim over land held by the estate or that could be recovered through an anti-avoidance mechanism to protect a claimed relationship property interest.

QUESTIONS

Q52

Do you agree with the issues we have identified?

Q53

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

Q54

What are your views on the proposals for reform?

Q55

Do you have any other suggestions for reform?

CHAPTER 10

Use and occupation orders

IN THIS CHAPTER, WE CONSIDER:

- the law enabling a court to grant orders for the use or occupation of property of an estate, such as housing, furniture or other household items; and
- issues with the current law and proposals for reform.

THE CURRENT LAW

- 10.1 Personal representatives are required to distribute a deceased's estate according to the deceased's will. If the deceased has died intestate, they must distribute the estate according to the intestacy regime under the Administration Act 1969. There may, however, be individuals who relied on the deceased for housing or furniture and other household items. If the deceased's will or an intestacy does not provide for these individuals, the distribution of the estate may require them to relinquish possession of the property.
- 10.2 The law provides several ways in which a court can award certain individuals use and occupation orders¹ notwithstanding the requirements of the will or the intestacy regime.

Occupation orders under the PRA

- 10.3 Section 27 of the Property (Relationships) Act 1976 (PRA) enables the court to grant a partner occupation of the family home or other premises forming part of the relationship property (an occupation order). An order enables the surviving partner to occupy the premises to the exclusion of any other person who would otherwise be entitled to occupy the premises.²

¹ "Use and occupation orders" is used here to refer to an occupation order, tenancy order or furniture order. This chapter does not consider occupation orders over whenua Māori under Te Ture Whenua Māori Act 1993.

² Property (Relationships) Act 1976, s 91(2).

- 10.4 The PRA provides no mechanism for the deceased's children to apply for an occupation order. Only partners may apply. However, when determining whether to grant an occupation order to a partner, the court must have particular regard to the need to provide a home for any minor or dependent child of the relationship.³
- 10.5 The court may require a partner to pay occupation rent.⁴ The purpose of occupation rent is to compensate for the denied or delayed access for those entitled to the property.
- 10.6 The case law shows that the courts generally grant occupation orders for short periods.⁵

Tenancy orders under the PRA

- 10.7 Section 28 of the PRA empowers the court to vest the tenancy of a dwellinghouse in a partner (a tenancy order). When a partner dies, the court may only make the order if:⁶
- (a) the tenancy has vested in either the personal representatives of the deceased or the surviving partner; and
 - (b) the surviving partner is residing in the dwellinghouse or at the date of death the deceased partner was the sole tenant of the dwellinghouse or a tenant in common with the surviving partner.
- 10.8 Like occupation orders, the court must have particular regard to the need to provide a home for any minor or dependent child of the relationship.⁷
- 10.9 Tenancy orders will rarely be made when a partner dies. If the tenancy is in the names of both partners, it is likely the surviving partner will be able to continue the tenancy without the need for orders from the court. If, however, the deceased was the sole tenant under a residential tenancy, it is likely the tenancy will terminate on their death.⁸

Furniture orders under the PRA

- 10.10 Section 28C of the PRA allows the court to grant a partner exclusive possession of furniture, household appliances and household effects (a furniture order). The court will only grant an order if it is satisfied the items are reasonably required to equip another dwellinghouse in which the partner will be living. The court may make an order for such a period and on such terms as it sees fit. The court must have particular regard to any need

³ Property (Relationships) Act 1976, s 28A(1).

⁴ Occupation rent can be payable as compensation for post-separation contributions under s 18B of the Property (Relationships) Act 1976 or in the form of interest under the court's ancillary powers under s 33(4) of the Property (Relationships) Act 1976.

⁵ Nicola Peart "Occupation orders under the PRA" [2011] NZLJ 356 at 356. Peart's review of 28 cases decided from 2002 found occupation orders were granted in 18 of the cases. Orders for a finite period were made in six cases. In five cases the period ranged from four to 22 months. In 10 cases, orders were made pending sale or division of relationship property.

⁶ Property (Relationships) Act 1976, s 91(3).

⁷ Property (Relationships) Act 1976, s 28A(1).

⁸ Residential Tenancies Act 1986, s 50A(1). The court has no power under the Property (Relationships) Act 1976 to extend a tenancy beyond its terms, which in this context would mean the terms set by the Residential Tenancies Act 1986.

of the applicant partner to the items to provide for the needs of any children of the relationship where those children live or will be living with the partner.⁹

- 10.11 Section 28B of the PRA enables the court to grant a partner the use of furniture, household appliances and household effects in a home to which the court has granted an occupation order under section 27.

Occupation orders under the FPA

- 10.12 The Family Protection Act 1955 (FPA) contains no provisions expressly empowering the court to grant a claimant use or occupation orders over property in the estate. Nevertheless, there are instances where the court has granted occupation rights under section 4 of the FPA to ensure “adequate provision” is made for the claimant.¹⁰ More often, however, rather than grant specific occupation rights, the court will award a portion of the estate or capital from the estate to ensure the claimant can retain the deceased’s home or obtain alternative accommodation.¹¹

Recommendations in the Commission’s review of the PRA

- 10.13 The Commission made several recommendations to reform the PRA to elevate children’s interests in relation to use and occupation orders. Those recommendations included the following:
- (a) There should be a presumption in favour of granting a temporary occupation or tenancy order on application by a principal caregiver of any minor or dependent children of the relationship. A court may decline to make an order if the respondent partner satisfies the court that an application is not in the child’s best interests or would otherwise result in serious injustice.¹²
 - (b) In some circumstances, the family home should be classified as separate property.¹³ The court’s power to grant occupation orders should extend to the family home regardless of whether it is relationship property or separate property.¹⁴ There should also be a limited jurisdiction to grant occupation orders over property held on trust where either or both partners or any child of the relationship are beneficiaries of the

⁹ Property (Relationships) Act 1976, s 28C(4).

¹⁰ See for example *Re Patterson* HC Nelson M84/92, 19 February 2001.

¹¹ See for example *Re Torrie* HC Christchurch CIV-2005-409-144, 12 October 2005; *Corbett v Down* FC Kaikohe FAM-2007-027-37, 30 May 2008; and *D v M* [2012] NZFC 6722.

¹² Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R69 and [12.62]–[12.68].

¹³ Specifically where the home was acquired by a partner before a relationship or as a gift or inheritance.

¹⁴ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R94 and [15.97].

trust or either or both partners are trustees.¹⁵ The court would, however, retain discretion to withhold an order, having regard to the circumstances of the trust.¹⁶

- (c) Express reference to the court's powers to award occupation rent when appropriate as a condition of any occupation order.¹⁷ However, there should not be guidance for how a court should calculate occupation rent. The decision will depend on many factors and the court should have broad discretion to take all relevant matters into account.
- (d) The court's power to grant furniture orders should be extended to other types of property that would come under the new definition of family chattels.¹⁸

ISSUES

- 10.14 First, the current law provides no express power for the minor or dependent children of the deceased or their principal caregiver to seek a use or occupation order. Currently, if the children's accommodation interests are inadequately provided for under the will or in an intestacy, they must rely on the surviving partner to apply for an order under the PRA.¹⁹ There may be instances, however, where the surviving partner is unwilling to apply, or the surviving partner is not the principal caregiver of the children.
- 10.15 As a signatory to the United Nations Convention on the Rights of the Child (the UNCROC), Aotearoa New Zealand has committed to ensure that, in matters affecting children, the best interests of the child shall be a primary consideration.²⁰ Arguably, the law should make better provision for the use and occupation rights of the deceased's minor children following the death.
- 10.16 Second, under the current law, the court's powers to grant occupation orders to a surviving partner only extend to the family home and other property forming part of the relationship property. As explained in the PRA review, in many instances, the couple's family home may not be relationship property.²¹ For instance, the home may be held on a trust connected with the family. If the recommendations in the PRA review are implemented, the family home may be one partner's separate property.
- 10.17 It is important that the court has adequate powers to ensure partners do not suffer hardship when relationships end by the death of their partner. The surviving partner will

¹⁵ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R94 and [15.97]–[15.100].

¹⁶ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [15.100].

¹⁷ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R95 and [15.104]–[15.106].

¹⁸ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R70 and [12.70].

¹⁹ As noted above, the children could apply for further provision from the estate under the Family Protection Act 1955, but the courts are more likely to grant a capital award from the estate rather than use and occupation rights.

²⁰ United Nations Convention on the Rights of the Child, 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 3.

²¹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [15.84]–[15.87].

often be an older person with limited means. They may therefore be particularly vulnerable if they are required to find alternative accommodation soon after the death of their partner.

- 10.18 Lastly, as noted in the PRA review, the court’s power to make furniture orders under the PRA is restricted in terms of the types of property included.²² Broadening the property beyond “furniture, household appliances, and household effects” could better support the best interests of children.

PROPOSALS FOR REFORM

- 10.19 We propose the court’s powers to make occupation, tenancy and furniture orders should be expressed in the new Act. While these orders may delay distribution of the estate and add costs to administration, we consider these disadvantages are outweighed by the need for the court to grant use and occupation rights in the following scenarios.

Occupation orders

- 10.20 We propose that a court should have the ability to grant an occupation order to a surviving partner or a principal caregiver of any minor or dependent child of the deceased. The purpose of the occupation order should be to provide stability for the deceased’s partner as they transition to a life in which they are not dependent on the deceased for accommodation support. For the deceased’s minor or dependent children, the court should consider their best interests as a primary consideration.
- 10.21 The inclusion of adult dependent children is to align with the availability of occupation orders when partners separate, which we affirmed in the PRA review.²³ As the court would consider their best interests, there may seem to be an inconsistency with family provision awards, as we are considering options to restrict eligibility for family provision awards to only children under a prescribed age. We consider this difference is justified because, as we explain below, an occupation order is distinct from family provision.
- 10.22 The court should have power to grant the occupation order in respect of any property of the estate. In addition, it should have power to grant an order over a home the deceased owned as a joint tenant with another party that would pass to the remaining owner by survivorship. The court should also have a limited jurisdiction to grant an occupation order over property held on trust where the deceased or any minor or dependent child of the deceased are beneficiaries of the trust. For homes that would pass by survivorship and homes held on trust, the court would retain discretion to decline an order, having regard to the surviving co-owner’s interests or the circumstances of the trust.

²² Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [12.70].

²³ Whether the child is “dependent” for the purposes of the PRA is a question of fact. The case law suggests that adult children may depend on their parents for support if they are physically or intellectually disabled, but adult children who have not progressed to financial independence due to lack of desire or motivation are unlikely to be dependent: see *B v B* (2009) 27 FRNZ 622 (HC) at [81].

Tenancy orders

10.23 We propose that a court should have the ability to grant a tenancy order to a surviving partner or a principal caregiver of any minor or dependent child of the deceased. However, we anticipate the courts will rarely grant tenancy orders for the reasons explained above.

Presumption in favour of minor or dependent children of the deceased

10.24 When the deceased left any minor or dependent child, we propose that the new Act should contain a presumption in favour of granting a temporary occupation or tenancy order to the primary caregiver of the child for the benefit of the child. A court may decline to make an order if it is satisfied that an application is not in the child's best interests or would otherwise result in serious injustice. In determining whether the order would be in the child's best interests, the court should have regard to:

- (a) the need to provide a home for the child;
- (b) the potentially disruptive effects on the child of a move to other accommodation; and
- (c) the child's views and preferences if they can be reasonably ascertained.

10.25 In considering whether the order would cause a serious injustice, the court would need to consider the interests of beneficiaries and claimants of the estate and how they would be affected by the order. The court's power to award occupation rent (see below) is relevant to this assessment.

10.26 We consider this approach is consistent with Aotearoa New Zealand's obligations to take a child-centred approach under the UNCROC and a parent's duty to provide for their children. It does, however, recognise there may be cases where an occupation order would cause serious injustice and the court could decline to make the occupation order.

Furniture orders

10.27 We propose that a court should have power to grant furniture orders to a surviving partner or principal caregiver of any minor or dependent child of the deceased. The court should consider the best interests of the child as a primary consideration.

10.28 The types of property that may be the subject of a furniture order should be extended to other types of property that would come under the new Act's definition of family chattels (see discussion on family chattels in Chapter 3). This is to maintain consistency between the new Act and the recommendations made in the PRA review for the relationship property regime that applies to relationships ending by separation.

Applicants

10.29 There may be individuals who are not the deceased's partner or minor or dependent children but have depended on the deceased for use or occupation of property. For example, such individuals could include a surviving partner who despite cohabiting with the deceased, was not in a qualifying relationship or an adult child who has not left home. They may need accommodation support.

10.30 We do not propose to extend the category of applicants beyond the surviving partner from a qualifying relationship or the principal caregiver of any minor or dependent child

of the deceased. It is difficult to see why, in the absence of formal occupation and use rights (such as a licence or a lease), the deceased should owe legal obligations to other individuals, especially as the deceased would have no obligations to provide for them while alive. We also consider that, in most cases, the personal representatives would be lenient towards these individuals as they transition to alternative accommodation.

Occupation rent

10.31 Consistent with the recommendations in the PRA review, we propose that the court should have power to order that the recipient of an occupation order pay occupation rent to the estate (or trust). However, the new Act should not contain guidance on how such rent should be calculated. The decision will depend on many factors, and the court should have broad discretion to take all relevant matters into account.

Relationship with family provision claims

10.32 A court should not be able to satisfy a family provision claim by awarding use or occupation rights to the claimant. That is because a family provision award should reflect the extent of the particular claimant's rights to family provision. A use or occupation order, on the other hand, should be targeted more towards the applicant's immediate accommodation needs. An occupation order may also be granted to an adult dependent child who is not eligible for a family provision order. As it is targeted towards accommodation needs, it should be possible for a use or occupation order to exceed the deceased's duties to make provision for the applicant. To the extent a use or occupation order goes beyond the deceased's duties, the court might require the applicant to pay occupation rent. In some cases, the occupation rent could be offset against any family provision award to the applicant. For these reasons, occupation, tenancy and furniture orders should be distinct from family provision awards.

SUMMARY OF PROPOSALS FOR REFORM

- The new Act should provide the court with powers to make:
 - occupation orders;
 - tenancy orders; and
 - furniture ordersin favour of a surviving partner or a principal caregiver of any minor or dependent child of the deceased.
- The court's power to grant an occupation order should extend to:
 - homes the deceased owned as a joint tenant with another party that pass to the remaining owner by survivorship; and
 - homes held on trust where the deceased or any minor or dependent child of the deceased are beneficiaries of the trust.
- Where the deceased left any minor or dependent child, we propose that the new Act should contain a presumption in favour of granting a temporary occupation or tenancy order to the primary caregiver of the child for the benefit of the child.

- The court should have power to order that the recipient of an order pay occupation rent to the estate (or trust). However, the new Act should not contain guidance on how such rent should be calculated.
- The court's power to make furniture orders should include types of property that would come under the new Act's definition of family chattels.

QUESTIONS

Q56

Do you agree with the issues we have identified?

Q57

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

Q58

What are your views on the proposals for reform?

Q59

Do you have any other suggestions for reform?

CHAPTER 11

Contracting out and settlement agreements

IN THIS CHAPTER, WE CONSIDER:

- the law that governs whether someone, during their lifetime, can make an agreement with another that determines rights in respect of their estate when they die instead of having those rights determined by the relevant statutes (contracting out agreements);
- the law that governs whether people can settle any dispute regarding claims against an estate without the court having to make orders (settlement agreements); and
- issues with the current law and proposals for reform.

THE CURRENT LAW

Contracting out of the PRA and settling claims

- 11.1 Part 6 of the Property (Relationships) Act 1976 (PRA) enables partners to reach their own agreement about the division of their property rather than following the provisions of the Act. There are different types of agreements. First, section 21 allows partners in a relationship, or contemplating entering a relationship, to make a contracting out agreement with respect to the status, ownership and division of their property. Second, section 21A provides for partners to enter an agreement for the purposes of settling any differences that have arisen between them during their relationship.
- 11.2 Section 21B allows agreements where one partner dies. This can apply where proceedings are commenced while both partners are alive but then one partner dies or when one partner has died and the surviving partner or the deceased's personal representative intends to commence or has commenced proceedings. In either case, the surviving partner and the personal representative may make an agreement for the purpose of settling the claim.

- 11.3 Parties must observe the procedural safeguards in section 21F for an agreement to have effect.¹ These are:
- (a) the agreement must be in writing;
 - (b) each party to the agreement must have independent legal advice before signing the agreement;
 - (c) the signature of each party to the agreement must be witnessed by a lawyer; and
 - (d) the lawyer who witnesses the signature must certify that, before the party signed, the lawyer explained to that party the effect and implications of the agreement.
- 11.4 Under section 21J, a court can set aside an agreement if satisfied that, having regard to all the circumstances, giving effect to it would cause serious injustice. In addition, section 21G provides that section 21F does not limit any other law that makes a contract void, voidable or unenforceable.

Contracting out of the FPA and settling claims

- 11.5 There is nothing in the Family Protection Act 1955 (FPA) that expressly prevents parties entering agreements during their lifetime regarding their rights under the FPA. However, the courts have held that the FPA is paramount as a matter of state policy and potential claimants cannot surrender their rights through agreements.²
- 11.6 The courts have held that agreements entered to settle FPA claims after the deceased has died do not prevent a person from pursuing a claim.³ Nevertheless, we understand parties often enter “deeds of family arrangement” to settle FPA claims.⁴

Contracting out of the TPA and settling claims

- 11.7 A claim under the Law Reform (Testamentary Promises) Act 1949 (TPA) is, by its nature, quasi-contractual. If the parties come to an agreement as to how a TPA claim would be determined, that would alter the promise upon which the claim is founded. Consequently, it would appear that parties can enter contracting out agreements to determine a claimant’s TPA claims both during the deceased’s lifetime and after their death.

¹ If an agreement does not comply with the procedural safeguards in s 21F, a court may declare the agreement has effect, wholly or in part, if it is satisfied that the non-compliance has not materially prejudiced the interests of any party to the agreement: Property (Relationships) Act 1976, s 21H.

² *Gardiner v Boag* [1923] NZLR 739 (SC) at 745–746. But see the recent case *Matthews v Phochai* [2020] NZHC 3455, in which the Court, while accepting the parties’ contracting out agreement was void or voidable insofar as it purported to exclude any claim under the Family Protection Act 1955, held that the agreement was relevant to the assessment of any award, as it recorded the parties’ joint intention to be financially independent and leave the relationship with only the assets they came in with, plus anything more they had acquired themselves: at [61]–[64].

³ *Hooker v Guardian Trust & Executors Co of New Zealand* [1927] GLR 536 (SC).

⁴ Bill Patterson has argued that if the issue came before the courts today, they would likely hold such deeds of family arrangements are enforceable: see Bill Patterson *Law of Family Protection and Testamentary Promises* (4th ed, LexisNexis, 2013) at 106–107. Note too s 47(3) of the Administration Act 1969, which provides that claimants cannot bring an action against an administrator for distributing an estate when they have advised the administrator in writing or acknowledged in any document that they consent to the distribution or do not intend to make any application that would affect the distribution.

Contracting out of the intestacy regime

- 11.8 There are no provisions in the Administration Act 1969 dealing with or prohibiting contracting out of the intestacy regime. This is understandable because the deceased could simply have made a will rather than contracting with another regarding their entitlements. There is some case law that has found that separating partners can contract out of intestacy entitlements.⁵
- 11.9 Under section 81, beneficiaries under the regime can disclaim their entitlements. However, a disclaimer has no effect if any valuable consideration is given for it.⁶

Mutual wills

- 11.10 A mutual wills arrangement is where two people make wills that dispose of certain property in a manner they have agreed upon accompanied by a mutual understanding that neither party will change or revoke the will or dispose of the property.⁷
- 11.11 For mutual wills made after 1 November 2007, section 30 of the Wills Act 2007 applies. It provides that where two people have made mutual wills and the first of them to die (person A) keeps the promise but the second (person B) does not, a person who would have benefited from person B's will had person B kept their promise may claim from person B's estate.
- 11.12 For wills made before 1 November 2007, the common law doctrine of mutual wills continues to apply. If the surviving person does not keep their promise, their personal representative will be required to hold the property on trust for the beneficiaries of the mutual wills agreement.⁸ This doctrine, rather than the Wills Act, also applies where the survivor acts inconsistently with the mutual wills agreement during their lifetime.

ISSUES

Parties cannot make comprehensive agreements regarding property on death

- 11.13 In our preliminary view, the law should respect the wishes of partners or people contemplating entering a relationship to have their rights and claims against each other's estates determined by agreement rather than the relevant statutes, provided the parties are capable of looking after their affairs and have entered the agreement informed of their rights. The current law enabling parties to contract out of the PRA but not the FPA undermines parties' freedom to arrange their affairs in the manner they wish, promoting a certain and final outcome.

⁵ *Warrender v Warrender* [2013] NZHC 787, [2013] NZFLR 565 at [19].

⁶ Administration Act 1969, s 81(3)(c).

⁷ *Wilson v Saunders* [2016] NZHC 1211, (2016) 17 NZCPR 404 at [8]–[9].

⁸ *Re Newey (Deceased)* [1994] 2 NZLR 590 (HC) at 592; and *Lewis v Cotton* [2001] 2 NZLR (CA) at [42].

The current law can lead to inconsistent outcomes

- 11.14 Several anomalies can potentially arise under the current law. First, a situation could arise where an FPA claim undermines a contracting out agreement under the PRA. For example, partners may make an agreement under section 21 of the PRA that certain property is to be separate property should one of the partners die. However, the surviving partner could, at least in theory, claim against the deceased's separate property under the FPA.
- 11.15 Second, the courts have held that they cannot interfere with contracts to make testamentary provision when determining FPA claims.⁹ A person could enforce a contract through which the deceased provided them certain benefits under their will. However, if a contract provided that a person agrees not to make a FPA claim against the estate, the court would not enforce it.
- 11.16 Third, there is conflicting case law as to whether a former spouse may still succeed under section 77 of the Administration Act when they have concluded a relationship property settlement with the deceased but the marriage has not been formally dissolved.¹⁰ Giving the surviving spouse entitlements under the intestacy regime is arguably inconsistent with the partners' intentions to conclude their property matters and sever the economic ties of their former relationship.

There are delays and costs to administration if matters cannot be settled out of court

- 11.17 It is unsatisfactory if claims cannot be settled without going to court. The parties will suffer from extra costs, delays and the adversarial nature of court proceedings. Scarce judicial resources may be unnecessarily spent. We explore this issue further when discussing resolution of matters out of court in Chapter 14.

It is unclear how claims against estates relate to mutual wills

- 11.18 It is unclear what effect a mutual wills arrangement has when a surviving partner elects option A under Part 8 of the PRA. It could be argued a mutual wills arrangement that does not meet the contracting out requirements under the PRA is void.¹¹ A surviving partner would therefore not be prevented from electing option A to divide relationship property despite the mutual wills. However, it is unclear whether the property the surviving partner receives from a relationship property division having chosen option A would be held on constructive trust or claimable under section 30 of the Wills Act.¹²

⁹ *Breuer v Wright* [1982] 2 NZLR 77 (CA).

¹⁰ Compare *Re Trotter* HC Christchurch CIV-2009-409-2584, 10 May 2010 at [10]; *W v P* [2012] NZFC 3293; and *Warrender v Warrender* [2013] NZHC 787, [2013] NZFLR 565 at [19].

¹¹ Property (Relationships) Act 1976, s 21F; and Nicola Peart "Effect of Option A" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Reuters, Wellington, 2004) 97 at 105–107.

¹² The authors of *Relationship Property on Death* have argued that it should: see Nicola Peart "Effect of Option A" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Reuters, Wellington, 2004) 97 at 105–107.

11.19 There is also a wider question about the requirements for finding a mutual wills arrangement. There have been cases where partners in a subsequent relationship have entered wills that made provision for the surviving partner to inherit the estate on the understanding they would then provide for the deceased partner's children in their will.¹³ After a partner died, the surviving partner changed their will to omit the deceased partner's children. In these cases, the court has held a mutual wills arrangement was not present because there was no evidence that the parties had committed not to revoke their wills. A question arises as to whether the evidential threshold at which the courts should find a mutual wills relationship arrangement exists should be lowered.

Contracting out and settlement agreements may leave insufficient property to meet claims

11.20 It is possible that partners' contracting out and settlement agreements will leave insufficient property in the deceased's estate to meet claims. We consider this issue further when discussing awards, priorities and anti-avoidance in Chapter 9.

PROPOSALS FOR REFORM

Contracting out agreements

Partners should be able to contract out of all claims under the new Act

11.21 We propose that partners or people contemplating entering a relationship, who are capable of looking after their affairs and are informed of their rights, should be able to enter contracting out agreements that deal with relationship property entitlements and family provision claims under the new Act.

11.22 Our preliminary view is that contracting out agreements under the new Act should be void unless they comply with the same procedural safeguards that currently apply to agreements entered under the PRA, namely:

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

11.23 These safeguards recognise that contracts regarding relationship property or family provision claims may be made between parties who do not approach one another as contracting parties at arm's length. Rather, they are in relationships of love, affection and aroha. The parties may be of unequal bargaining power. The purpose of the safeguards is to ensure people do not sign away their rights without appreciating their entitlements under the new Act and the implications of the agreement.

11.24 If an agreement does not comply with the formalities, a court should have powers to give effect to the agreement if non-compliance has not caused material prejudice to the

¹³ See for example *Cleary v Cockcroft* [2020] NZHC 1452; and *McNeish v McArthur* [2019] NZHC 3281, [2020] 2 NZLR 287.

parties. A court should only give effect to the agreement to the extent it would not be caught by any anti-avoidance provisions that may be implemented in the new Act.

- 11.25 We propose that these agreements should also be subject to any other law that makes a contract void, voidable or unenforceable. A court should also be able to set an agreement aside if satisfied that giving effect to it would cause serious injustice. This will enable the court to address agreements that have, for example, become unfair or unreasonable in light of any changes in circumstances since they were made. The court should have regard to the matters currently set out in section 21J of the PRA, including whether the estate has been wholly or partly distributed.¹⁴ The factors should also direct the court to have regard to the best interests of any minor or dependent children of the deceased, like the recommendation in the PRA review.¹⁵
- 11.26 Depending on what anti-avoidance mechanisms (if any) are contained within the new Act (see the proposals for reform set out in Chapter 9), a court should have power to set aside contracting out agreements that defeat the claims of others against the estate.

Procedural safeguards are not needed for agreements concerning family provision and contribution claims

- 11.27 In Chapter 4 on family provision claims, we raise the option of allowing children of the deceased to claim an award to recognise them as members of the deceased's family. We do not, however, consider the new Act should make express provision for adult children to enter a formal contracting out agreement with the deceased. That is because, in determining whether to make an award, the court should have regard to all the circumstances, such as the deceased's reasons not to recognise the child in their will and any provision that the deceased made for the child during the deceased's lifetime. Omitting express provision in the new Act for adult children to enter agreements will not preclude the parties from entering agreements and will instead enable the parties to enter arrangements that might not comply with the statutory contracting out requirements. For example, a person may provide their adult child with support during their life on the understanding it was an advance on their inheritance and no further provision would be available for that child when the deceased dies. The court should not be required to disregard this arrangement as void because it does not qualify as a contracting out agreement.
- 11.28 We are also mindful that an award to an adult child is more discretionary than a partner's relationship property entitlements. It would be difficult to apply the other provisions that apply to contracting out agreements in the PRA, such as when the court should validate a non-complying agreement or set an agreement aside for serious injustice.
- 11.29 We do not consider the parties should be required to follow the same procedural safeguards when making a contract that relates to a person's rights to bring a contribution claim. It is preferable that parties are able to make agreements for services or other benefits that might otherwise give rise to a contribution claim without the potential barrier

¹⁴ Property (Relationships) Act 1976, s 21J(5).

¹⁵ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R78 and [13.96]–[13.98]. The court could also unwind an agreement if the deceased's children chose to challenge an agreement through anti-avoidance provisions, meaning there are potentially two routes through which the court could set aside or vary an agreement when it infringed on the best interests of minor or dependent children.

of having to go through the full procedural safeguards. Similarly, if the parties wish to agree that the provision of those benefits will not give rise to a contribution claim, they should not be obstructed by needing to observe the procedural safeguards. In any event, parties already entering a contracting out or settlement agreement could include terms relating to contribution claims.

Effect of a relationship property settlement when a partner dies

11.30 Under the present law, it is unclear whether a relationship property settlement between partners precludes them from making an FPA claim and/or precludes them from entitlements under the intestacy regime. Our preliminary view is that an agreement between former partners on their separation that purports to be a full and final settlement of relationship property claims should be presumed to be a full and final settlement of the surviving partner's claims and entitlements under the new Act unless the agreement provides otherwise.¹⁶

Mutual wills

11.31 We propose that mutual wills agreements should be subject to the same procedural requirements as contracting out agreements regarding claims against the other's estate. That is, if the parties agree not to revoke their wills or deal with property inconsistently with them, that agreement should be recorded in writing, their signatures should be witnessed, and the lawyers advising each partner should certify the agreement. If these requirements were not met, the court could give effect to the agreement if neither partner suffered material prejudice. A court should be able to vary or set aside agreements that would cause serious injustice.

11.32 Our reasons for favouring this approach are:

- (a) consistency with the wider regime for contracting out;
- (b) it would avoid the contentious litigation often seen in the courts as to whether the partners did in fact enter a mutual wills arrangement; and
- (c) because the court would have residual powers to give effect to the agreement or to vary or set the agreement aside, it will help address instances where mutual wills ought or ought not to be enforced.

No ability to contract out of some family provision claims

11.33 There are strong public policy reasons to prohibit agreements that purport to contract out of a deceased's obligations to provide for their minor children and dependent disabled children by precluding family provision claims. There are also practical and legal issues about minor and some disabled children's capacity to be party to such agreements.

¹⁶ Our preliminary view is the presumption should apply equally to a non-complying agreement that a court has ordered should be given effect.

Settlement agreements

Parties should be able to settle their claims under the new Act by agreement

11.34 Our preliminary view is that parties and personal representatives of an estate, informed of their rights, should be able to enter an agreement that settles any claim under the new Act. We seek feedback on what procedural requirements should apply when parties enter settlement agreements. We present two options for reform.

Option One: the new Act does not prescribe any procedural safeguards

11.35 The first option is to clarify in statute that parties can enter an agreement to settle any differences arising between them under the new Act but prescribe no procedural requirements for those parties to observe when entering agreements. This approach would continue the existing practice of parties entering deeds of family arrangement. It would be a matter of judgement for the parties, particularly the personal representatives, as to how the agreement should be entered. For example, questions that might need to be considered include:

- (a) who would need to be party to the settlement agreement;
- (b) which parties would need to obtain independent legal advice;
- (c) how parties who have chosen against actively participating in the settlement negotiations should be included in the agreement; and
- (d) how beneficiaries who are minors, unborn or unascertained or otherwise lack capacity ought to be represented.

11.36 If the personal representatives or other parties consider it would not be appropriate to enter the settlement agreement, they could submit the proposed settlement to court for approval.

11.37 Under this option, the new Act should provide the court with power to vary or set aside an agreement that would cause serious injustice. Depending on what anti-avoidance mechanisms are contained within the new Act, a settlement agreement could potentially be set aside and the property clawed back if it had the effect of defeating claims.

11.38 The main advantage of this option is it should be easier for the parties to conclude settlements than if more stringent procedural safeguards applied.

11.39 The disadvantages of this option include:

- (a) the possible uncertainty as to when and how it is permissible for the parties to enter a settlement agreement; and
- (b) the potential that parties enter imprudent agreements they would not otherwise have entered had more stringent safeguards applied.

Option Two: the new Act prescribes procedural safeguards

11.40 The alternative option is for the new Act to require parties to follow the same procedure applying to contracting out agreements we have proposed above, namely:

- (a) the agreement must be in writing;
- (b) each party to the agreement must have independent legal advice before signing the agreement;

- (c) the signature of each party to the agreement must be witnessed by a lawyer; and
 - (d) the lawyer who witnesses the signature must certify that, before the party signed, the lawyer explained to that party the effect and implications of the agreement.
- 11.41 The procedure would apply to all parties entering the settlement agreement, including beneficiaries.
- 11.42 A question arises as to how parties who are minors, unascertained (such as beneficiaries yet to be born) or otherwise lack capacity are to enter agreements. We discuss this question further in Chapter 14 regarding the resolution of matters out of court. We propose that a court should appoint a representative for these parties. Those representatives may agree to any settlement agreement, but the settlement should then be approved by the court.¹⁷ The same procedural safeguards should apply to these parties when they enter settlement agreements.
- 11.43 Under this option, the court should retain power to vary or set aside agreements that would cause serious injustice. Depending on what anti-avoidance mechanisms are contained within the new Act, a settlement agreement could potentially be set aside and property clawed back if it had the effect of defeating claims.
- 11.44 The advantage of this option is that it would help ensure parties do not compromise their rights without understanding the effects and implications of the settlement agreement into which they are entering. The court would probably be required to set aside agreements less often than under the first option because the parties would be less likely to enter bad bargains.
- 11.45 The approach would also have the advantage of being consistent with the procedure we propose should apply to contracting out agreements made while the deceased is still alive. It is also consistent with the approach set out in the PRA applying to couples concluding an agreement settling their relationship property matters.
- 11.46 The main disadvantage of this option is the burden it may place on parties to obtain independent legal advice. When minor, unascertained or parties otherwise lacking capacity are involved, it would require the involvement of the court, which could delay a settlement and increase cost.

SUMMARY OF PROPOSALS FOR REFORM

- The new Act should permit partners or those contemplating entering a relationship to enter contracting out agreements regarding relationship property and family provision claims. It should not be possible to contract out of minor children's and disabled adult children's family provision claims.
- Contracting out agreements should be void unless the following requirements are complied with:
 - The agreement must be in writing.

¹⁷ This follows the approach in s 144(1) of the Trusts Act 2019.

- Each party to the agreement must have independent legal advice before signing the agreement.
- The signature of each party to the agreement must be witnessed by a lawyer.
- The lawyer who witnesses the signature must certify that, before the party signed, the lawyer explained to that party the effect and implications of the agreement.
- If an agreement does not comply with the formalities, a court should have powers to give effect to the agreement if non-compliance has not caused material prejudice to the parties.
- A court should also be able to vary or set an agreement aside if it is satisfied that giving effect to the agreement would cause serious injustice.
- An agreement between former partners on their separation that purports to be a full and final settlement of relationship property claims should be presumed to be a full and final settlement of the surviving partner's claims and entitlements under the new Act unless the agreement provides otherwise.
- Mutual wills agreements should be subject to the same procedural requirements as contracting out agreements regarding claims against the other's estate. If the parties agree not to revoke their wills or deal with property inconsistently with them, that agreement should be recorded in writing, their signatures should be witnessed and the lawyers advising each partner should certify the agreement.
- The new Act should not prevent adult parties from entering agreements regarding a family provision claim for recognition.
- The new Act should permit parties to enter agreements that settle any claim under the new Act. We present two options for what procedure the parties ought to observe when entering an agreement:
 - Option One is to clarify in statute that parties can enter an agreement to settle any differences arising between them under the new Act but prescribe no procedural requirements for those parties to observe when entering agreements.
 - Option Two is require parties to follow the same procedure applying to contracting out agreements we have proposed above. If parties are minors, unascertained (such as beneficiaries yet to be born) or otherwise lack capacity, we propose that a court should appoint a representative for these parties. Those representatives may agree to any settlement agreement, but the settlement should then be approved by the court.
- Under both options the court should have power to vary or set aside agreements that would cause serious injustice.

QUESTIONS**Q60**

Do you agree with the issues we have identified?

Q61

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

Q62

What are your views on the proposals for reform?

Q63

Do you have any other suggestions for reform?

CHAPTER 12

Jurisdiction of the courts

IN THIS CHAPTER, WE CONSIDER:

- the jurisdiction of te Kōti Whānau | the Family Court and te Kōti Matua | the High Court to hear and determine claims against an estate; and
- issues with the current law and proposals for reform.

THE CURRENT LAW

12.1 The discussion in this chapter focuses on the jurisdiction of te Kōti Whānau | the Family Court (the Family Court) and te Kōti Matua | the High Court (the High Court) when claims are made against estates. Te Kooti Whenua Māori | the Māori Land Court has jurisdiction for succession matters regarding whenua Māori under Te Ture Whenua Maori Act 1993. We discuss the role of te Kooti Whenua Māori | the Māori Land Court further in Chapters 7 and 15.

The PRA

12.2 Every application under the Property (Relationships) Act 1976 (PRA) must be heard by the Family Court.¹ The Family Court can transfer the proceedings to the High Court if the judge is satisfied that the High Court is the more appropriate venue, having regard to:²

- (a) the complexity of the proceedings or of any question in issue in the proceedings;
- (b) any proceedings before the High Court that are between the same parties and that involve related issues; and
- (c) any other matter that the judge considers relevant in the circumstances.

¹ Property (Relationships) Act 1976, s 22(1).

² Property (Relationships) Act 1976, s 38A.

- 12.3 Parties to a proceeding or any other person prejudicially affected by the decision have an automatic right of appeal to the High Court.³ Appeals against decisions of the High Court are governed by the Senior Courts Act 2016.⁴

The FPA and the TPA

- 12.4 The Family Protection Act 1955 (FPA) and the Law Reform (Testamentary Promises) Act 1949 (TPA) have very similar jurisdictional rules. The High Court and Family Court have concurrent jurisdiction with respect to proceedings under both Acts.⁵ The Family Court does not have jurisdiction if proceedings related to the same matter have already been filed with the High Court.⁶ The Family Court may refer proceedings or any question in the proceedings to the High Court if it considers it appropriate.⁷ The High Court, upon application by any party, must order that the proceedings be removed to the High Court unless it is satisfied that the proceedings would be more appropriately dealt with in the Family Court.⁸

- 12.5 Parties to a proceeding, or any other person prejudicially affected by the proceedings, have an automatic right of appeal to the High Court.⁹ Appeals against a High Court decision are governed by the Senior Courts Act 2016.¹⁰

The intestacy regime

- 12.6 The Administration Act 1969 provides that the High Court has jurisdiction to determine proceedings relating to testamentary matters and matters relating to the estate of deceased persons.¹¹ This general provision encompasses matters relating to intestate estates, although there are more specific rules in relation to certain matters:

- (a) The High Court has jurisdiction to grant letters of administration and to determine who should be appointed as administrator.¹²

³ Property (Relationships) Act 1976, s 39. The automatic right of appeal applies to a Family Court or District Court decision to make or refuse to make an order, or to dismiss or otherwise finally determine the proceedings.

⁴ Property (Relationships) Act 1976, s 39B.

⁵ Family Protection Act 1955, s 3A(1); and Law Reform (Testamentary Promises) Act 1949, s 5(1).

⁶ Family Protection Act 1955, s 3A(2); and Law Reform (Testamentary Promises) Act 1949, s 5(2). For the FPA, proceedings will relate to the same matter if a non-FPA proceeding might have the effect of enlarging or decreasing the estate, thus affecting the viability of an FPA claim: see *Hayes v Family Court* [2015] NZCA 470, (2015) 30 FRNZ 414.

⁷ Family Protection Act 1955, s 3A(3); and Law Reform (Testamentary Promises) Act 1949, s 5(3).

⁸ Family Protection Act 1955, s 3A(4); and Law Reform (Testamentary Promises) Act 1949, s 5(4).

⁹ Family Protection Act 1955, s 15(1); and Law Reform (Testamentary Promises) Act 1949, s 5A(1). Similarly to the PRA, the right of appeal is against a decision of the Family Court or District Court to make or refuse to make an order, dismiss proceedings or otherwise finally determine proceedings: Family Protection Act 1955, s 15(1AA); and Law Reform (Testamentary Promises) Act 1949, s 5A(1AA).

¹⁰ Decisions of the High Court are final unless the appellant obtains leave from the Court of Appeal: Senior Courts Act 2016, s 60(1).

¹¹ Administration Act 1969, s 5.

¹² Administration Act 1969, ss 5 and 6; and High Court Rules 2016, r 27.35.

- (b) The High Court has jurisdiction to determine the validity of a will or its interpretation.¹³ The High Court's determination may lead to a total or partial intestacy.
- (c) The Family Court may give approval for a person under 18 years to make, change revoke or revive a will.¹⁴ The Family Court's determination may lead to a total or partial intestacy.
- (d) The High Court may decide that a surviving de facto partner who was in a relationship of short duration should succeed on the deceased partner's intestacy.¹⁵
- (e) A person can claim against an intestate estate under the PRA, FPA and TPA, in which case, the jurisdictional rules under those Acts will apply.¹⁶
- (f) The administrators will hold an intestate estate on trust. Trustees may therefore apply to the High Court for directions,¹⁷ or beneficiaries may apply to the High Court to review a trustee's decision.¹⁸

ISSUES

Which court is the most appropriate to deal with claims?

- 12.7 The central issue is the appropriate forum to deal with claims under the new Act. We consider the Family Court and High Court in turn.
- 12.8 On the one hand, there is a strong argument for the Family Court having first instance jurisdiction, with the power to transfer proceedings to the High Court and being subject to rights of appeal. Factors in favour of this approach include the following:
- (a) The specialist jurisdiction of the Family Court in matters concerning families, relationships and children's interests. The Family Court has held jurisdiction for PRA matters for 40 years, and FPA and TPA matters for 30 years.
 - (b) Proceedings in the Family Court are private as hearings are generally not open to the public.¹⁹ Parties to a dispute may prefer privacy if the dispute centres on questions like whether the deceased and the surviving partner were in a qualifying relationship.
 - (c) The Family Court is generally more accessible as Family Court judges are stationed in towns across Aotearoa New Zealand.
 - (d) Family Court proceedings must be conducted in such a way as to avoid unnecessary formality.²⁰

¹³ Wills Act 2007, ss 14 and 32.

¹⁴ Wills Act 2007, s 9.

¹⁵ Administration Act 1969, s 77B.

¹⁶ Property (Relationships) Act 1976, s 61; Family Protection Act 1955, s 4; Law Reform (Testamentary Promises) Act 1949, s 3.

¹⁷ Trusts Act 2019, s 133.

¹⁸ Trusts Act 2019, s 95.

¹⁹ Family Court Act 1980, s 11A.

²⁰ Family Court Act 1980, s 10(1).

- (e) Lawyers acting for parties in Family Court proceedings must, so far as possible, promote conciliation.²¹
 - (f) The overall costs of Family Court proceedings are generally lower than High Court proceedings.
- 12.9 On the other hand, there are reasons to favour the High Court having first instance jurisdiction:
- (a) Giving the Family Court exclusive first instance jurisdiction could increase its already heavy workload and exacerbate delays.²²
 - (b) A claim against an estate can be brought alongside other claims for which the High Court has exclusive jurisdiction, such as challenging the validity of a will or the replacement of a personal representative.
 - (c) The claims against estates proposed in this Issues Paper may be complex and may be more appropriate for the High Court's determination. For example, contribution claims and anti-avoidance provisions could involve difficult questions of law and fact.

Rights of appeal against interlocutory matters are uncertain

- 12.10 Some High Court decisions have interpreted the right to appeal under the PRA as limited to orders that finally determine proceedings.²³ However, in *L v L*, the High Court held there is a right of appeal against interlocutory decisions under the PRA.²⁴
- 12.11 The courts have also been divided on rights of appeal under the FPA. In *Re Mcllraith*, the High Court held there was no automatic right of appeal against an interlocutory decision given the terms of section 15(1AA) of the FPA.²⁵ On the other hand, in *E v E*, the High Court refused to follow *Re Mcllraith*, relying instead on the District Court Act 1947.²⁶
- 12.12 The conflicting decisions and consequent uncertainty are a matter the new Act ought to resolve.

Jurisdictional limitations of the Family Court

- 12.13 There are questions regarding the Family Court's jurisdiction to address certain property issues that may arise under the PRA, such as whether a valid trust exists. Similar issues may arise in FPA and TPA proceedings where claimants try to impugn certain

²¹ Family Court Act 1980, s 9A.

²² See Rosslyn Noonan, La-Verne King and Chris Dellabarca *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Tāhū o te Ture | Ministry of Justice, May 2019) at 24 for findings regarding delays and workload of court staff.

²³ *Dunsford v Shanly* [2012] NZHC 257 at [7]–[8], applying *E v E* [2005] NZFLR 806 (HC) and *Crick v Mcllraith* HC Dunedin CIV-2004-412-37, 1 June 2004. See also *Smith v Smith* HC Whangarei CIV-2003-488-394, 12 March 2004.

²⁴ *L v L* [2017] NZHC 2529 at [22].

²⁵ *Crick v Mcllraith* HC Dunedin CIV-2004-412-37, 1 June 2004 at [3].

²⁶ *E v E* [2005] NZFLR 806 (HC), relying on s 72 of the District Courts Act 1947, now s 124 of the District Court Act 2016. See also *R v N* [2014] NZHC 1295, in which the Court held it had jurisdiction to hear an appeal from an interlocutory direction in an FPA proceeding.

transactions. For example, property purportedly settled on a trust that the court declares invalid would revert to the deceased's estate and be available to satisfy a claim.

- 12.14 These issues have been partly addressed by section 141 of the Trusts Act 2019. That provision gives the Family Court the power to make any order or give any direction available under the Trusts Act in proceedings for which the Family Court has jurisdiction under section 11 of the Family Court Act 1980.
- 12.15 In the PRA review, we recommended that, in relationship property proceedings, the Family Court should have jurisdiction to hear and determine any related matter within the general civil and equitable jurisdiction of te Kōti-ā-Rohe | the District Court pursuant to sections 74 and 76 of the District Court Act 2016.²⁷

PROPOSALS FOR REFORM

First instance jurisdiction

- 12.16 We propose that the Family Court and the High Court should have concurrent first instance jurisdiction to hear claims under the new Act. We generally favour the Family Court retaining first instance jurisdiction because of the “family” nature of the claims under the new Act, the relative accessibility of the Family Court and the proven expertise of the Family Court. However, there may be instances where it is appropriate for the High Court to have jurisdiction, such as when the proceedings involve questions affecting the estate that are in the exclusive jurisdiction of the High Court or where the issues are particularly complex.
- 12.17 It would be possible to involve the High Court through an uplift approach, like that taken in the PRA, which we affirmed in the PRA review.²⁸ The Family Court could have first instance jurisdiction generally but be able to order the transfer of proceedings in the High Court. Our preliminary view, however, is that the better approach is concurrent jurisdiction. We consider there is less risk that a party would use the High Court jurisdiction for tactical advantage in proceedings under the new Act than in proceedings under the PRA.²⁹ The FPA and TPA have provided for concurrent jurisdiction for several years now, and there appears to be little criticism of that approach.
- 12.18 We have also heard that the High Court procedures and case management system enable cases to be heard more efficiently in the High Court. In Chapter 13, we consider proposals to improve procedures in the Family Court.
- 12.19 The new Act should continue the FPA and TPA's approach of requiring the High Court to hear the claims if proceedings relating to the same matter have already been commenced

²⁷ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [17.41]. We also recommended the financial limit on the District Court's jurisdiction should not apply.

²⁸ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R114–R115.

²⁹ See discussion in Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [17.37(e)].

in the High Court. It is procedurally more efficient that all matters be considered by the same court at the same time.

12.20 We propose that the new Act should contain directions on when proceedings already filed in the Family Court, or a question in those proceedings ought to be removed to the High Court. The Court should have regard to:³⁰

- (a) the complexity of the proceedings or any question in issue in the proceedings;
- (b) any proceedings before the Family Court or High Court that relate to the same matters; and
- (c) any other matter the judge considers relevant in the circumstances.

12.21 We do not propose a provision for when the High Court should transfer proceedings to the Family Court. We are cautious about creating an additional procedural matter than could be argued over and used to delay the resolution of substantive matters. We also note that the FPA and TPA do not include a power for the High Court to transfer a matter to the Family Court and we have encountered no significant criticism of this approach.

12.22 Given the proposal that the Family Court and the High Court ought to exercise concurrent jurisdiction, both Courts should be capable of exercising the power to transfer proceedings to the High Court.

12.23 The High Court should continue to hold jurisdiction for issues concerning the administration and distribution of an intestate estate. We anticipate that matters relating to an intestacy are most likely to come before the court because personal representatives apply for directions, such as on the validity of a will or the standing of an individual to succeed under the intestacy regime. The High Court currently holds jurisdiction for such applications.

Rights of appeal against interlocutory matters

12.24 The new Act should permit appeals as of right against interlocutory decisions that can have a significant impact on the parties' rights and obligations. The interlocutory matters on which parties should have an automatic right of appeal include:

- (a) occupation, tenancy and furniture orders;
- (b) transfers of the proceeding to the Family Court or High Court; and
- (c) orders for the disclosure of information.

12.25 For all other interlocutory matters, the appellant should be required to obtain the leave of the court to appeal. This requirement is to minimise risks that parties unduly protract proceedings with appeals.

12.26 This approach is consistent with our recommendations in the PRA review.³¹

³⁰ These are the same factors as in s 38A of the Property (Relationships) Act 1976.

³¹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R119 and [17.53].

Jurisdictional limitations of the Family Court

- 12.27 In our preliminary view, when dealing with matters under the new Act, the Family Court should have jurisdiction to hear and determine any related matter within the general civil and equitable jurisdiction of te Kōti-ā-Rohe | the District Court pursuant to sections 74 and 76 of the District Court Act. This should include jurisdiction to grant any remedy pursuant to section 84 of the District Court Act. This accords with our recommendations regarding Family Court jurisdiction in the PRA review.³²
- 12.28 Clarifying the equitable jurisdiction in this way will not detract from the statutes that require the High Court to exercise jurisdiction for certain succession matters, like the Administration Act and the Wills Act 2007.

SUMMARY OF PROPOSALS FOR REFORM

- The Family Court and the High Court should have concurrent first instance jurisdiction to hear claims under the new Act, subject to both Courts having the power to remove the proceedings to the High Court.
- The High Court should continue to hold jurisdiction for issues concerning the administration and distribution of an intestate estate.
- The new Act should permit appeals as of right against interlocutory decisions that can have a significant impact on the parties' rights and obligations, namely:
 - occupation, tenancy and furniture orders;
 - transfers of the proceeding to the Family Court or High Court; and
 - orders for the disclosure of information.
- The Family Court should have jurisdiction to hear and determine any matter within the general civil and equitable jurisdiction of the District Court pursuant to sections 74 and 76 of the District Court Act 2016.

QUESTIONS

Q64

Do you agree with the issues we have identified?

Q65

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

Q66

What are your views on the proposals for reform?

Q67

Do you have any other suggestions for reform?

³² See discussion in Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | Te Arotake i te Property (Relationships) Act 1976 (NZLC R143, 2019) at [17.5]–[17.20].

CHAPTER 13

Resolving disputes in court

IN THIS CHAPTER, WE CONSIDER:

- limitation periods for making claims;
- disclosure of information;
- evidence;
- representation of minors or people lacking capacity;
- costs;
- delays in te Kōti Whānau | the Family Court; and
- issues with the current law and proposals for reform.

LIMITATION PERIODS**The current law**

13.1 Generally, proceedings under the Property (Relationships) Act 1976 (PRA), the Family Protection Act 1955 (FPA) and the Law Reform (Testamentary Promises) Act 1949 (TPA) must be commenced within 12 months from the grant of administration.¹ A two-year period applies if the application is made under the FPA by a personal representative on behalf of a person who is not of full age or mental capacity.²

¹ Property (Relationships) Act 1976, s 90; Family Protection Act 1955, s 9; and Law Reform (Testamentary Promises) Act 1949, s 6. Note, the TPA does not refer to the grant of administration being made in Aotearoa New Zealand and it is therefore possible that time may commence from the date of a grant first obtained outside of Aotearoa New Zealand. Patterson submits, however, that because the TPA is considered a matter of administration rather than succession, at least in respect of immovables situated in Aotearoa New Zealand and probably movables, time will not commence until a grant is made (or resealed) in Aotearoa New Zealand: see Bill Patterson *Law of Family Protection and Testamentary Promises* (4th ed, LexisNexis, 2013) at 301.

² Family Protection Act 1955, s 9(2)(a).

- 13.2 The court may extend the time limits in some circumstances, although an application for an extension cannot be made after the final distribution of the estate. The TPA and PRA do not define what is meant by final distribution. However, case law has established that in proceedings under these Acts, it means the point where the personal representative has completed administration of the estate and becomes the trustee for the beneficiaries of those assets, even if those assets have not actually been distributed.³ A different approach is taken under the FPA, where section 2(4) clarifies that, for the purpose of that Act, distribution will not be deemed to have occurred simply because the administrator has finished their administrative duties in respect of that property and they or another trustee are holding the property on trust.⁴ Final distribution requires that the assets are transferred to those beneficially entitled.⁵
- 13.3 A surviving partner has six months from the grant of administration in Aotearoa New Zealand in which to make election under the PRA whether to seek division under the Act (option A) or accept whatever provision is made for them under the deceased partner's will or on their intestacy (option B).⁶ If the estate is small, meaning that it can be distributed without the need for the grant of administration,⁷ the choice must be made within the later of:⁸
- (a) six months from the date of the deceased's death; or
 - (b) six months from the grant of administration in Aotearoa New Zealand (if the grant is made within six months of the deceased's death).
- 13.4 A surviving partner must have chosen option A to commence proceedings under the PRA.⁹ The court may extend the time for making the choice.¹⁰ If a surviving partner makes no election within the relevant timeframe, including any extended timeframe, they are

³ See *Lilley v Public Trustee* [1981] 1 NZLR 41 (PC) and *Sullivan v Brett* [1981] 2 NZLR 202 (CA) in respect of final distribution under the TPA. The concept of assent has evolved as the means by which the personal representative might indicate that they do not require particular property in the estate for the purposes of administration and the estate assets may pass to the beneficiaries, however, it is rare in Aotearoa New Zealand for personal representatives to formally give assent: *Sullivan v Brett* [1981] 2 NZLR 202 (CA) at 207. The stricter approach has been applied by te Kōti Pira | the Court of Appeal to proceedings under the PRA's predecessor the Matrimonial Property Act 1963 (see *Re Magson* [1983] NZLR 592 (CA)) and it appears likely that the same approach would be consistently taken to proceedings under the PRA: see Bill Patterson *Law of Family Protection and Testamentary Promises* (4th ed, LexisNexis, 2013) at 259 and 274; *R v D [Relationship property]* [2009] NZFLR 607 (FC); and *McConkey v Clarke* [2019] NZHC 924, [2019] NZFLR 170 at [74].

⁴ Administrative duties will include proving the will, burying the deceased, getting in the assets and paying debts, funeral and testamentary expenses.

⁵ John Caldwell *Family Law Service (NZ)* (online looseleaf ed, LexisNexis) at [7.908.01]. Multiple cases have considered whether final distribution has occurred in respect of proceedings under the FPA: see for example *Re Hill (dec'd)* [1999] NZFLR 268 (HC) at 275; *Re Kahn (dec'd)* [2008] NZFLR 782 (HC) at [18]; *Gudgeon v Public Trustee* [1960] NZLR 233 (SC); *Fowler v New Zealand Insurance Co Ltd* [1962] NZLR 947 (SC); and *Bennett v Percy* [2020] NZFC 770.

⁶ Property (Relationships) Act 1976, s 62(1)(b).

⁷ Property (Relationships) Act 1976, s 2 definition of "small estate".

⁸ Property (Relationships) Act 1976, s 62(1)(a).

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

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

deemed to have chosen option B.¹¹ Under section 69(2), a court may set aside a surviving partner's chosen option if satisfied that:

- (a) the choice was not freely made;
- (b) the surviving partner did not fully understand the effect and implications of the choice;
- (c) since the choice was made the surviving partner has become aware of information relevant to the making of the choice; or
- (d) since the choice was made a third-party has made an application under the TPA or FPA.

13.5 In all cases, the court must be satisfied, having regard to all the circumstances, that it would be unjust to enforce the choice.¹²

13.6 Section 47 of the Administration Act 1969 sets out the circumstances in which personal representatives may distribute an estate without facing liability to potential claimants.¹³ The general rule is that they may make distributions six months from the grant of administration, provided they have not received notice of a potential claim.¹⁴ Where a person of full legal capacity has consented to the distribution, that person also loses the right to bring an action against the personal representative.¹⁵

13.7 A personal representative will be protected when they make early distributions for the maintenance, support or education of any person partially or totally dependent on the deceased immediately before the deceased's death. Such distributions may be made even if the personal representative has notice of an intended claim, and any distribution made for this purpose, if properly made, cannot be later disturbed.¹⁶

13.8 In certain circumstances, claimants may have the ability to "follow" the estate property into the hands of a beneficiary after distributions have already been made.¹⁷ This process is set out in sections 49–52 of the Administration Act. The court has considerable discretion as to the form and extent of the orders it may make.¹⁸ It may require the transfer or payment of any interest in any assets distributed, the payment of a sum not exceeding the net value of the assets at the date of distribution (with interest if the court thinks equitable). A following order may be made against the recipient of the distributed assets who received those assets otherwise than in good faith and for full valuable consideration. The court may make the following order on terms and conditions that it thinks fit and may make any further orders to give effect to the following order.

¹¹ Property (Relationships) Act 1976, s 68.

¹² Property (Relationships) Act 1976, s 69(2).

¹³ See also s 71(2) of the Property (Relationships) Act 1976. Distribution is defined in s 46 of the Administration Act 1969.

¹⁴ Administration Act 1969, s 47(4).

¹⁵ Administration Act 1969, s 47(3).

¹⁶ Administration Act 1969, s 47(2). See s 47(1) for the relevant claims, which include the FPA, TPA and PRA.

¹⁷ The court may only make an order if there is nothing in any Act that prevents the distribution from being disturbed: see for example s 9(1) of the Family Protection Act 1955; s 6 of the Law Reform (Testamentary Promises) Act 1949; and s 47(2) of the Administration Act 1969.

¹⁸ These are set out in s 49(1) of the Administration Act 1969.

- 13.9 A following order requires a separate court application to the substantive application under the TPA and FPA, but this must also be made within the same time limits for making claims.¹⁹ The court does not have the general power to grant an extension of time for the making of a following order,²⁰ but if an applicant was not aware of the distribution at the time of filing a substantive application, they may still make an application for a following order if they do so within six months of first becoming aware of the distribution.²¹ Failure to comply with that six-month time limit, however, is an absolute bar to following the assets.²²

Issues with time limits under the PRA, FPA and TPA

- 13.10 Six months may be too short a timeframe to make an election under the PRA. In our preliminary engagement, several individuals described how, at times, partners end up making hasty decisions under pressure and without full knowledge of the estate. Partners are not always aware of the time limits in the PRA and the consequences of not electing in time.²³
- 13.11 Most of the reasons why a partner might seek to set aside their chosen option will fall within the four circumstances listed in section 69(2)(a) of the PRA. However, even if the application is uncontested, the courts are confined to these grounds. There may be occasions beyond these circumstances where a court would consider it unjust to enforce the chosen option.²⁴
- 13.12 There appears to be broad satisfaction with the 12-month time limit for commencing proceedings under the Acts. However, in our preliminary engagement, we heard that the two-year timeframe for FPA claims on behalf of minors and those lacking capacity can cause problems because estates are often wound up in this timeframe.
- 13.13 Several issues may arise in respect of final distribution. Restricting a court's power to extend time limits or make other orders²⁵ up to the point an estate has been finally

¹⁹ Administration Act 1969, s 49(3). Note that s 49(3)(a) specifies that time period commences from the date of the grant of administration in Aotearoa New Zealand.

²⁰ Compare the provisos in s 9 of the Family Protection Act 1955; and s 6 of the Law Reform (Testamentary Promises) Act 1949. See *Lapwood v Teirney* [2012] NZHC 1803 at [10] and [21].

²¹ Administration Act 1969, s 49(4).

²² *Re Nicoll* HC Tauranga M44/92, 13 August 1993. However, in *Hodgkinson v Holmes* [2012] NZHC 2972 at [27] the Court suggested that an application made outside the six-month period would not be barred if "final distribution" had not occurred. This was criticised by Bill Patterson in *Bill Patterson Law of Family Protection and Testamentary Promises* (LexisNexis NZ, Wellington, 2013) at [16.18].

²³ Nicola Peart "Death and the Property (Relationships) Act 1976 – Options other than Heaven and Hell" (paper presented to New Zealand Law Society PRA Intensive - keeping ahead of the pack 2020 Intensive Conference, Auckland, 26 June 2020) at 5. Peart references several cases that suggest the lack of understanding about the need to make an election to commence proceedings and the process for doing so: *Bell v Ehlers* FC Dunedin FAM-2008-012-122, 5 May 2009; *McConkey v Clarke* [2019] NZHC 2047; and *Sands v Executor of B O'Horgan Estate* [2016] NZFC 8970.

²⁴ An example of a case where the court dismissed the application to set aside option B is *Re Leenman; Mulder v Mulder* [2009] NZFLR 727 (FC), where the deceased's partner of 37 years failed to establish any of the four circumstances in s 69(2)(a). Note, however, that there was no suggestion in that case that the court would have come to a different conclusion had there been broader grounds available.

²⁵ For example, under s 77 of the Property (Relationships) Act 1976 a court may permit a surviving partner to take under the will or on intestacy in addition to their division under option A provided that the application to do so is made before the final distribution of the estate.

distributed provides certainty and protection for personal representatives and beneficiaries. However, it can unfairly impact on claimants with legitimate claims. Claimants may be forced to bring claims against personal representatives personally.²⁶ It is also confusing that what constitutes final distribution differs depending on the statute and is not clearly defined in legislation.²⁷ It is not always obvious to interested parties when final distribution has occurred.

Issues with distribution

- 13.14 Our preliminary engagement revealed mixed views about whether six months from the grant of administration in Aotearoa New Zealand is a suitable period to wait for an estate to be distributed. The six-month period may be justified because it allows claimants time to find out about the estate and consider their options while not excessively delaying distribution. However, issues can arise because of the difference between a six-month hold for distribution and the general 12-month time limit for making claims. There may also be occasions where a personal representative wishes to distribute earlier than the six-month period. At present, a personal representative would make this decision after assessing the risk of claims and obtaining indemnities from beneficiaries or other potential claimants.²⁸
- 13.15 There is little case law available on section 47(2) regarding the protection of distributions made to provide for maintenance, support and education, and we are unaware how frequently personal representatives rely on it. Personal representatives could potentially distribute property using the section 47(2) power with the effect of leaving insufficient property to meet other claims against the estate.²⁹ However, our preliminary engagement indicated that this had not been an issue in practice.
- 13.16 Sections 49–52 of the Administration Act that deal with the following of assets are difficult to understand and may cause confusion.

Proposals for reform

- 13.17 Any time limit must balance the need to avoid undue delay in the administration and distribution of an estate with the need to ensure that those with a genuine claim have sufficient time to make it. The limitation periods should work cohesively together to the extent that is practicable.

Distribution

- 13.18 Our preliminary view is that a personal representative should continue to be protected against personal liability from claimants under the new Act where the personal representative distributes any part of the estate in the circumstances prescribed in section 47 of the Administration Act (detailed above). While we note the potential

²⁶ See *B v T* [2015] NZHC 3174 as an example of a claim brought against personal representatives in their personal capacity. Note, however, the personal representative will be protected from such claims where they have made distributions in accordance with s 47 of the Administration Act 1969.

²⁷ Noting that s 2(4) of the Family Protection Act 1955 goes part way to explaining the definition under that Act.

²⁸ See s 47(3) of the Administration Act 1969.

²⁹ Provided that the distribution is made in accordance with any trust, power or authority which is subsisting: see s 48(2) of the Administration Act 1969.

problems with a personal representative's power to distribute to the deceased's dependants for their maintenance, support or education, we think limits on this power or its repeal are not desirable reforms. We are reassured that we have had no concerns raised with us about this provision.

Election to divide relationship property

- 13.19 Our preliminary view is that there should not be a change to the time limits for making an election to divide relationship property. Under the new Act, a surviving partner would continue to have six months from the grant of administration in Aotearoa New Zealand to make an election to divide relationship property (option A) or to take under the will or intestacy regime (option B). If a surviving partner makes no election within that timeframe, they should be treated as choosing option B, as currently provided under the PRA. If the estate can be lawfully distributed without a grant of administration, the new Act should provide that the choice should be made within the later of:
- (a) six months from the date of the deceased's death; or
 - (b) six months from the grant of administration in Aotearoa New Zealand (if the grant is made within six months of the deceased's death).
- 13.20 Comparing Aotearoa New Zealand to the Canadian jurisdictions that have a limitation period for electing or applying to divide relationship property, six months from the grant of administration is typical.³⁰ Extending the time limit would not address concerns about lack of awareness and access to relevant information. These may be addressed by other measures including general education (see Chapter 18), imposing on the personal representative a duty to notify certain parties of their rights to claim (see Chapter 16) and improved guidance for personal representatives about the information that must be disclosed (see below).
- 13.21 To commence proceedings for a division of relationship property, electing option A should continue to be a prerequisite.³¹
- 13.22 We propose that the court retains its power to set aside an election if it is satisfied that it would be unjust to enforce the choice, but our preliminary view is that a court should not be confined to the grounds in section 69(2)(a) of the PRA when deciding whether to set aside a choice of option. However, we see value in retaining these four circumstances in the new Act as guidance for partners, lawyers and judges.
- 13.23 A court would continue to have the discretion to grant extensions prior to the final distribution of the estate (discussed below).

³⁰ This applies in Manitoba, Nova Scotia, Saskatchewan, Northwest Territories and Nunavut: The Family Property Act CCSM 1987 c F25, s 29(1); Matrimonial Property Act RSNS 1989 c 275, s 12(2); The Family Property Act SS 1997 c F-6.3, s 30(2); Family Law Act SNWT 1997 c 18, s 37(7); and Family Law Act SNWT (Nu) 1997, c 18, s 37(7). In New Brunswick, Ontario, and Newfoundland and Labrador, the limitation periods commence from the date of death, and are four months, six months and one year, respectively: Marital Property Act RSNB 2012 c 107, s 4(3); Family Law Act RSO 1990 c F.3, s 6(10); and Family Law Act RSNL 1990 c F-2, s 21(3).

³¹ Compare s 63 of the Property (Relationships) Act 1976.

Time limit to bring claim

- 13.24 We propose that proceedings for claims under the new Act should be commenced within 12 months from the grant of administration in Aotearoa New Zealand.
- 13.25 For decades, this has been the time period for FPA and TPA claims, and it appears relatively uncontroversial. We anticipate that 12 months would generally be sufficient time for potential claimants under the new Act to determine their eligibility and evaluate their prospect of success. We note that 12 months is at the upper end of the limitation periods for family provision-type claims in comparable jurisdictions.³²
- 13.26 We also propose that claims relating to estates that can be lawfully distributed without a grant of administration should be made within the later of:
- (a) 12 months from the date of the deceased's death; or
 - (b) 12 months from the grant of administration in Aotearoa New Zealand (if the grant is made within six months of the deceased's death).
- 13.27 There should not be an extended limitation period for claims made on behalf of minors or individuals without capacity. Because estates may be distributed after six months, our preliminary view is that there is no significant benefit in allowing a two-year limit for minors or those without capacity.
- 13.28 We propose that courts retain their discretion to allow claims to be made beyond the express time limits provided that the application is made before final distribution of the estate. However, we propose that final distribution is defined in the new Act. Our preliminary view is that, for the purposes of the new Act, final distribution occurs when all estate assets are transferred to those beneficially entitled rather than when the personal representative has finished their administrative duties and is holding the property on trust.

DISCLOSURE OF INFORMATION

The current law

- 13.29 Section 11A of the FPA provides that personal representatives have a duty to place before the court all relevant information in their possession concerning the financial affairs of the estate and the deceased's reasons for making the dispositions made by the will or for not making any further provision, as the case may be. This duty to provide the court with relevant information about the deceased's reasons will override any claim to legal privilege in the context of a solicitor-client relationship.³³ There is no equivalent provision in the TPA. However, the same principle is treated as applying to TPA proceedings.³⁴

³² For example, in Victoria, Western Australia, South Australia and the Australian Capital Territory, claimants have six months from the grant of administration: Administration and Probate Act 1958 (Vic), s 99; Family Provision Act 1972 (WA), s 7(2); Inheritance (Family Provision) Act 1972 (SA), s 8; and Family Provision Act 1969 (ACT), s 9. In Tasmania, it is only three months and in Northern Territory it is 12 months: Testator's Family Maintenance Act 1912 (Tas), s 11; and Family Provision Act 1970 (NT), s 9. In Queensland and New South Wales the limitation periods commence from the date of death and are nine and 12 months respectively: Succession Act 1981 (Qld), s 41(8); and Succession Act 2006 (NSW), s 58(2).

³³ *Carmichael v Goddard* [1979] 2 NZLR 586 (SC); and *Re Cross* [1981] 2 NZLR 673 (HC).

³⁴ *Powell v Public Trustee* [2003] 1 NZLR 381 (CA) at [27].

- 13.30 In Chapter 3, we discuss several specific rules relating to the classification of relationship property, including the presumption that all property owned by the deceased partner or acquired by the estate is relationship property.³⁵ Those rules place an onus on the personal representatives to disclose information if they want to resist a finding that the property of the estate is relationship property. No corresponding rule applies to the property of the surviving partner.
- 13.31 Under both the Family Court Rules and the High Court Rules, discovery is available to any party who has filed a pleading in respect of any of the Acts.³⁶ Pre-action discovery orders may also be available for intending claimants provided they have a strong foundation for the order.³⁷

The PRA review

- 13.32 In the PRA review, the Commission observed that situations may arise where one partner has greater knowledge of the couple's relationship property affairs but refuses to make adequate disclosure, thereby putting the other partner at a disadvantage.³⁸
- 13.33 The Commission made several recommendations aimed at encouraging a culture of compliance with disclosure obligations when resolving relationship property matters in and out of court.³⁹ These included recommending that:
- (a) the new Relationship Property Act include an express duty of disclosure on partners;
 - (b) new pre-action procedures include a prescribed process for complying with the duty of disclosure prior to making an application to te Kōti Whanau | the Family Court (the Family Court); and
 - (c) new procedural rules include the procedure for initial and subsequent disclosure in relationship property proceedings.⁴⁰

Issues

- 13.34 In our preliminary engagement, a concern was raised that it can be difficult for potential claimants to obtain relevant information needed to assess the viability of the claim or to resolve that claim outside of court. We discuss this issue in Chapter 14.
- 13.35 Obtaining relevant information once a claim had been filed seems to be more straightforward. However, issues arise about the disclosure of irrelevant information, particularly when affidavits and annexures total tens or hundreds of pages or denigrate the character and motives of another family member.⁴¹

³⁵ Property (Relationships) Act 1976, ss 81–82.

³⁶ Family Court Rules 2002, r 141; and High Court Rules 2016, rr 8.4–8.5.

³⁷ Family Court Rules 2002, r 140; and High Court Rules 2016, r 8.20. See also *Moon v Lafferty* [2020] NZHC 1652 at [27].

³⁸ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [16.121].

³⁹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [16.141].

⁴⁰ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R110–R111 and [16.142]–[16.146].

⁴¹ See *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [71]; and *Kirby v Sims* HC Wellington CIV-2010-485-1019, 22 August 2011 at [65].

Proposals for reform

- 13.36 Our preliminary view is that the new Act should include an express duty on the personal representative to assist the court, similar to that in section 11A of the FPA. We propose that this would provide that a personal representative who had received notice of an application for an award under that Act would have an obligation to place before the court all relevant information in the personal representative's possession or knowledge concerning details of:
- (a) members of the deceased's family;
 - (b) the financial affairs of the estate;
 - (c) persons who may be claimants under the Act; and
 - (d) the deceased's reasons for making the testamentary dispositions and for not making provision or further provision for any person.
- 13.37 We also propose that, in respect of relationship property claims, the surviving partner and the personal representative should have a duty to disclose each partner's assets and liabilities, and this should be expressed in the new Act.
- 13.38 Our preliminary view is that the quality and clarity of the information disclosed may also be improved by updated affidavit forms. For example, a form similar to P(R) 1 Affidavit of Assets and Liabilities, which parties are required to file in relationship property proceedings,⁴² should be created for the personal representative to complete when a family provision claim or contribution claim is made. It should include instructions about non-estate property that needs to be disclosed. A form for an affidavit in support for each of the claims under the new Act could also be created with accompanying guidance on relevant and non-relevant information.
- 13.39 We discuss our proposed recommendations for pre-action procedural rules including the process for disclosure of information in Chapter 14.

EVIDENCE

The current law

- 13.40 In FPA and PRA proceedings, evidence is usually given by affidavit regardless of whether they are in the Family Court or te Kōti Matua | the High Court (the High Court).⁴³ In TPA proceedings, affidavit evidence is preferred in the Family Court, whereas the presumption in the High Court is that evidence will be given orally unless the judge directs otherwise.⁴⁴ A commonly cited reason for receiving evidence by way of affidavit in FPA claims is that the deceased's evidence cannot be led or tested.⁴⁵

⁴² Family Court Rules 2002, r 398.

⁴³ Family Court Rules 2002, r 48; and High Court Rules 2016, r 18.15(1).

⁴⁴ High Court Rules 2016, r 18.15(2)(a).

⁴⁵ John Caldwell *Family Law Service (NZ)* (online looseleaf ed, LexisNexis) at [7.913], citing *Re Munro (dec'd)* DC Waitakere 760/99, 19 October 2000 at 11; and *Re Darby (dec'd)* FC Christchurch FP 1427/98, 8 August 2000 at 16.

- 13.41 Under the FPA and PRA, cross-examination is allowed in exceptional circumstances where allegations are specific and serious.⁴⁶ It is discouraged, particularly where it is sought by family members as a means of blackening each other's character.⁴⁷ Affidavits in reply may also be made but must not introduce new matters.⁴⁸
- 13.42 Section 11 of the FPA provides that the court can hear reasons for dispositions or for leaving someone out of the will, whether that evidence would be otherwise admissible in court or not.

Issues

- 13.43 It is unclear why, for TPA proceedings, affidavit evidence would be suitable in the Family Court but not suitable in the High Court.⁴⁹

Proposals for reform

- 13.44 Our preliminary view is that, unless a judge directs otherwise, affidavit evidence should be preferred for all claims under the new Act irrespective of which court the proceeding is commenced in.⁵⁰

REPRESENTATION OF MINORS AND PERSONS LACKING CAPACITY

The current law

- 13.45 Section 4(4) of the FPA states that an administrator of the estate may apply for further provision from the estate on behalf of a person who is not of full age or mental capacity. They may also apply to the court for advice or directions as to whether they ought to apply.
- 13.46 Section 37A of the PRA allows the court to appoint a lawyer to represent any minor or dependent child of the relationship if there are special circumstances that make the appointment necessary or desirable.
- 13.47 In proceedings under the FPA or the TPA, both the Family Court and the High Court may also make representation orders for minors or people who lack capacity.⁵¹ The appointed party may be the personal representative, counsel, a litigation guardian or Public Trust.
- 13.48 When a claimant files for directions as to service, they also apply for orders of representation that might be required. At least in the Family Court, it is customary for the claimant to obtain and file the consent of counsel whom it is requested be appointed to

⁴⁶ See for example *Willis v Fredson* [2013] NZFC 4742.

⁴⁷ *Re Meier (deceased)* [1976] 1 NZLR 257 (SC).

⁴⁸ Family Court Rules 2002, r 158; and High Court Rules 2016, r 9.76.

⁴⁹ See Bill Patterson *Law of Family Protection and Testamentary Promises* (4th ed, LexisNexis, 2013) at 306.

⁵⁰ See Family Court Rules 2002, r 48; and High Court Rules 2016, r 18.15(1).

⁵¹ Family Court Rules 2002, r 382; and High Court Rules 2016, r 4.27. In the Family Court, these orders can be made without the appointment of a litigation guardian or next friend for the minor or incapacitated person, which are governed by rr 90B, 90C, 90D and 90F: Family Court Rules 2002, r 382(2). In the High Court, these orders can occur at the request of a party or intending party, or on the court's own initiative: High Court Rules 2016, r 4.27; and see also rr 4.35 and 18.8.

represent them.⁵² This generally means that the claimant is expected to find a lawyer to represent the minor child with the hope that the lawyer will get paid from the estate.

- 13.49 Article 12 of the United Nations Convention on the Rights of the Child provides that children are given the right to freely express their views in all matters that affect them and to have their views given due weight in accordance with their age and maturity. This includes their right to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Issues

- 13.50 When FPA claims are made on behalf of minor children, these are generally brought by the child's guardian, and it appears to be uncommon for minor children to take an active role in proceedings that directly or indirectly affect them. Similarly, in the Commission's review of the PRA, we observed that "it is unusual for children to participate in relationship property proceedings or for a lawyer for child to be appointed."⁵³
- 13.51 Personal representatives are not under a general duty to initiate FPA applications. However, te Kōti Pīra | the Court of Appeal stated in *Re Magson* that, in a clear case, a duty would apply.⁵⁴ Although section 4(4) states that a personal representative may apply on behalf of any person not of full age or mental capacity, it fails to provide any guidance about when personal representatives should make such an application.

The PRA review

- 13.52 The Commission made several recommendations in the PRA review aimed to give greater priority to children's best interests following parental separation, which we considered should be a primary consideration in the new Relationship Property Act.⁵⁵ This included the recommendation that the Government consider ways to strengthen child participation in relationship property proceedings in any work undertaken in response to the recommendations of the Independent Panel appointed to examine the 2014 family justice reforms.⁵⁶

Proposals for reform

- 13.53 Our preliminary view is that the primary responsibility to bring a family provision claim on behalf of a minor child should lie with the child's parent or guardian. We suggest that a welfare guardian would also take this primary responsibility for an adult lacking capacity.

⁵² *Family Court Caseload Management Practice Note* (March 2011) at [9.6].

⁵³ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [12.23].

⁵⁴ *Re Magson* [1983] NZLR 592 (CA) at 599.

⁵⁵ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R67–R72.

⁵⁶ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R71.

- 13.54 We therefore propose that section 4(4) of the FPA should be repealed. In its place, we propose that personal representatives should have a statutory duty to notify potential claimants of their rights under the new Act and to provide them with information about the claims, relevant time limits and obtaining independent legal advice. We discuss this duty further in Chapter 16.
- 13.55 In respect of out-of-court dispute resolution processes, our preliminary view is that, when any minor child, person lacking capacity or unascertained party wishes to claim or may be affected by a claim under the new Act, the court must appoint a representative for that party.⁵⁷ We discuss this process further in Chapter 14.
- 13.56 Our preliminary view is that the same requirement should apply to court proceedings. These representation orders should be made at the time of giving directions of service. It appears that both the Family Court and the High Court's existing powers would be sufficient to enable these representation orders to be made.
- 13.57 Tāhū o te Ture | Ministry of Justice has an ongoing programme of work focused on enhancing children's participation in Family Court proceedings.⁵⁸ Our preliminary view is that this work programme should include participation in proceedings under the new Act.

COSTS

The current law

- 13.58 Costs are at the discretion of the court.⁵⁹ Historically, it was common in FPA proceedings for the court to order that costs be paid from the estate.⁶⁰ We understand that it is now usual in claims against an estate for costs to follow the event (that is to be awarded in favour of the successful party).⁶¹ However, the court may consider the family context of proceedings and be reluctant to exacerbate family rifts by personal costs orders.⁶²
- 13.59 Reprehensible conduct in the course of proceedings that causes delay and expense may be reflected in costs.⁶³
- 13.60 A personal representative's full costs will generally be paid by the estate unless the personal representative has acted unreasonably.⁶⁴

⁵⁷ Compare s 144 of the Trusts Act 2019.

⁵⁸ See for example Tāhū o te Ture | Ministry of Justice *Regulatory Impact Assessment: Strengthening the Family Court – First stage initiatives to enhance child and whānau wellbeing* (14 May 2020).

⁵⁹ Family Court Rules 2002, r 207(1); and High Court Rules 2016, r 14.1(1). In exercising its discretion as to costs, the Family Court may apply rr 14.2–14.12 of the District Court Rules 2014 so far as applicable and with all necessary modifications. These rules are largely the same as the High Court Rules 2016. Where costs are ordered by the court, these are allocated according to the civil scale of costs in schs 4 and 5 of the District Court Rules 2014 and schs 2 and 3 of the High Court Rules 2016.

⁶⁰ *Keelan v Peach [Costs]* [2003] NZFLR 727 (CA) at [7]; and *Fry v Fry* [2015] NZHC 2716, [2016] NZFLR 713 at [12].

⁶¹ *Fry v Fry* [2015] NZHC 2716, [2016] NZFLR 713 at [17].

⁶² *Ware v Reid* [2019] NZHC 1706 at [53]; and *Keelan v Peach [Costs]* [2003] NZFLR 727 (CA) at [7].

⁶³ See for example *Powell v Public Trustee* [2003] 1 NZLR 381 (CA). See also District Court Rules 2014, rr 14.6 and 14.7; and High Court Rules 2016, rr 14.6 and 14.77.

⁶⁴ *Fry v Fry* [2015] NZHC 2716, [2016] NZFLR 713 at [17].

The PRA review

- 13.61 In the PRA review, the Commission stated that it is appropriate as a general principle that costs in PRA proceedings lie where they fall because of the distinctive characteristics of such proceedings.⁶⁵ It would reflect the semi-inquisitorial nature taken by the Family Court in relationship property proceedings and recognise that the nature of those disputes means that each partner will have “successes” and both partners will benefit from resolution.
- 13.62 A common feature the Commission noted in disputes about relationship property on separation was intentional tactics to delay or disrupt proceedings. The Commission recommended:
- (a) a new Relationship Property Act should make express provision for the Family Court to impose costs and other consequences for non-compliance with procedural requirements;
 - (b) new procedural rules and guidance should be issued addressing the imposition of costs and other consequences of non-compliance with procedural requirements as well as the exercise of the Court’s discretion to make costs orders that are not for the purpose of penalising non-compliance; and
 - (c) the establishment of a separate scale of costs for relationship property proceedings because of their distinctive characteristics.⁶⁶

Issues

- 13.63 Commentators do not identify any significant problems with the current costs regime. The previously common approach of ordering costs to be paid from the estate has been criticised for potentially encouraging unmeritorious claims and at times exhausting smaller estates.⁶⁷ There appears to be broad satisfaction now with the courts’ flexible approach and the move towards general cost principles under the court rules.

Proposals for reform

- 13.64 We propose no change to the general rule that a court has discretion to order costs against parties as it sees fit, following general cost principles.
- 13.65 We agree that it is preferable that courts have moved away from the general presumption that costs are borne by the estate. Our preliminary view is that, in relationship property proceedings on death, it will often be appropriate for costs to lie where they fall, for the same reasons that the Commission gave for proceedings for relationship property division on separation. Frequently, these proceedings will be about

⁶⁵ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [16.111]. The distinctive characteristics of relationship property proceedings are discussed in that report at [16.70].

⁶⁶ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R105–R107 and [16.110]–[16.111].

⁶⁷ See *Fry v Fry* [2015] NZHC 2716, [2016] NZFLR 713 at [13]; Nicola Peart (ed) *Family Property* (online looseleaf ed, Thomson Reuters) at [FP5.02]; Greg Kelly “An Inheritance Code for New Zealand” (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 2010) at 20.

the classification of relationship property and there will not be “successes” as in other civil proceedings. For family provision and contribution claims, it may be more common for costs to be paid by the unsuccessful party following the proceeding. Flexibility will be particularly important in proceedings that consider multiple different claims.

- 13.66 Our preliminary view is that the new Act should contain a provision expressly referring to the court’s power to make cost orders as it thinks fit.⁶⁸ Our preliminary view is the provision should expressly refer to the court’s ability to impose costs for non-compliance with procedural requirements.⁶⁹ This would signal to parties what is expected of them, although our understanding is that this is less of an issue for claims against estates than it is for relationship property claims on separation.
- 13.67 We are also considering whether establishing a separate scale of costs would be justifiable for any of the claims under the new Act. While we are not aware of any concerns that the current scales are not adequate, many of the distinctive characteristics of relationship property proceedings on separation are shared with the claims under the new Act and therefore may better suit a scale developed for that purpose.

DELAYS IN THE FAMILY COURT

- 13.68 The Independent Panel examining the 2014 family justice reforms reported that delay in the Family Court impacted on almost every other issue in family justice services.⁷⁰ In the PRA review, the Commission identified that a key issue with the procedure governing proceedings under the PRA was the delays experienced in the Family Court.⁷¹ The Commission observed that, in 2015, half of the cases that proceeded to a hearing took more than two years from filing to disposal.⁷²
- 13.69 On average, TPA and FPA cases take more than 60 weeks from filing to disposal in the Family Court,⁷³ significantly longer than the intended 26 weeks.⁷⁴

The PRA review

- 13.70 In the PRA review, the Commission explained that the delays in relationship property proceedings were attributable to multiple factors. These included the complex legal and

⁶⁸ Compare s 40 of the Property (Relationships) Act 1976.

⁶⁹ See also Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R105.

⁷⁰ Rosslyn Noonan, La-Verne King and Chris Dellabarca *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Tāhū o te Ture | Ministry of Justice, May 2019) at 7.

⁷¹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [16.69]–[16.70].

⁷² Based on data provided to the Commission by email from Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission (16 September 2016): see discussion in Te Aka Matua o te Ture | Law Commission *Dividing relationship property – time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [25.24].

⁷³ The average age of the TPA and FPA cases disposed of by te Kōti Whānau | the Family Court between 2009 and 2019, was 450 days (64.3 weeks) and 440 days (62.9 weeks) respectively: email from Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding annual court data (13 February 2020).

⁷⁴ The Family Court’s *Caseflow Management Practice Note*, last updated in 2011, states that FPA, TPA and PRA cases should be disposed of within 26 weeks of filing: *Family Court Caseflow Management Practice Note* (March 2011) at [9.1].

factual issues that arise about property, the emotional component of separating partners and the lack of a structured case management process with prescribed timeframes.⁷⁵

- 13.71 The Commission recommended that a Family Court Rules Committee should be established for the purpose of developing new procedural rules for relationship property matters to be included as a sub-part of the Family Court Rules 2002 and issuing guidance on the rules as required. The Commission made several other recommendations, including:⁷⁶
- (a) the new procedural rules should include case management procedures tailored to the needs of relationship property proceedings;
 - (b) the Family Court should have broad powers to appoint a person to make an inquiry into any matter that would assist the Court to deal effectively with the matters before it; and
 - (c) the Government should collect data on the progress and resolution of relationship property proceedings in the Family Court in order to monitor whether the Family Court is adequately resourced to deal appropriately with relationship property proceedings.

Issues

- 13.72 In our early engagement, several practitioners raised general concerns about delays in the Family Court, but we did not receive concerns specific to the claims in question, nor did we hear that tactics are used to delay proceedings. It was suggested by some that delay may be useful in some estate disputes as it allows the deceased's friends and family time to grieve and heightened emotions to settle.
- 13.73 However, a year or more to resolve a dispute may be a long time for families. Delays can have significant consequences for beneficiaries who cannot access some or all the estate property during that time, especially those who had relied on the deceased for support during their lifetime.

Proposals for reform

- 13.74 Our proposals for reform of the substantive law may reduce delays. Establishing a single cause of action in the place of the TPA and other equitable remedies should reduce time spent on multiple causes of action for the same fundamental purpose (see Chapter 5). Most of the FPA claims that reach court are brought by the deceased's independent adult children, and our proposals either exclude or severely restrict the awards they could seek (see Chapter 4).
- 13.75 It is not obvious to us that any specific procedural reform is necessary to address the general issue of delays in the Family Court. Our preliminary view is that any Rules Committee established as per the Commission's recommendations in the PRA review should consider whether to develop rules in respect of claims under the new Act.

⁷⁵ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [16.70]–[16.71].

⁷⁶ For a full list of these recommendations see Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R102–R109 and [16.99]–[16.113]. We discuss several of the recommendations in the section in this chapter on costs.

SUMMARY OF PROPOSALS FOR REFORM

- 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.
- No change is recommended to the time limits for surviving partners to choose whether to divide relationship property, but a court should have greater flexibility when deciding whether to set aside a choice of option.
- Proceedings for all claims under the new Act should be commenced within 12 months from the grant of administration in Aotearoa New Zealand. 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 New Zealand (if the grant is made within six months of the deceased's death).
- 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.
- The new Act should expressly require personal representatives to place before the court relevant information in their knowledge or possession.
- 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.
- Updated affidavit forms should be created for proceedings under the new Act.
- 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.
- 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.
- 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.
- A court should continue to have discretion to make cost orders as it thinks fit.
- The new Act should expressly refer to the court's ability to impose costs for non-compliance with procedural requirements.
- Consideration is also given to whether claims under the new Act would justify a separate scale of costs.
- Any Rules Committee established as recommended in the PRA review should consider whether to develop rules in respect of claims under the new Act.

QUESTIONS**Q68**

Do you agree with the issues we have identified?

Q69

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

Q70

What are your views on the proposals for reform?

Q71

Do you have any other suggestions for reform?

CHAPTER 14

Resolving disputes out of court

IN THIS CHAPTER, WE CONSIDER:

- ways in which parties can resolve a dispute without going through a court hearing;
- the law that applies to resolving disputes out of court; and
- issues with the current law and proposals for reform.

THE CURRENT LAW

- 14.1 A significant proportion of claims against estates are resolved out of court. There are good reasons to promote the resolution of matters outside of court. It is generally quicker and less expensive. It can result in better outcomes for families involved because resolution processes can focus on reaching agreement rather than adversarial court proceedings.
- 14.2 The most common ways of resolving disputed claims against estates out of court are:
- (a) party or lawyer-led negotiation;
 - (b) mediation;
 - (c) arbitration; and
 - (d) judicial settlement conferences.
- 14.3 We understand that resolutions reached by negotiation or mediation are often concluded by the parties entering a deed of family arrangement. In judicial settlement conferences, the presiding judge may make consent orders confirming the resolution reached.¹ A consent order made at a settlement conference has the same effect as if it were made with the consent of the parties in proceedings in a court.² Arbitrations are concluded by

¹ Family Court Rules 2002, r 179(1).

² Family Court Rules 2002, r 179(3)(a).

the arbitrator’s decision. However, the parties must first have entered an arbitration agreement through which they agree to be bound by the decision.

- 14.4 The Trusts Act 2019 allows for alternative dispute resolution procedures.³ The Act provides that the trustees or the court may refer a matter to an “ADR process”, even if there is no provision in the terms of the trust that would allow for an alternative dispute resolution process.⁴ The matter may include legal proceedings or a dispute that may give rise to legal proceedings.⁵
- 14.5 If a matter is “internal”, meaning it is a matter to which the only parties are the trustees or beneficiaries, the matter can be referred to ADR even if there are beneficiaries who are unascertained, are minors or lack capacity. The court must appoint a representative who must act in the best interests of those beneficiaries.⁶ The representative may agree to an ADR settlement on behalf of those beneficiaries, including an arbitration agreement and any arbitral award under that agreement.⁷ Except in relation to arbitral awards, the court must approve an ADR settlement in order for it to take effect.

RECOMMENDATIONS IN THE PRA REVIEW

- 14.6 In the PRA review, we recommended measures to support out-of-court resolution. We said parties should have adequate information about the property sharing regime and options for resolving relationship property matters and have access to affordable legal advice.⁸ Such an approach would promote the speedy, simple and inexpensive resolution of PRA matters. We recommended too that voluntary out-of-court dispute resolution for relationship property matters should be promoted by:⁹
- (a) including in the recommended new Relationship Property Act an endorsement of voluntary out-of-court dispute resolution to resolve relationship property matters;
 - (b) introducing new pre-action procedures in the Family Court Rules 2002 that will provide a clear process for partners to follow when attempting to resolve relationship property matters out of court; and
 - (c) requiring applicants to court to acknowledge in court application forms that they have received information about the pre-action procedures and the availability of dispute resolution services.

³ The Trusts Act 2019 applies to all express trusts governed by New Zealand law, such as trusts created by wills and statutory trusts under the intestacy regime: Trusts Act 2019, s 5. It also applies to the duties incidental to the office of administrator under the Administration Act 1969: Trusts Act 2019, sch 4 pt 1.

⁴ Trusts Act 2019, s 143.

⁵ Trusts Act 2019, s 142.

⁶ Trusts Act 2019, s 144(2)(a).

⁷ Trusts Act 2019, s 144(1)(b).

⁸ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R96–R99 and [16.7]–[16.32].

⁹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R100.

ISSUES

The legality of some out-of-court settlements is unclear

- 14.7 In Chapter 11, we discuss the legality of agreements that purport to settle claims against an estate. To summarise:
- (a) A surviving partner may enter an agreement under Part 6 of the PRA with the personal representative of the estate to resolve relationship property matters.¹⁰
 - (b) The courts have held that agreements through which parties purport to settle Family Protection Act 1955 claims are not binding on grounds of public policy.¹¹ It is unclear whether the courts would continue to uphold this rule if the issue arose in proceedings.¹² We understand that parties will frequently settle claims by entering deeds of family arrangement.
 - (c) It appears that parties can settle Law Reform (Testamentary Promises) Act 1949 claims by agreement.
 - (d) The Arbitration Act 1996 provides generally that “any dispute” can be arbitrated unless the arbitration agreement is “contrary to public policy” or “under any other law, such a dispute is not capable of determination by arbitration”.¹³ We have found no case that has considered a relationship property arbitration award in Aotearoa New Zealand, although some commentators have argued the agreement would be binding if it conformed to the contracting out requirements under Part 6 of the PRA.¹⁴
- 14.8 As a result of this law, it is unclear whether parties are able to comprehensively settle claims without going to court.

Out-of-court resolution and parties who are unascertained, minors or people who lack capacity

- 14.9 A key question concerning out-of-court resolution is whether court involvement is needed when the parties involved are unascertained (such as beneficiaries yet to be born), minors or people who lack capacity. These parties may be beneficiaries of the estate and/or claimants under the new Act. If out-of-court resolution is to continue to be available under the new Act there is a question as to how the interests of such parties should be protected. As noted, the Trusts Act sets out procedures for ADR processes concerning internal matters when beneficiaries are involved who are unascertained, minor or lack capacity.

¹⁰ Property (Relationships) Act 1976, s 21B.

¹¹ *Hooker v Guardian Trust & Executors Co of New Zealand* [1927] GLR 536 (SC).

¹² Bill Patterson has argued that if the issue came before the courts today, they would likely hold such deeds of family arrangements are enforceable: see Bill Patterson *Law of Family Protection and Testamentary Promises* (4th ed, LexisNexis, 2013) at 106–107. Note too s 47(3) of the Administration Act 1969, which provides that claimants cannot bring an action against an administrator for distributing an estate when they have, in writing, consented to the distribution or acknowledged they do not intend to make an application that would affect the distribution.

¹³ Arbitration Act 1996, s 10(1).

¹⁴ See Robert Fisher “Relationship property arbitration” (2014) 8 NZFLJ 15 at 16; and Regan Nathan “Another tool in the kete? – relationship property arbitration in New Zealand” (2020) 10 NZFLJ 47 at 47–48.

Should pre-action procedures be contemplated for claims against estates?

- 14.10 Potential claimants sometimes experience difficulties obtaining the relevant information needed to assess the viability of a claim or to resolve that claim. Those who are not already beneficiaries under the will often have the most difficulty. During our preliminary engagement, we heard that accessing the will itself can be complicated, often only being provided once probate is granted and the will becomes a public record.
- 14.11 In the PRA review, we recommended the introduction of new “pre-action procedures” for relationship property matters.¹⁵ Parties would need to comply with the pre-action procedures, unless there are good reasons not to, to equip them for out-of-court resolution and help avoid procedural issues like inadequate disclosure of information. We recommended pre-action procedures should cover:
- (a) giving notice to the other party of an intention to engage in out-of-court dispute resolution to resolve a relationship property dispute, which would provide an opportunity to put the parties on notice of their disclosure obligations and of other matters such as the prohibition on disposing of family chattels without the other partner’s consent;
 - (b) the process for disclosure; and
 - (c) participation in out-of-court dispute resolution, such as negotiation, counselling, mediation, arbitration and other recognised dispute resolution methods.
- 14.12 Given our recommendation in the PRA review to introduce pre-action procedures to relationship property matters, a question arises as to whether they should be introduced for claims against an estate.

PROPOSALS FOR REFORM

Legality of out-of-court resolution should be clarified in the new Act

- 14.13 Consistent with our proposals for contracting out and settlement agreements in Chapter 11, we present an option for reform that adult parties, who are capable of looking after their affairs and informed of their rights, should be able to settle their claims out of court. This should be expressly provided for in the new Act to clarify that court involvement will not be required to vary the distribution of an estate under the terms of a will or intestacy, provided that the parties comply with any procedural requirements for entering settlement agreements proposed in Chapter 11.
- 14.14 We do not propose that the new Act require parties to participate in out-of-court resolution. However, out-of-court resolution may be particularly beneficial for the types of family disputes that would arise under the new Act. A process that allows the parties to arrive at an agreed settlement may be more helpful at diffusing family hostilities than an adversarial court process. Out-of-court resolution processes may also allow other family matters to be addressed that may not be strictly relevant to the legal issues before

¹⁵ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [16.54]–[16.55].

the court. For these reasons, we consider there should be a statutory endorsement of out-of-court resolution in the new Act (as also recommended in the PRA review).¹⁶

The new Act should prescribe a process for out-of-court resolution involving parties who are unascertained, minors or persons lacking capacity

- 14.15 We propose that a process consistent with the alternative dispute resolution provisions of the Trusts Act should apply. The court should appoint representatives for parties who are unascertained (such as beneficiaries yet to be born), minors or persons who lack capacity when:
- (a) a person makes a claim against an estate under the new Act that may affect the interests of any parties who are unascertained, minors or persons who lack capacity; or
 - (b) any minor or person who lacks capacity wishes to bring a claim under the new Act.¹⁷
- 14.16 A representative should be able to agree to participate in an out-of-court resolution process and agree to any settlement reached. The representative should act in the best interests of the parties they represent.
- 14.17 We propose the court should be required to approve any settlement that involves unascertained parties, minors or persons who lack capacity. It should also be able to vary or set aside any agreement that would cause serious injustice.
- 14.18 For arbitrations, our preliminary view is the same process should apply. Representatives should be appointed for unascertained, minor or parties who lack capacity. Court scrutiny of the arbitral award, however, should not be required, as is the case under the Trusts Act.

Pre-action procedures

- 14.19 We have heard that the introduction of pre-action procedures, like those recommended in the PRA review, could be beneficial in addressing issues such as:
- (a) parties being evasive about participating in settlement discussions unless the court is involved;
 - (b) parties failing to disclose information; and
 - (c) parties being locked into “litigation mode”.
- 14.20 We therefore propose that parties to a dispute governed by the new Act should be required to follow pre-action procedural rules. The procedures should cover:
- (a) giving notice to other parties of an intention to engage in out-of-court dispute resolution;

¹⁶ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R100 and [16.53].

¹⁷ We do not consider unascertained parties would be able to bring a claim under the new Act. In Chapter 4 we propose that the only unborn children eligible to claim a family provision award should be unborn children in utero prior to the expiry of a limitation period. Children who may be born in the future, but were not in utero prior to the expiry of the limitation period, would not be eligible.

- (b) the requirement to make arrangements for the representation of parties who are unascertained, minors or persons who lack capacity;
- (c) the process for disclosure of information, including initial disclosure obligations; and
- (d) information about participation in out-of-court dispute resolution, such as negotiation, counselling, mediation, arbitration and other recognised dispute resolution services.

14.21 These procedures could be set by a Family Court Rules Committee that we recommended be established in the PRA review and, for the High Court, by the High Court Rules Committee.¹⁸

SUMMARY OF PROPOSALS FOR REFORM

- The new Act should expressly confirm and endorse the ability of parties to resolve disputes out of court.
- The new Act should prescribe a process for out-of-court dispute resolution that involves parties who are unascertained, minors or persons who lack capacity.
- Parties in disputes should be required to follow pre-action procedures.

QUESTIONS

Q72

Do you agree with the issues we have identified?

Q73

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

Q74

What are your views on the proposals for reform?

Q75

Do you have any other suggestions for reform?

¹⁸ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R102 and [16.56].

CHAPTER 15

Tikanga Māori and resolution of succession disputes

IN THIS CHAPTER, WE CONSIDER:

- tikanga Māori and dispute resolution; and
- current and other potential options for resolving succession disputes.

INTRODUCTION

- 15.1 This chapter explores dispute resolution and tikanga Māori for succession disputes. By their nature, succession disputes will mostly be within whānau and hapū (kin groups), and this is likely to affect the way in which disputes are best resolved. Consideration of dispute resolution options may also be affected by the earlier discussions in Chapters 2, 7 and 8.
- 15.2 Dispute resolution was mentioned frequently in our preliminary consultation, sometimes in relation to whenua Māori and sometimes more generally in relation to succession. We were told that whānau hui are regularly used to resolve disputes. This was felt to be appropriate given that tikanga is practised by whānau, and this also allows for the tikanga of that whānau to be applied. There was a desire by some for the resolution of disputes to be led by Māori communities rather than by lawyers and judges. This would mean resolution processes other than those on the marae should also be available to Māori. Others felt that te Kooti Māori | the Māori Land Court (the Māori Land Court) could facilitate dispute resolution by whānau through contributing appropriately skilled people as mediators and possibly as a decision maker of last resort. Better access to information about law and processes relating to succession was also identified as likely to make dispute resolution easier and quicker.

MĀORI DISPUTE RESOLUTION

- 15.3 The norms of tikanga Māori promote wellbeing and balance between all aspects of the human, natural and spiritual worlds.¹ Māori dispute resolution is primarily concerned with maintaining this state of wellbeing and balance.²
- 15.4 The application of tikanga to social relationships leads to conflict management processes that differ from prevalent Western ways of viewing and solving conflict.³ However, Māori decision-making processes are not easily reduced into detailed rules.⁴
- 15.5 Instead mana and tapu dictate the cause and consequences of disputes within te ao Māori.⁵ Utu is the primary mechanism by which upsets in mana or tapu are rectified. Resolution might be achieved through kōrero (dialogue), hui (meeting), whakamā (shame, embarrassment), rāhui (prohibition), and many other methods besides.⁶
- 15.6 Suitable resolution methods are decided and acted upon according to various factors, including the relationships involved and the tikanga that were transgressed.⁷ The dispute resolution process is thus fluid and might incorporate several methods and principles in order to reach a solution.⁸ This might be contrasted with Pākehā methods where, for example, the parties may contractually bind themselves to a particular process before a dispute has even arisen.⁹
- 15.7 Associate Professor Khylee Quince has discussed the importance of rangatira (chiefs or leaders) in the resolution of disputes.¹⁰ Rangatira are widely regarded as carrying the mana of their people and demonstrate this through actions and words that strengthen the cohesiveness of the group. Three principles are employed to achieve this: aroha, the

¹ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 262.

² Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 262 and 264–265.

³ Carwyn Jones “Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes” in Morgan Brigg and Roland Bleiker (eds) *Mediating Across Difference: Oceanic and Asian Approaches to Conflict Resolution* (University of Hawai‘i Press, Honolulu, 2011) 115 at 124.

⁴ Te Aka Matua o te Ture | Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase – An Advisory Report for Te Puni Kōkiri, the Office of Treaty Settlements and the Chief Judge of the Māori Land Court* (NZLC SP13, 2002) at 11.

⁵ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 264.

⁶ Traditionally, the practices of muru (taking of personal property as compensation) and marriage alliances were also used: see Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 75–79, 83, 86 and 200. Withdrawal from disputed territory was another practice: see Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 265.

⁷ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 83.

⁸ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 89.

⁹ For example, parties that agree to submit future disputes to arbitration are bound to arbitrate those disputes by the provisions of the Arbitration Act 1996.

¹⁰ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 265–268.

emotional response stirred by empathy and kindness; atawhai, the obligation to serve others and protect their well-being; and manaaki, the ability to look after those under one's care. Quince observes that a traditional dispute process might involve rangatira leading discussions, exploring options and leading their people to accept one solution over another in the event that consensus is not achieved by mediation.¹¹ Kuia and kaumātua also play a significant role in addressing transgressions and restoring relationships.¹² The ultimate measure of success for Māori dispute resolution was the degree of social harmony achieved within the group and between the group and others.¹³

- 15.8 The arrival of the British settlers introduced to Aotearoa New Zealand institutions that differentiated between the political and the legal, while for Māori, political and legal were subsumed under the rules and practices of mana and tapu associated with whakapapa and whanaungatanga.¹⁴ With the emphasis on individual identity and diminution of group obligation, the role of the rangatira and their authority as spokesperson and guardian of group rights diminished.¹⁵
- 15.9 Associate Professor Dr Carwyn Jones has discussed three key differences between Māori and dominant Western methods of addressing conflict: relationships with other people, attitudes towards time and attitudes towards the environment.¹⁶ Māori tend to resolve disputes with reference to the maintenance of relationships rather than with the application of universal standards.¹⁷ Collective responsibility also means that the whole community is responsible for maintaining and sustaining the values of that community.¹⁸ Māori regard the length of time it takes to resolve a dispute as subordinate to the overall goal of achieving balance in the relationships involved. The close connections with the past and the future mean that the focus is shifted away from the present.¹⁹ Because

¹¹ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 270.

¹² Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 83 and 89–91.

¹³ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 269.

¹⁴ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 271.

¹⁵ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 271.

¹⁶ Carwyn Jones “Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes” in Morgan Brigg and Roland Bleiker (eds) *Mediating Across Difference: Oceanic and Asian Approaches to Conflict Resolution* (University of Hawai'i Press, Honolulu, 2011) 115 at 124.

¹⁷ Carwyn Jones “Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes” in Morgan Brigg and Roland Bleiker (eds) *Mediating Across Difference: Oceanic and Asian Approaches to Conflict Resolution* (University of Hawai'i Press, Honolulu, 2011) 115 at 125.

¹⁸ See Harry Dansey “A View of Death” in Michael King (ed) *Te Ao Hurihuri: Aspects of Maoritanga* (Reed Publishing, Auckland, 1992) 105 at 109; and Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 90. This report uses case studies to demonstrate various tikanga and kawa around dispute resolution. In one example, the whānau of two kuia who were having a minor dispute came to the marae to be involved in the process. In this way they supported their whanaunga but also ensured their own mana was protected as it was affected by the mana of the individual.

¹⁹ Carwyn Jones “Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes” in Morgan Brigg and Roland Bleiker (eds) *Mediating Across Difference: Oceanic and Asian Approaches to Conflict Resolution*

tikanga that underpin Māori dispute resolution are all closely connected to or derived from the natural world, parties within a dispute are not isolated actors from their environment.²⁰

15.10 Associate Professor Quince favours a modern system of dispute resolution that incorporates fundamental aspects of tikanga and establishes practical processes that reflect the reality of present-day Māori.²¹ In her view, simply placing Māori in positions of power within the current systems is inadequate; a truly representative system would be predicated on tikanga as well as Māori people.²²

15.11 The marae remains at the centre of Māori life and continues to play a crucial role in Māori dispute resolution.²³ Dame Joan Metge has explained that:²⁴

Māori collectively see the marae as the appropriate venue for debating issues of all kinds, especially at family and community level. Discussion is an integral part of every gathering held on a marae, whether the community is meeting on its own or entertaining visitors, and whatever the publicly announced reason for coming together. When Māori meet for discussion in other places, they transform them into the likeness of a marae by their use of space and application of marae rules of debate.

15.12 However, it is well recognised that the impacts of colonisation have left many Māori without access to any marae as a forum for dispute resolution and without access to wider whānau and hapū as support networks.²⁵

TE KOOTI WHENUA MĀORI | THE MĀORI LAND COURT

15.13 State law has played a significant role in the resolution of Māori succession for many years. A working Native Land Court was established in Aotearoa New Zealand in 1865.²⁶ A brief history of legislation relating to succession (to whenua Māori but also other

(University of Hawai'i Press, Honolulu, 2011) 115 at 127, where Jones emphasises that the present and future generations are seen as living faces of the ancestors.

²⁰ Carwyn Jones “Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes” in Morgan Brigg and Roland Bleiker (eds) *Mediating Across Difference: Oceanic and Asian Approaches to Conflict Resolution* (University of Hawai'i Press, Honolulu, 2011) 115 at 128.

²¹ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 280–281.

²² Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 292.

²³ See Joan Metge *Korero Tahī: Talking Together* (Auckland University Press with Te Mātāhauariki Institute, Auckland, 2001) at 8–10; Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 269; and Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 24.

²⁴ Joan Metge *Korero Tahī: Talking Together* (Auckland University Press with Te Mātāhauariki Institute, Auckland, 2001) at 8–10, cited in Te Aka Matua o te Ture | Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase – An Advisory Report for Te Puni Kōkiri, the Office of Treaty Settlements and the Chief Judge of the Māori Land Court* (NZLC SP13, 2002) at 11–12.

²⁵ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 271–273.

²⁶ The Native Lands Act 1865, s 5. See Tom Bennion and Judi Boyd *Succession to Maori Land, 1900–52* (Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal, Rangahaua Whanui National Theme P, 1997) for a detailed history of succession to Maori land and other property.

property) reveals the extensive role of state courts in determining succession matters for Māori.

- 15.14 The Native Land Court acquired jurisdiction over personal property in the estate of a Māori person under the Intestate Native Succession Act 1876. On an application to the Court, a certificate could be granted setting out who “according to Native custom, or most nearly in accordance with Native custom,” should succeed to the deceased’s personal property and to appoint an administrator to distribute that property.²⁷ Further legislative changes were made in the Native Succession Act 1881 and shortly afterwards, the Native Lands Amendment Act 1882. Parliament attempted to address Māori custom by acknowledging Māori customary marriage, allowing the Court power to validate informal wills and allowing personal property to pass according to Māori custom.²⁸ In considering this law, the Supreme Court commented that “[i]f the law of the colony respecting descents and successions cannot be reconciled with Native custom, the latter it would seem must prevail.”²⁹
- 15.15 In 1890, the Native Land Court was granted concurrent jurisdiction with the Supreme Court “to grant probates of wills and letters of administration of the estates and effects of Natives dying within New Zealand”.³⁰ Following concerns about how English and customary laws of succession were being applied to Māori estates, the Native Land Court Act 1894 gave the court exclusive jurisdiction over probate and administration, with Māori custom to prevail unless “there be no Native custom applicable to any particular case, then according to the law of New Zealand”.³¹
- 15.16 In contrast to this more accommodating approach to Māori custom, the Native Land Court Act was amended in 1895 to prevent *ōhākī* being recognised as a legally valid distribution of property (although the Court continued to have regard to *ōhākī* for some years to determine whether land left in a will was meant to be a gift for life or an outright gift).³² After a Supreme Court decision stopped this practice, Māori protest led to an amendment to the Act in 1927, which provided that succession to Māori land received under a will would be treated as a customary gift if the donee had died intestate.³³
- 15.17 The Native Land Act 1909 did not substantially change the Native Land Court’s approach to succession.³⁴ Wills had to meet the same execution requirements imposed on

²⁷ The Intestate Native Succession Act 1876, s 4.

²⁸ Tom Bennion and Judi Boyd *Succession to Maori Land, 1900–52* (Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal, Rangahaua Whanui National Theme P, 1997) at 7–8.

²⁹ *Pahoro v Cuff* (1890) 8 NZLR 751 (SC) at 756.

³⁰ The Native Land Laws Amendment Act 1890, s 2.

³¹ The Native Land Court Act 1894, s 2 definition of “Successor”; and see Tom Bennion and Judi Boyd *Succession to Maori Land, 1900–52* (Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal, Rangahaua Whanui National Theme P, 1997) at 11.

³² Tom Bennion and Judi Boyd *Succession to Maori Land, 1900–52* (Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal, Rangahaua Whanui National Theme P, 1997) at 11–13 and 36.

³³ Tom Bennion and Judi Boyd *Succession to Maori Land, 1900–52* (Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal, Rangahaua Whanui National Theme P, 1997) at 37.

³⁴ Tom Bennion and Judi Boyd *Succession to Maori Land, 1900–52* (Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal, Rangahaua Whanui National Theme P, 1997) at 41.

Europeans and where a Māori died intestate, their estate except for whenua Māori was to devolve as if they were a European.³⁵ The Act provided for applications to be made by the deceased's widow and children where an intestacy or a will did not provide sufficiently for their maintenance.³⁶ The Act expressly excluded the application of the Family Protection Act 1908 to "the estate of a deceased Native".³⁷ The Native Land Court continued to have exclusive jurisdiction to grant probate and letters of administration.³⁸ The Maori Affairs Act 1953 was a consolidating Act and the laws relating to succession generally continued on.

- 15.18 Significant policy changes took effect in 1967 when the Māori Affairs Act 1953 was amended. The changes had the effect of making general laws of succession applicable to Māori other than in relation to whenua Māori, returning the jurisdiction for granting probate and letters of administration to te Kōti Matua | the High Court (the High Court) as well as the jurisdiction to hear and determine proceedings relating to estates.³⁹
- 15.19 Te Ture Whenua Maori Act 1993 (TTWMA) introduced a significant policy change with the recognition of the Treaty and a focus on land retention and use by Māori, although the existing rules relating to succession were generally retained. Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020 has made several changes relevant to succession. Part 3A sets out a new mediation process has been created to help resolve matters over which the Māori Land Court has jurisdiction. The purpose of the Part is to assist parties to quickly and effectively resolve disputes between themselves in accordance with the law and, as far as possible, in accordance with the relevant tikanga of the whānau or hapū with whom they are affiliated for both the process and the substance of the resolution.⁴⁰ The Māori Land Court now has jurisdiction, alongside te Kōti Whānau | the Family Court (the Family Court) and the High Court, to determine Family Protection Act 1955 (FPA) and Law Reform (Testamentary Promises) Act 1949 (TPA) claims relating to whenua Māori.⁴¹ If the claim only concerns whenua Māori, the application must be made to the Māori Land Court and not to the Family Court or High Court.
- 15.20 We have heard that the expertise of both judges and staff of the Māori Land Court in tikanga and te reo Māori can make the Court a supportive and positive place to go for dispute resolution. The Court is required to conduct proceedings as will best avoid unnecessary formality and may also apply such rules of marae kawa as the judge thinks appropriate and make rulings on the use of te reo Māori during a hearing.⁴² There are additional powers allowing the Court to take a flexible approach to obtaining and

³⁵ Native Land Act 1909, ss 133 and 139.

³⁶ Native Land Act 1909, ss 140 and 141.

³⁷ Native Land Act 1909, s 141(5).

³⁸ Native Land Act 1909, s 144.

³⁹ We discuss in Chapter 7 the effect of the 1967 Act on ownership of Māori land.

⁴⁰ Te Ture Whenua Maori Act 1993, s 98I.

⁴¹ Family Protection Act 1955, s 3A; and Law Reform (Testamentary Promises) Act 1949, s 5.

⁴² Te Ture Whenua Maori Act 1993, s 66.

receiving evidence as may assist the Court to deal effectively with the matters before it.⁴³ The Court may appoint counsel to assist the Court or represent a person or class of people.⁴⁴ As mentioned above, the Court has new powers to refer disputes to mediation.⁴⁵

Consideration of the role of the Māori Land Court

- 15.21 The history of the Māori Land Court we outline above shows that at one time the Court had exclusive jurisdiction over probate and administration for Māori, with Māori custom to prevail if possible. Consideration has continued to be given to the appropriate role of the Māori Land Court.⁴⁶
- 15.22 A Royal Commission reported on the Māori Land Court in 1980, following a wider Royal Commission inquiry into the courts generally.⁴⁷ The report reflected upon the diversity of opinion and attitudes regarding the Court.⁴⁸ The judges at the time and submissions from the New Zealand Māori Council and Department of Māori Affairs all stressed the:⁴⁹
- ... dissimilarity of its jurisdiction with those of other courts, and claiming that this special jurisdiction calls for a particular type of court ... which only long association with Maori organisations and people can develop.
- 15.23 The Chief Judge favoured an overriding social and therapeutic approach for the Court.⁵⁰ However, the Royal Commission report did not favour any extension to the Court's role. Instead, it suggested that the solution to allowing the expertise of Māori Land Court judges to be used more widely was simply for more well-trained Māori to become judges in other courts.⁵¹ Nonetheless, the Royal Commission report did recognise that enabling

⁴³ Te Ture Whenua Maori Act 1993, s 69.

⁴⁴ Te Ture Whenua Maori Act 1993, s 70. See the discussion in Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 240.

⁴⁵ Te Ture Whenua Maori Act 1993, pt 3A. Existing powers to refer matters relating to representation of Māori groups to mediation are found in ss 30B and 30C. Note the Waitangi Tribunal also has the power to refer claims to mediation: Treaty of Waitangi Act 1975, sch 2 cl 9A.

⁴⁶ The Royal Commission on the Maori Land Courts "The Maori Land Courts: Report of the Royal Commission of Inquiry" [1980] IV AJHR H3; Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004); Te Aka Matua o te Ture | Law Commission *Striking the Balance: Your Opportunity to Have Your Say on the New Zealand Court System* (NZLC PP51, 2002); Te Aka Matua o te Ture | Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002); Te Aka Matua o te Ture | Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase – An Advisory Report for Te Puni Kōkiri, the Office of Treaty Settlements and the Chief Judge of the Māori Land Court* (NZLC SP13, 2002); and Te Kooti Whenua Māori | Māori Land Court and Tāhū o te Ture | Ministry of Justice *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero: 150 Years of the Māori Land Court* (2015).

⁴⁷ The Royal Commission on the Maori Land Courts "The Maori Land Courts: Report of the Royal Commission of Inquiry" [1980] IV AJHR H3; and "Report of Royal Commission on the Courts" [1978] VII AJHR H2.

⁴⁸ The Royal Commission on the Maori Land Courts "The Maori Land Courts: Report of the Royal Commission of Inquiry" [1980] IV AJHR H3 at 70.

⁴⁹ The Royal Commission on the Maori Land Courts "The Maori Land Courts: Report of the Royal Commission of Inquiry" [1980] IV AJHR H3 at 70.

⁵⁰ The Royal Commission on the Maori Land Courts "The Maori Land Courts: Report of the Royal Commission of Inquiry" [1980] IV AJHR H3 at 80.

⁵¹ The Royal Commission on the Maori Land Courts "The Maori Land Courts: Report of the Royal Commission of Inquiry" [1980] IV AJHR H3 at 75.

Māori Land Court judges to solve Māori social problems was a question worthy of more discussion and consideration.⁵²

- 15.24 The Commission reported on the structure of the courts in 2004.⁵³ A major theme of submissions received on one of the Commission’s preliminary papers related to the need for a specialist Māori court to deal with Māori land and wider issues as well.⁵⁴ Suggestions were made for the processing of wills to return to the Māori Land Court as well as questions around all communal assets owned by traditional Māori kin groups and not just Māori land.⁵⁵ The Commission noted that Māori are “wary of any approach likely to lead to more cases involving Māori issues being dealt with in the general courts”.⁵⁶
- 15.25 The Commission noted the suggestion of the Chief Judge of the Māori Land Court at the time that disputes involving Māori communities are all of a similar nature, whether they involve land or other property, and that the Court is essentially the “Māori Lands and their Communities Court”.⁵⁷
- 15.26 The Commission recommended that the jurisdiction of the Māori Land Court be extended in relation to communal assets and that the Court make use of pū-wananga (experts in tikanga and whakapapa).⁵⁸ The Commission was referring to assets Māori might acquire in the context of Treaty settlements but also communally owned taonga.⁵⁹

⁵² The Royal Commission on the Maori Land Courts “The Maori Land Courts: Report of the Royal Commission of Inquiry” [1980] IV AJHR H3 at 75.

⁵³ Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004).

⁵⁴ Te Aka Matua o te Ture | Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002) at 187. The Commission referred to the 1986 report of the Advisory Committee on Legal Services and its suggestion that te Kooti Whenua Māori | the Māori Land Court be restructured to return decision-making power to whānau, hapū and iwi and to establish tribal rūnanga to work through and decide their own issues: at 189; see Advisory Committee on Legal Services *Te Whainga i te Tika | In Search of Justice* (Department of Justice, 1986) at 55.

⁵⁵ Te Aka Matua o te Ture | Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002) at 191.

⁵⁶ Te Aka Matua o te Ture | Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002) at 190.

⁵⁷ Te Aka Matua o te Ture | Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002) at 191.

⁵⁸ Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at R118–R120 and 234. Note that the Chief Judge of the Māori Land Court advised the Commission that pū-wananga was a more accurate term to use than pūkenga: at n 383. The Commission also recommended that the Māori Appellate Court should be the forum for deciding any disputed issue or tikanga in all court litigation.

⁵⁹ Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 239. The Commission had earlier suggested that dispute resolution within post settlement entities might be advanced by establishing a domestic tribunal established by the settlement group themselves or from extending the role of te Kooti Whenua Māori | the Māori Land Court (including mediation and facilitation, and adjudication if necessary): Te Aka Matua o te Ture | Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase – An Advisory Report for Te Puni Kōkiri, the Office of Treaty Settlements and the Chief Judge of the Māori Land Court* (NZLC SP13, 2002) at 21–22, cited in Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 237–238. Note that the Commission’s recommendations for structural changes to the courts were rejected.

- 15.27 The Commission cited the comments of the Chief Judge on how the Māori Land Court could operate:⁶⁰

This approach [a judge and pū-wananga sitting together] is not new. When the Native Land Court was established as a pilot scheme in 1862, the bench comprised Pū-wananga chaired by a Pākehā Magistrate. The processes utilized were hui based. It is clear that in this area involving as it does the application of fundamental concepts of tikanga Māori, the usual western approaches to dispute resolution are unlikely to be as successful as techniques which utilise Māori processes, Māori knowledge and are conducted in a Māori spirit. These ideas will present real challenges in terms of making orthodox principles of procedural fairness work in a completely different cultural context.

Other cases, raising more familiar legal issues of internal iwi or hapū decision making for example may well be best dealt with in the usual manner of judicial proceedings. It will be important for the court to adapt its procedures to the needs of the parties and the particular dispute.

- 15.28 The Commission recorded that strong support for expanding the role of the Māori Land Court was expressed among key Māori organisations and opinion leaders, reflecting a preference by Māori to internally manage their own dispute resolution processes, with the Māori Land Court as a back-up where adjudication is required.⁶¹
- 15.29 In 2015, a report was published to mark 150 years of the operation of the Māori Land Court.⁶² The current Chief Judge commented on the role of the court, observing that:⁶³

I want to see us involved in more matters than land. When I say a Māori Court, that's a court that deals with Māori issues ... I want to see us get back some of the family jurisdiction in terms of adoptions, because, at times, we have matters referred to us from the Family Court to sort out, including family protection issues. Matters are referred occasionally from the High Court, when they want a Court which understands Māori to deal with a particular situation. We should have the jurisdiction to preside over these issues from the start.

What role might the Māori Land Court have in resolving succession disputes (other than over whenua Māori)?

- 15.30 In our preliminary consultation, it was common to hear concerns about the challenges Māori face in resolving succession matters that may involve not only Māori land, but other property governed by general succession law. As a result, it may be necessary for whānau to deal with not only the Māori Land Court but also the High Court to obtain probate or letters of administration. Sorting out the estate can then be costly and time-consuming, requiring engagement with two or more courts. The desirability of a “one-stop shop” for estates of Māori was raised with us several times.
- 15.31 One way to establish a “one-stop shop” would be to extend the Māori Land Court’s jurisdiction to matters of probate and administration in relation to estates already before

⁶⁰ Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 241.

⁶¹ Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 238–239.

⁶² Te Kooti Whenua Māori | Māori Land Court and Tāhū o te Ture | Ministry of Justice *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero: 150 Years of the Māori Land Court* (2015).

⁶³ Te Kooti Whenua Māori | Māori Land Court and Tāhū o te Ture | Ministry of Justice *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero: 150 Years of the Māori Land Court* (2015) at 135.

the Court in relation to whenua Māori. This may not be desirable given the specialised nature of probate and administration matters and the risk of unintended consequences in extending jurisdiction in this way. An alternative might be for the Māori Land Court to take more of an active liaison role with the High Court where probate or letters of administration are required. This would not avoid the possibility that parties would have to engage with more than one court to resolve succession matters. On the other hand, the benefits of allowing the Māori Land Court to resolve all matters of succession might outweigh any perceived risks. The concerns expressed to us might also raise more general issues about the accessibility of information about the law relating to succession.

- 15.32 We are seeking feedback on the appropriate role of the Māori Land Court in relation to succession matters (other than whenua Māori).

THE GENERAL COURTS

- 15.33 Succession matters other than those in relation to whenua Māori are currently governed by the general law of succession, and accordingly, any disputes may be taken to the courts that have jurisdiction over succession matters. As discussed in Chapter 12, the High Court has jurisdiction to determine proceedings relating to testamentary matters and matters relating to the estates of deceased persons, including intestate estates. Claims under the Property (Relationships) Act 1976 (PRA), FPA and TPA may all be heard in the Family Court or High Court. We discuss resolving disputes in court in Chapter 13.
- 15.34 Māori may choose to resolve a succession dispute in these courts, and the right to do so is guaranteed by the Treaty. But concerns have long been expressed about Māori experience with the courts and justice system and the need for the justice system to better take account of te ao Māori.⁶⁴ The Independent Panel examining the 2014 family justice reforms reported in 2019 that the family justice system is largely monocultural and does not operate in a way that recognises tikanga Māori or Māori views on whānau.⁶⁵
- 15.35 Some steps have been taken in recent decades to incorporate tikanga into contemporary dispute resolution processes, including in the administration of justice by the courts.⁶⁶

⁶⁴ See for example The Maori Perspective Advisory Committee *Puao-Te-Ata-Tu (day break): The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (September 1988); Moana Jackson *The Maori and the Criminal Justice System: A New Perspective | He Whaipanga Hou* (Policy and Research Division, Department of Justice, Study Series 18, 1987–1988; and *Turuki! Turuki! Move Together! Transforming our criminal justice system: The second report of Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group* (December 2019); Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004); Te Aka Matua o te Ture | Law Commission *Justice: The Experiences of Māori Women | Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999); Rosslyn Noonan, La-Verne King and Chris Dellabarca *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Tāhū o te Ture | Ministry of Justice, May 2019).

⁶⁵ Rosslyn Noonan, La-Verne King and Chris Dellabarca *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Tāhū o te Ture | Ministry of Justice, May 2019) at 37.

⁶⁶ See discussion in Helen Winkelmann “Renovating the House of the Law” (keynote speech to Hui-a-Tau 2019, Te Hūnga Rōia Māori o Aotearoa | The Māori Law Society Annual Conference, Wellington, 29 August 2019). This has been particularly the case in the criminal justice sphere: Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 275–281. See also the discussion of the Te Ao Mārama model for the District Court: Heemi Taumaunu “Norris Ward McKinnon Annual

- 15.36 Recent recommendations have been made for reform in relation to the Family Court. The Independent Panel examining the 2014 family justice reforms recommended the development of a joined-up family justice service, to be called Te Korowai Ture-ā-Whānau.⁶⁷ The Panel recommended that Tāhū o te Ture | Ministry of Justice work with iwi and other Māori, the Family Court and other professionals to develop, resource and implement a strategic framework to improve family service for Māori.⁶⁸ The Panel also observed that the emphasis on relationships in Māori culture contrasts with family justice services, which prioritise individual rights of parties.⁶⁹ The Panel made several recommendations directed to increasing the number of Māori Family Court judges and pending that, to appoint some Māori Land Court judges to sit in the Family Court, require Family Court judges to observe proceedings in the Māori Land Court, and involve Family Court judges in the tikanga Māori programme delivered by Te Kura Kaiwhakawā | Institute of Judicial Studies.⁷⁰
- 15.37 In the PRA review we made several recommendations about the resolution of relationship property matters that involve questions of tikanga Māori:
- (a) The Family Court should be able to appoint a person to make an inquiry into matters of tikanga Māori and report to the Court.
 - (b) Family Court judges should receive education on tikanga Māori.
 - (c) The Government should give further consideration to warranting Māori Land Court judges to sit alongside judges in the Family Court where there is a difficult matter of tikanga Māori at issue.⁷¹
- 15.38 Issues of ensuring diversity amongst the judiciary and the judiciary's appreciation of te ao Māori are important for all courts. Te Kura Kaiwhakawā | Institute of Judicial Studies, the professional development arm of the judiciary, provides education programmes and resources to the judiciary, including te reo and tikanga wānanga.⁷²
- 15.39 Courts may access expertise on matters of fact such as tikanga in various ways. Perhaps most commonly, the parties to a case will each provide evidence from an expert. Often, the court will require the experts to conference and prepare a joint witness statement identifying the matters on which they agree and disagree.⁷³ In *Ellis v R*,⁷⁴ counsel agreed

Lecture 2020: Mai te pō ki te ao mārama | The transition from night to the enlightened world – Calls for transformative change and the District Court response" (11 November 2020).

⁶⁷ Rosslyn Noonan, La-Verne King and Chris Dellabarca *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Tāhū o te Ture | Ministry of Justice, May 2019).

⁶⁸ Rosslyn Noonan, La-Verne King and Chris Dellabarca *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Tāhū o te Ture | Ministry of Justice, May 2019) at 38.

⁶⁹ Rosslyn Noonan, La-Verne King and Chris Dellabarca *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Tāhū o te Ture | Ministry of Justice, May 2019) at 40.

⁷⁰ Rosslyn Noonan, La-Verne King and Chris Dellabarca *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Tāhū o te Ture | Ministry of Justice, May 2019) at 37–39.

⁷¹ See Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R83–R85 and [14.59]–[14.62].

⁷² See Te Kura Kaiwhakawā | Institute of Judicial Studies *Prospectus 2021*.

⁷³ See for example *Ngāti Whātua Ōrākei Trust v Attorney-General* [2020] NZHC 3120 at [41].

⁷⁴ *Ellis v R* [2020] NZSC 89.

on a process involving a wānanga of tikanga experts who met with each other and with all counsel and produced an agreed statement of tikanga.

15.40 As discussed earlier, the appointment of a court expert or pūkenga (or pū-wananga) is another way to assist the court.⁷⁵ The Māori Appellate Court may also provide an opinion on a question of tikanga in an appropriate case.⁷⁶

15.41 Māori Land Court judges could sit on the Family Court and High Court succession cases, bringing their expertise in tikanga to bear in relation to the dispute.

How might the Family Court and High Court best deal with whānau disputes over succession?

15.42 Some Māori may wish to bring claims in the Family Court or High Court. We are seeking feedback about whether there are changes that might be made to the processes of the High Court and Family Court that would better accord with tikanga and that would then better facilitate decision-making that takes tikanga into account.

OTHER WAYS TO RESOLVE SUCCESSION DISPUTES

15.43 Going to court may be less attractive and less desirable for disputes relating to succession given the generally private nature of the issues and the focus on relationships within and between whānau. The Commission has previously noted that litigation, as a means of solving intra-kin group disputes, is unlikely to be the most efficient or durable approach to take, the essential issue being that kin groups cannot escape having an ongoing relationship.⁷⁷

15.44 Resolving disputes outside of court is discussed in Chapter 14. It seems that mediation and arbitration are dispute resolution methods used in some circumstances by Māori but the private nature of these mechanisms means that there is limited information available about the extent of that use.⁷⁸ We discuss here the potential for mediation and arbitration as methods to resolve succession disputes.

Mediation

15.45 Mediation is a voluntary and confidential process where an impartial and independent third party chosen by the parties assists them to resolve their dispute. The more involved the parties are in deciding the outcome of their dispute, the more likely they are to be

⁷⁵ See subpt 5 of pt 9 of the High Court Rules 2016 and the inherent jurisdiction of the court: *Ngāti Whātua Ōrākei Trust v Attorney-General* [2020] NZHC 3120 at [36]. Section 99 of the Marine and Coastal Area (Takutai Moana) Act 2011 provides for the High Court to refer a question of tikanga to a court expert (pūkenga).

⁷⁶ Te Ture Whenua Māori Act 1993, s 61. See also *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [95]; and the discussion in Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 242 and following.

⁷⁷ Carrie Wainwright “Maori Representation and the Courts” (paper presented to the New Zealand Centre for Public Law Roles and Perspectives in the Law Conference, Victoria University of Wellington, Wellington, 5–6 April 2002) at 21, cited in Te Aka Matua o te Ture | Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase – An Advisory Report for Te Puni Kōkiri, the Office of Treaty Settlements and the Chief Judge of the Māori Land Court* (NZLC SP13, 2002) at 21.

⁷⁸ See for example *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291.

satisfied with the outcome and abide by it. In a mediation, the rules of evidence do not apply, and typically anything said or presented during the mediation is not admissible in any subsequent court proceedings. Where a mediation leads to a successful resolution, the parties will usually record the outcome in a binding agreement.

- 15.46 Mediation may be a useful way for whānau to resolve disputes, particularly after the death of a whānau member. Some have expressed caution about a standard model of mediation for dispute resolution in a Māori context.⁷⁹ Other tikanga-based processes may be better suited for whānau. Some mediation services are available that offer tikanga-based, Māori mediation frameworks derived from mātauranga Māori and incorporating Māori beliefs, principles, values and practices.⁸⁰
- 15.47 It would be possible to incorporate tikanga-based mediation into the resolution of succession disputes, leaving the courts in reserve where mediation is unsuccessful. Mediation has long been included in dispute resolution processes contemplated under TTWMA and the Waitangi Tribunal Act 1975.⁸¹

Arbitration

- 15.48 In arbitration, an independent third party will make a private determination of a dispute after hearing the representations of the parties. The decision of the arbitrator (known as an award) is normally final and binding on the parties and is enforceable in the courts.
- 15.49 Arbitration allows parties to choose to apply non-state laws, either in combination with or instead of state law.⁸² This means that parties can choose to apply tikanga as the applicable proper law, without having to prove that tikanga meets the common law rules for recognition as law.⁸³ This may also allow more scope for an arbitration to follow a tikanga-based process. For these reasons, arbitration may be an attractive option for whānau who want to resolve a dispute in accordance with tikanga and be confident that an outcome will be reached.
- 15.50 However, the way in which arbitration is undertaken and on what issues may be important. While in recent years some Māori have demonstrated an interest in arbitrating disputes, this has been with mixed success, including because technical requirements for valid arbitrations have not always been met.⁸⁴

⁷⁹ See James T Hudson “Tikanga Maori & the Mediation Process” (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 1996) at 20–29.

⁸⁰ See for example Tūhono Māori Dispute Resolution Collective “Tūhono: Māori Dispute Resolution” <www.tuhono.nz>; and Te Reo O Te Omeka Hau “He Aha Te Tikanga?” <fairwayresolution.com>.

⁸¹ Te Ture Whenua Maori Act 1993, ss 26E–26M, 26S–26ZA, 30B–30I and 98J–98S; and Treaty of Waitangi Act 1975, sch 2 cl 9A.

⁸² Amokura Kawharu “Arbitration of Treaty of Waitangi Settlement Cross-Claim Disputes” (2018) 29 PLR 295 at 303.

⁸³ In disputes which can only be resolved through the application of customary law, one of the common features of arbitrations dealing with such matters is a choice to apply tikanga as the proper law, see Amokura Kawharu “Arbitration of Treaty of Waitangi Settlement Cross-Claim Disputes” (2018) 29 PLR 295 at 301.

⁸⁴ For example, in *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, the Court considered the appointment of a particular arbitrator to arbitrate a dispute in relation to whakapapa to be contrary to Ngāti Rehua-Ngātiwai ki Aotea tikanga.

- 15.51 One aspect of the tikanga of Māori dispute resolution processes is the use of debate and through that the building of consensus on a matter in dispute. The idea of an arbitral tribunal that is independent of the parties having final authority over the resolution of a dispute may not accord with that. On the other hand, rangatira have traditionally taken significant roles in dispute resolution and if the right arbitrator is chosen (as a single arbitrator or as a member of an arbitral tribunal), their mana may reassure the parties that the process may be followed successfully.

NEW MĀORI MODELS OF DISPUTE RESOLUTION

- 15.52 There may be space for a modern Māori system of dispute resolution reflecting the present-day reality of Māori and incorporating fundamental aspects of tikanga.⁸⁵ Associate Professor Quince has suggested that such a system would be based on the fundamental building blocks of community input and responsibility, reciprocity and balance, inclusiveness in participation and accountability as well as representation and the use of an appropriate forum, such as a marae or other suitable space, as well as te reo Māori.⁸⁶ Such a system would include a Māori conception of what it means to be human as well as concepts of whakapapa, mana, tapu and wider collectivity in order to achieve a coherent and balanced world or state of ea that reinforces obligations arising from individuals who are part of a connected universe.⁸⁷
- 15.53 There may be support for a Māori dispute resolution body or bodies or for steps to be taken to support a return to marae as the place of decision-making in relation to succession disputes. This might be supported by specific roles for kuia and kaumātua. There might be a role for the Māori Land Court or other courts to support marae-based decision-making.
- 15.54 We would welcome feedback on what new models of dispute resolution might be desirable, bearing in mind the practical reservations we express in Chapter 2 about allowing tikanga to determine succession matters for Māori without state law involvement.

⁸⁵ See Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256; and Gina Hefferan “Post-Settlement Dispute Resolution: Time to Tread Lightly” (2004) 10 *Auckland U L Rev* 212 at 239–240.

⁸⁶ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 280–292.

⁸⁷ Khylee Quince “Māori Disputes and Their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, South Melbourne, 2007) 256 at 280–281.

QUESTIONS**Q76**

Have we correctly described the tikanga relevant to dispute resolution? What else might be relevant?

Q77

Should the Māori Land Court have a broader role in relation to resolving succession disputes over matters other than whenua Māori?

Q78

Is it important to make the general courts more accessible and attractive for Māori? If so, what needs to change? Is knowledge and understanding of tikanga the primary goal?

Q79

Are mediation or arbitration useful ways to resolve succession disputes? Should tikanga-based mediation be included in state law as a dispute resolution option?

Q80

How else might whānau resolve succession disputes? Are there other options we have not identified? If so, what are they? What are the best options, and how might they be facilitated?

CHAPTER 16

Role of personal representatives

IN THIS CHAPTER, WE CONSIDER:

- personal representatives' duties when claims are brought, or may be brought, against an estate; and
- issues with the current law and proposals for reform.

THE CURRENT LAW**Duty to give notice of a claim**

- 16.1 Personal representatives' duty of even-handedness extends to claimants against an estate where personal representatives are aware that they wish to make a claim.¹ Personal representatives must not actively or dishonestly conceal relevant material about the estate from potential claimants who seek information.²
- 16.2 Te Kōti Pīra | the Court of Appeal (the Court of Appeal) has confirmed there is no general duty to advise all potential claimants of the death of a deceased, nor a general duty to advertise for claimants.³ The Court left open the question of whether a duty of even-handedness and a duty to notify potential claimants should extend to those of whose claims the executor ought to be aware. However, in *B v T*, te Kōti Matua | the High Court (the High Court) held that the personal representatives ought to have given notice to the deceased's estranged daughter.⁴ The Court reasoned it should have been "abundantly plain" the daughter would have been entitled to claim.

¹ *Irvine v Public Trustee* [1989] 1 NZLR 67 (CA) at 70.

² *MacKenzie v MacKenzie* (1998) 16 FRNZ 487 (HC) at 495.

³ *Sadler v Public Trust* [2009] NZCA 364, [2009] NZFLR 937 at [39].

⁴ *B v T* [2015] NZHC 3174 at [111].

The role of personal representatives in court proceedings

- 16.3 Personal representatives will be the named defendants in Family Protection Act 1955 (FPA), Law Reform (Testamentary Promises) Act 1949 (TPA) and Property (Relationships) Act 1976 (PRA) proceedings, but the role they should take to actively defend the claims differs based on the nature of the claims and the extent to which the claims are opposed by other parties.
- 16.4 In FPA proceedings, the representatives can be described as “nominal defendants” because they are generally expected to take a neutral role in proceedings, submitting to the judgment of the court without taking sides.⁵ Section 11A of the FPA imposes a duty on personal representatives to place all relevant information about the estate finances and the deceased’s reasons for making dispositions before the court.
- 16.5 In contrast, personal representatives are expected to take an active role in defending claims under the TPA. The beneficiaries under the will may not be able to shed any light on the alleged claim or to contest the detail.⁶ The personal representatives’ role is therefore to ensure the claim is properly tested and proved. However, where other parties wish to take full part in the proceedings, it is usual for personal representatives to take a neutral role.⁷
- 16.6 The same active role is expected of personal representatives in PRA proceedings.⁸
- 16.7 In any of these proceedings, the court may require personal representatives to represent infants, unborn persons, absentees or those not already represented.⁹

Managing conflicts of interest

- 16.8 When a claim is made against an estate, sometimes personal representatives will have a conflict of interest. A personal representative may be:¹⁰
- (a) a claimant against the estate;¹¹

⁵ John Earles and others *Wills and Succession (NZ)* (online looseleaf ed, LexisNexis) at [13.11]; and Bill Patterson *Law of Family Protection and Testamentary Promises* (4th ed, LexisNexis, 2013) at 109.

⁶ See Nicola Peart (ed) *Family Property* (online looseleaf ed, Thomson Reuters) at [TA5.07].

⁷ Bill Patterson *Law of Family Protection and Testamentary Promises* (4th ed, LexisNexis, 2013) at 110, giving *Re Barker* (1997) 15 FRNZ 618 (HC) as an example.

⁸ Bill Atkin and Bill Patterson *Laws of New Zealand Family Protection and other Family Property Arrangements* (online ed) at [52].

⁹ See Family Court Rules 2002, rr 380 and 382, regarding applications for representation; High Court Rules 2016, r 4.27; and discussion in Bill Patterson *Law of Family Protection and Testamentary Promises* (4th ed, LexisNexis, 2013) at 316–317. Section 4(4) of the Family Protection Act 1955 also provides that personal representatives may apply on behalf of any person who is not of full age or mental capacity.

¹⁰ This list is taken from Stephen McCarthy “Will Challenges – what is the executor to do?” (paper presented to Trusts & Estates Conference 2016, Auckland, 18 August 2016) at 10–11. See also *Bennett v Percy* [2020] NZFC 3223; and John Caldwell *Family Law Service (NZ)* (online looseleaf ed, LexisNexis) at [7.909], referring to instances where a personal representative retains their role while defending the claim in their capacity as beneficiary.

¹¹ Note that partners who elect option A under s 61 of the Property (Relationships) Act 1976 are ineligible to apply for letters of administration in their partner’s intestacy: High Court Rules 2016, r 27.35. However, a partner electing option A may still be appointed an executor. If a surviving partner is the sole personal representative of the deceased partner’s

- (b) a beneficiary and intends to defend a claim as a beneficiary;
 - (c) a family member on one side of a dispute between family members; or
 - (d) the family solicitor who has previously acted for a number of family members.
- 16.9 In these instances, it may be appropriate for the personal representatives to renounce or retire from their role because of the conflict.
- 16.10 Personal representatives may, with the consent of the High Court and if not expressly prohibited, appoint Public Trust as sole executor or as a co-executor.¹²
- 16.11 If the conflicted individual does not step down as personal representative, the High Court has power to remove them under section 21 of the Administration Act 1969. The Court of Appeal has held that “the conflict must actually prejudice the beneficiaries’ welfare or undermine the executor’s ability to perform his or her duties as administrator”.¹³

ISSUES

Criticism of personal representatives’ duty to notify potential claimants

- 16.12 The case law suggests that personal representatives have a duty to notify potential claimants of whose claims they ought to be aware. There has been criticism that this requires the personal representatives to speculate as to who may or may not wish to bring a claim, to judge the strength of the claim, and advise them accordingly.¹⁴ These are matters critics say are inconsistent with personal representatives’ duties.
- 16.13 We have heard during our preliminary engagement that the current law is unsatisfactory. Some individuals stressed to us that a personal representative’s primary duty is to administer the estate and distribute it according to the deceased’s will or the intestacy regime. On the other hand, others we have heard from favoured imposing obligations on the personal representatives to take reasonable steps to notify potential claimants.

The role personal representatives should take in proceedings may be unclear

- 16.14 The role personal representatives should take in defending claims against an estate is set out in case law. It is also highly dependent on the nature of the claim and how other parties choose to participate. In our preliminary engagement, several people emphasised that the role of personal representatives in proceedings should be clear and their duties as straightforward as possible.

Applications to replace personal representatives should be made and dealt with efficiently

- 16.15 As noted, there may be some cases where personal representatives have a conflict of interest but continues to act as representative. When personal representatives must

estate, they must submit any agreement settling relationship property matters to the court for approval: Property (Relationships) Act 1976, s 21B(3).

¹² Public Trust Act 2001, s 76.

¹³ *Tod v Tod* [2015] NZCA 501, [2017] 2 NZLR 145 at [27], citing *Hunter v Hunter* [1938] NZLR 520 (CA) at 530–531.

¹⁴ Shane Campbell “Executors and trustees of estates: an obligation to invite adverse claims against an estate?” [2018] NZLJ 75 at 76.

stand aside because of the conflict, but they refuse to do so, it will be necessary for affected claimants or beneficiaries to apply to the High Court for their removal. It is important that removal applications can be made and dealt with as efficiently as possible.

PROPOSALS FOR REFORM

Personal representatives' duty to notify potential claimants should be clarified

- 16.16 Our preliminary view is that duties on personal representatives to notify potential claimants should be clarified in the new Act by requiring them to give notice in a prescribed form to certain individuals.
- 16.17 First, we propose the new Act should require personal representatives to give notice to the deceased's surviving partner. The prescribed form of the notice would contain information about:
- (a) the option of choosing relationship property rights rather than receiving what is provided in the will or an intestacy;¹⁵
 - (b) family provision claims;
 - (c) the relevant time limits; and
 - (d) obtaining independent legal advice.
- 16.18 The advantage of this approach is that surviving partners will be made aware of their rights, which we understand is not always the case currently. The notice procedure should reduce the likelihood of proceedings being filed out of time because the claimant was unaware of their rights.¹⁶
- 16.19 On the other hand, we recognise the difficulties in requiring personal representatives to determine whether the deceased was in a relationship at the time of their death, but we consider the benefits of the approach outweigh this potential difficulty.
- 16.20 Second, in Chapter 4 on family provision, we propose several options that would enable:
- (a) the deceased's children under a prescribed age to claim a family provision award (we present alternatives in Chapter 4 for whether the prescribed age should be 18, 20 or 25);
 - (b) disabled adult children dependent on the deceased parent to claim a family provision award; and
 - (c) all children of the deceased to claim a family provision award to recognise the parent-child relationship and that the child belongs to the family if the deceased's will fails to do so.
- 16.21 We propose the new Act should require personal representatives to give notice in a prescribed form to:
- (a) the guardian of any of the deceased's children aged under 18; and

¹⁵ Note the option for reform proposed in Chapter 3 regarding relationship property entitlements that the law should adopt a "top-up" approach. When choosing relationship property division on death, a surviving partner would be entitled to whatever provision is made for them under the will plus whatever further property is needed from the estate to top-up that provision to the full extent of their relationship property entitlement.

¹⁶ Note this should take place alongside a general education campaign as proposed in Chapter 18.

- (b) children aged 18 or over if the prescribed age is set at either 20 or 25.
- 16.22 The notice would set out information about family provision claims, relevant time limits and obtaining independent legal advice.
- 16.23 Again, a potential difficulty with this approach is requiring the personal representatives to determine who may be an eligible child claimant. As set out in Chapter 4, we propose that non-biological children for whom the deceased assumed parental responsibility in an enduring way should be eligible as accepted children to apply for a family provision award. Again, our preliminary view is that the benefits of this approach outweigh these potential difficulties.
- 16.24 In Chapter 4, we express reservations about awards to disabled adult children and awards to all children to recognise them as members of the deceased's family. At this stage, we have not considered proposals requiring personal representatives to give notice to these individuals. We recognise, however, if there is strong support for the inclusion of these claims in the new Act, that there is a good case for extending personal representatives' notice requirements to these potential claimants.
- 16.25 We do not propose that personal representatives should be required to give notice in a prescribed form to potential contribution claimants. As claimants could be any individual and not just the deceased's family members, it could be difficult for personal representatives to identify these individuals.

The role personal representatives should take in proceedings should not be prescribed in the new Act

- 16.26 We have considered whether the role personal representatives should take in proceedings under the Act should be set out in the new Act. In particular we have considered whether the Act should expressly provide that the personal representatives are to assume a neutral role.
- 16.27 Although we see some merit in prescribing in the new Act the role personal representatives should take, we do not favour this approach for several reasons.
- (a) First, as discussed in Chapters 11 and 14, we consider there are advantages in encouraging parties to settle disputes without going to court. If personal representatives are required by the statute to take a neutral position, it may be unclear when personal representatives ought to actively engage in settlement negotiations or let a court decide the matter.
- (b) Second, personal representatives should be prepared to take a pragmatic approach depending on the nature of the claim and what roles other parties take in defending a claim. For example, when other beneficiaries actively defend the claim, we would expect personal representatives to take a neutral and passive role. If, on the other hand, a person brought a baseless contribution claim, we would expect personal representatives to defend the proceeding. To prescribe in the new Act what the approach should be in any given case would be cumbersome and impractical.
- (c) Lastly, in our review of comparable jurisdictions, we are not aware of any jurisdiction that prescribes in its legislation the role personal representatives are to take, nor are we aware of any recommendations from law reform bodies in those jurisdictions to implement legislative guidance.

- 16.28 We do, however, propose the new Act should require personal representatives to assist the court by placing before the court all relevant information in the personal representative's possession or knowledge including:¹⁷
- (a) members of the deceased's family;
 - (b) the financial affairs of the estate;¹⁸
 - (c) persons who may be claimants under the Act; and
 - (d) the deceased's reasons for making the dispositions made in the will or for not making provision or further provision for any person.

The court should have powers under the new Act to remove and replace personal representatives

- 16.29 Although it appears conflicts of interest frequently arise when claims are made against estates, we do not consider it necessary for the new Act to provide guidance to personal representatives for managing conflicts. We understand that in most cases personal representatives and their legal counsel will know how to manage the conflict consistently with their legal duties.
- 16.30 We recognise, however, there will be cases where it is expedient for the court to intervene to remove or replace a personal representative. We see merit in expressing this power within the new Act so the matter can be dealt with in the same court and same proceedings without the need for a separate application to the High Court under the Administration Act. If the proceedings relating to the substantive claim are filed in te Kōti Whānau | the Family Court, our preliminary view is that the Family Court should have jurisdiction to remove or replace personal representatives involved in that matter.

SUMMARY OF PROPOSALS FOR REFORM

- The new Act should require personal representatives to give notice in a prescribed form to the deceased's surviving partner and the deceased's children who are potentially eligible for a family provision award. The notice should include information about the option of choosing relationship property rights, rights to claim family provision under the new Act, relevant time limits and obtaining independent legal advice.
- The new Act should not prescribe the role personal representatives are to take in proceedings, except to provide a duty to place before the court information in the personal representative's knowledge or possession concerning:
 - members of the deceased's family;
 - the financial affairs of the estate;
 - persons who may be claimants under the Act; and

¹⁷ Currently provided for in s 11A of the Family Protection Act 1955. The Commission recommended a similar duty in Te Aka Matua o te Ture | Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at 152.

¹⁸ Depending on how the law may be reformed to deal with property that may have passed from the deceased without falling into the estate, such as jointly owned property passing by survivorship, personal representatives may need to place further information before the court. We discuss options to address property passing outside the estate in Chapter 9.

- the deceased's reasons for making the dispositions made in the will or for not making provision or further provision for any person.
- No provision should be made within the new Act for how personal representatives are to manage conflicts of interest, instead leaving the general law on personal representatives' duties to apply. The new Act should, however, contain a power for both the High Court and Family Court to remove or replace personal representatives where expedient.

QUESTIONS

Q81

Do you agree with the issues we have identified?

Q82

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

Q83

What are your views on the proposals for reform?

Q84

Do you have any other suggestions for reform?

CHAPTER 17

Cross-border issues

IN THIS CHAPTER, WE CONSIDER:

- the conflict of law rules relating to succession, particularly claims against estates and intestate succession; and
- issues with the current law and proposals for reform.

THE CURRENT LAW

- 17.1 In 2019, an estimated 272 million people worldwide lived in a country other than their birth country. Between 500,000 and one million New Zealanders are estimated to live overseas.¹ Prior to 2020, Aotearoa New Zealand also had a high rate of net migration.² With the frequent movement of people and property between countries, it is inevitable that Aotearoa New Zealand's domestic succession laws will come into conflict with the domestic laws of another country.
- 17.2 With the exception of section 5 of the Administration Act 1969 (confirming te Kōti Matua | the High Court's (the High Court) broad jurisdiction in relation to administration and succession) and the choice of law rules in section 22 of the Wills Act 2007, the conflicts of law rules about claims against estates are found in the common law.
- 17.3 In Aotearoa New Zealand, matters of administration³ are governed by the law of the country in which the assets are located and a grant of administration is made. Where, for example, probate of a will is granted by the High Court in Aotearoa New Zealand, the personal representative will have authority to collect the New Zealand assets and pay any debts, according to New Zealand law. If, however, the deceased also owned property in Australia, a fresh grant of administration in Australia will be required for the personal

¹ Paul Spoonley *The New New Zealand: Facing demographic disruption* (Massey University Press, 2020) at 119. We note that events such as COVID-19 encourage more New Zealanders to return from overseas and fewer to leave.

² Aotearoa New Zealand's annual net migration rate was 11.4 per 1,000 people in the year ended June 2019 (similar to 2017 and 2018). The rate is similar to Australia's in 2017–2018 but more than triple that in the United Kingdom: Tauranga Aotearoa | Stats NZ "New Zealand net migration rate remains high" (12 November 2019) <www.stats.govt.nz>.

³ Administration is concerned with the appointment of a personal representative, the collection of the assets of the estate and the payment of the estate's debts.

representative to administer that property. A claim under the Law Reform (Testamentary Promises) Act 1949 (TPA) has been categorised by the courts as a matter of administration.⁴ This means that if a grant of administration has been made in Aotearoa New Zealand, a court is able to entertain a claim under the TPA that may then be satisfied from that New Zealand property. For administration purposes, it does not matter where the deceased was domiciled when they died.

- 17.4 Succession is concerned with the distribution of the residue of the estate to those entitled to inherit either under the will or, if there is no will, under the statutory distribution rules set out in the Administration Act. The Family Protection Act 1955 (FPA) has been treated as a matter of succession because it is concerned with the appropriate distribution of the net estate (the remainder of the estate after debts are paid). In general, matters of succession are governed by the “scission” principle which differentiates between movable and immovable property. The succession of movable property is determined by the law of the deceased’s domicile (*lex domicilii*) whereas the succession to immovable property is determined by the law of the country where the property is situated (*lex situs*).
- 17.5 There are also conflicts of law rules that apply to wills, including the creation and revocation of a will, its validity, and its construction. Apart from section 22 of the Wills Act, these rules are found in the common law. These rules also rely on the distinction between movable and immovable property and frequently use domicile as the relevant connecting factor.
- 17.6 There are some fundamental differences between the succession regimes in common law countries and in civil law countries, which may add complexity when a cross-border element arises. For instance, Aotearoa New Zealand and other common law countries distinguish between administration and succession, while civil law countries tend not to make the same distinction. Civil law jurisdictions often implement a system of forced heirship, whereas Aotearoa New Zealand allows for greater testamentary freedom.

RECOMMENDATIONS IN THE PRA REVIEW

- 17.7 In our review of the Property (Relationships) Act 1976 (PRA), we identified several issues with the choice of law provisions in that Act.⁵ Section 7 of the PRA confirms that the Act applies to immovable property in Aotearoa New Zealand (not to immovable property situated overseas). In respect of movable property, it may apply to property outside Aotearoa New Zealand if one of the partners is domiciled in Aotearoa New Zealand at the date of an application under the PRA, at the date of any agreement between the partners relating to the division of their property or at the date of either partner’s death. The distinction between movable and immovable property prevents the resolution of property disputes under a single legal regime. The domicile test for movable property is problematic because it enables the application of the PRA in circumstances where Aotearoa New Zealand might not be the country most closely connected to the

⁴ *Re Greenfield* [1985] 2 NZLR 662 (HC) at 666. However, it is perhaps questionable whether Parliament intended for this to be the case given its inclusion of s 3(5) of the Law Reform (Testamentary Promises) Act 1949, which contemplates the ability to extend directly or indirectly to property outside Aotearoa New Zealand and is equivalent to s 7(1) of the Family Protection Act 1955.

⁵ See *Te Aka Matua o te Ture | Law Commission Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [19.1]–[19.89].

relationship. Section 7 also operates as a unilateral choice of law rule, meaning that it only sets out when the PRA applies and is silent on which country's laws apply when the PRA does not apply. This creates uncertainty and risks leaving gaps in the law if no other country's law applies.

17.8 Section 7A applies where the partners have made an agreement on what law should be applied to their property before or at the time their relationship began. However, it fails to give priority to the autonomy of partners by not allowing for agreements to be made during the relationship.⁶ Section 7A(1) gives partners the right to agree that the PRA will apply to their property, even if neither partner is domiciled in Aotearoa New Zealand.⁷ The technical requirements in section 7A(2) may mean that many agreements, particularly those entered into outside Aotearoa New Zealand, may not be recognised even where the partners have organised their affairs in reliance on those agreements.⁸

17.9 We recommended the following:⁹

- (a) Section 7 of the PRA should be repealed, and in the absence of a valid foreign law agreement, the law to be applied to property disputes between partners shall be the law of the country to which the relationship had its closest connection.
- (b) There should be a presumption that the country to which a relationship had its closest connection is the country where the partners last shared a common residence unless either partner satisfies a court that the relationship had its closest connection with another country.
- (c) All of the partners' property, including movable and immovable property situated outside Aotearoa New Zealand, should be subject to the recommended rules of classification and division.
- (d) The court's broad ancillary powers to give effect to a division of relationship property should expressly include the power, in relation to property situated outside Aotearoa New Zealand, to order a partner to transfer the property or pay a sum of money to the other partner.
- (e) Section 7A of the PRA should be repealed, and new provisions made in relation to foreign law agreements, including that the agreement is valid under the law of the country that is chosen under the agreement, or under the law of the country with which the relationship had its closest connection. The court should, however, retain discretion not to give effect to a valid agreement if it would be contrary to New Zealand public policy.

⁶ Our review noted other issues with s 7A of the Act. An implicit choice of law is insufficient to satisfy the technical requirements in s 7A(2): see Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [19.45]–[19.50].

⁷ If such an election is made, it would cover all property except for overseas immovable property.

⁸ For the full discussion of these issues, see Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [19.45]–[19.50].

⁹ For the full discussion of the recommendations, see Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [19.1]–[19.89].

ISSUES

The scission principle

- 17.10 The scission principle distinguishes between movable and immovable property, requiring succession to movable property to be governed by the law of the deceased's domicile (lex domicilii) and succession to immovable property to be governed by the law of the country where the property is located (lex situs). This has been heavily criticised by legal commentators, law reform bodies and the judiciary.¹⁰ It is seen to cause significant anomalies, particularly in intestate succession and FPA claims.
- 17.11 In cases where someone has died without a will, the situs rule for immovables might mean that a partner is entitled to two statutory legacies, potentially at the expense of other family members.¹¹
- 17.12 In FPA cases, the scission principle can frustrate the court's ability to award the level of provision it thinks fit or to access the whole of the estate.¹² For example, when making an award under the FPA, a court may take account of the value of overseas immovable property, but it cannot make an award in respect of that property.¹³ A claim under the FPA may be made in respect of immovable property situated in Aotearoa New Zealand (even if the deceased is domiciled outside Aotearoa New Zealand on death)¹⁴ and to movable property situated anywhere only if the deceased was domiciled in Aotearoa New Zealand at the time of death.¹⁵
- 17.13 The distinction is becoming increasingly artificial because of the ease with which a person can convert movable property to immovable or vice versa.¹⁶

Characterisation of TPA and FPA claims

- 17.14 The second issue relates to TPA claims being regarded as a matter of administration and FPA claims being regarded as a matter of succession. Neither statute contains an express choice of law rule, and as a result the courts have had to determine how to characterise each claim. These claims are often pleaded in the same case and the different

¹⁰ Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [8.91] and [8.128]; Australian Law Reform Commission *Choice of Law* (ALRC 58, 1992) at [9.4]–[9.6]; Paul Torremans (ed) *Cheshire, North & Fawcett Private International Law* (15th ed, Oxford University Press, Oxford, 2017) at 1352, discussing the reluctance of the judge in the English case of *Re Collens, decd* [1986] Ch 505 to see the widow succeed in both jurisdictions.

¹¹ Although there is no New Zealand case law dealing with this issue, it has occurred in England and Canada with varying results: see for example *Re Collens, decd* [1986] Ch 505; *Re Thom* (1987) 50 Man R (2d) 187; and *Manitoba (Public Trustee) v Dukelow* (1994) 20 OR (3d) 378.

¹² Section 7(1) of the Family Protection Act 1955 provides that in cases where the authority of the court does not extend or cannot directly or indirectly be made to extend to the whole estate, then to so much thereof as is subject to the authority of the court.

¹³ *Re Bailey* [1985] 2 NZLR 656 (HC) at 658–660.

¹⁴ *Re Butchart (Deceased)* [1932] NZLR 125 (CA).

¹⁵ *Re Terry (Deceased)* [1951] NZLR 30 (SC); *Re Knowles (Deceased)* [1995] 2 NZLR 377 (HC); and *Roberts v Public Trustee of Queensland* HC Christchurch M316-97, 13 November 1997.

¹⁶ Australian Law Reform Commission *Choice of Law* (ALRC 58, 1992) at [9.7].

categorisation can force artificial constraints on the court.¹⁷ Our preliminary view is that the TPA should be repealed and a single cause of action included in the new Act that provides a remedy when a person has provided a benefit to the deceased or the estate (see Chapter 5).

Relationship property claims

- 17.15 The third issue arises in relationship property claims. As noted above, the Commission has recommended that, in the absence of a valid foreign law agreement, the law to be applied to property disputes between partners on separation should be the law of the country to which the relationship had its closest connection (with a rebuttable presumption that the country to which a relationship had its closest connection is the country where the partners last shared a common residence). When considering the appropriate choice of law rule for family provision and contribution claims, we need to keep this recommendation in mind.

PROPOSALS FOR REFORM

Choice of law rules based on personal connecting factor

- 17.16 Our preliminary view is that the scission principle should not apply to matters of succession. Instead, we propose that the choice of law rule for succession would be based on a personal connecting factor.
- 17.17 Our preference is that this connecting factor would be the deceased's last habitual residence, drawing on the definition in the EU Succession Regulation.¹⁸ We propose that habitual residence is defined in legislation¹⁹ to mean the country to which the deceased had the closest and most stable connection. This would be determined with reference to an overall assessment of the specific circumstances of the case, including the deceased's social, professional and economic ties to the country, and the underlying aim of engaging the most relevant law for that case to give effect to the interests of the deceased, of people close to the deceased and of creditors.

¹⁷ *Re Greenfield* [1985] 2 NZLR 662 (HC), for example, involved claims under both the FPA and the TPA by a son against his mother's estate. Her estate consisted of movable property (money in a New Zealand investment fund) and letters of administration were granted in New Zealand to the New Zealand Insurance Co Ltd. The court found that the mother had died domiciled in Australia. The applicable law to decide the succession of this movable property was therefore Australian law. For this reason, the FPA claim failed. However, the finding that the TPA was a matter of administration meant that the court was entitled to make an order in the testamentary promises action notwithstanding the Australian domicile of the deceased. See Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [8.127].

¹⁸ See art 21(1) and recitals 7 and 23–25 of Regulation 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107. Article 21(2) provides an exception that another law should apply when it is clear from all the circumstances that the deceased was manifestly more closely connected to another Member State. This exception clause has been criticised because it undermines the desire for habitual residence to be determined using an overall assessment focusing on the core of the relationship: see Alfonso-Luis Calvo Caravaca "Article 21: General Rule" in Alfonso-Luis Calvo Caravaca, Angelo Davì and Heinz-Peter Mansel (eds) *The EU Succession Regulation: A Commentary* (Cambridge University Press, Cambridge, 2016) 298 at 318.

¹⁹ This may be within the new Act or the Wills Act 2007, or both, depending on the scope of the choice of law rule.

- 17.18 Relevant criteria for evaluating the deceased's ties to a country might include the presence of the deceased's family members, the renting or purchase of a house, schooling of children, fluency in the language, the existence of a network of friends and acquaintances, employment in a local company, attending professional training or university courses and the opening of a bank account.²⁰ Whether the deceased intended to reside indefinitely in a country would not be an isolated element to be considered,²¹ but intention would be demonstrated through the evidence of a deceased's social, professional and economic ties to the country.²² The passage of time will play a significant role in determining habitual residence. For example, the more time a person spent residing in a country, the more likely it is that they will be determined habitually resident in that country.²³
- 17.19 A possible alternative connecting factor is domicile. However, there are various reasons why habitual residence is preferable. First, habitual residence has international recognition as an appropriate connecting factor for choice of law in succession matters. Second, habitual residence would be relatively easy to understand and to establish.²⁴ The flexible and contextual definition we propose would be applicable to everyone without requiring variation for children or those lacking mental capacity.²⁵ Conversely, domicile is not a readily understood concept, as it relies on intricate rules to determine both the domicile one inherits as a child and the independent domicile one may subsequently acquire.²⁶ A new domicile is acquired by a combination of residence and an intention to live permanently in a country. Determining that the requisite intention has been met may cause difficulties. An intention to return to a country might not mean that the individual is most closely connected with that country at the time of their death.
- 17.20 We acknowledge that domicile also has benefits. It is well established as a connecting factor in New Zealand law, it would represent the least amount of change to the current law²⁷ and it would be consistent with other related provisions, most notably section 22 of the Wills Act. It was preferred by the Australian Law Reform Commission in 1992.²⁸

²⁰ These and additional criteria are discussed in Alfonso-Luis Calvo Caravaca "Article 21: General Rule" in Alfonso-Luis Calvo Caravaca, Angelo Davì and Heinz-Peter Mansel (eds) *The EU Succession Regulation: A Commentary* (Cambridge University Press, Cambridge, 2016) 298 at 303–304.

²¹ Compare s 9(d) of the Domicile Act 1976.

²² See the Supreme Court discussion about ordinary residence in *Greenfield v Chief Executive, Ministry of Social Development* [2015] NZSC 139, [2016] 1 NZLR 261 at [36]–[37]. See also Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [4.188].

²³ Alfonso-Luis Calvo Caravaca "Article 21: General Rule" in Alfonso-Luis Calvo Caravaca, Angelo Davì and Heinz-Peter Mansel (eds) *The EU Succession Regulation: A Commentary* (Cambridge University Press, Cambridge, 2016) 298 at 305–306.

²⁴ The flexible and contextual definition we propose would also avoid the need for an exception clause.

²⁵ Compare s 6 of the Domicile Act 1976 that prescribes the rules of law relating to the domicile of children. Under the current law, an individual who lacks the mental capacity to form the necessary intention to acquire a new domicile may retain the domicile inherited as a child even if they have resided elsewhere for many years. See generally Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at Chapter 4, C.3.

²⁶ See ss 6 and 7 of the Domicile Act 1976.

²⁷ Insofar as the current choice of law rule for the succession of movable property is the law of the deceased's domicile.

²⁸ Australian Law Reform Commission *Choice of Law* (ALRC 58, 1992) at [9.9].

- 17.21 Our preliminary view is that disputes over relationship property following the death of a partner should also be governed by the law of the deceased's last habitual residence to avoid fragmenting the law governing a deceased's estate. This would differ from the choice of law rule recommended by the Commission in the PRA review for determining the law applicable to relationship property disputes for relationships that end on separation.²⁹
- 17.22 It is sensible that disputes between separating partners over their relationship property are decided in accordance with the law most closely connected to that relationship, particularly given the relationship property is likely to be situated in that country. However, this may be more complicated on death as not all countries have a relationship property regime similar to Aotearoa New Zealand.³⁰ In other jurisdictions, a surviving partner's entitlement may be characterised as a question of succession. If the same connecting factor applies in both cases, courts will not need to determine whether the issue should be characterised as a question of relationship property or as a question of succession. Under the alternative approach, it is conceivable that a surviving partner could get a windfall if, for example, they receive a significant share of their partner's estate under the relationship property law of one country and also a significant share of the estate under the intestacy regime in another country.
- 17.23 We propose that courts have some flexibility to interpret or adapt the rules to harmonise domestic and foreign law. For example, this might include the ability to take into account the completion of a relationship property division when determining the estate and the respective shares of the beneficiaries.³¹ It may be beneficial for a rule on adaptation to be set out in legislation, such as that suggested by Gerhard Dannemann:³²
- (1) in the application and interpretation of both domestic and foreign law, courts must seek to avoid a situation in which the combination of rules from or decisions taken in different jurisdictions produces an outcome which differs from a common outcome for purely domestic, but otherwise identical cases in the same jurisdictions, unless an applicable rule intends such a different treatment.
- (2) If such a different outcome cannot be avoided by application and interpretation, courts may modify or set aside otherwise applicable rules if the outcome would otherwise violate human rights, in particular rights to equal treatment.
- 17.24 We also propose that a New Zealand court continues to have the power to refuse to apply a foreign rule where doing so would be contrary to public policy.

Scope of the choice of law rules

- 17.25 Our preliminary view is that legislation should contain multilateral choice of law rules that identify the most appropriate system of law to govern the issue in question, whether that is New Zealand law or foreign law.

²⁹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R130–R131.

³⁰ Meaning that they do not have a regime that provides entitlements to a surviving partner based on matrimonial/relationship property rights on inter vivos separation.

³¹ See recital 12 of Regulation (EU) 650/2012.

³² Gerhard Dannemann "Adaptation" in Stefan Leible (ed) *General Principles of European Private International Law* (Wolters Kluwer, Alphen aan den Rijn (Netherlands), 2016) 331 at 342.

- 17.26 We are considering two alternative options about the scope of the issues that would be determined by the new rules. Neither option would preclude rules of the *lex situs* continuing to apply to the administration of estates.

Option One: new choice of law rules for matters of succession excluding formal validity, capacity and interpretation

- 17.27 Under Option One, the new Act would specify multilateral choice of law rules for issues relating to intestate succession, material and essential validity, revocation of wills, relationship property claims and claims in the nature of family provision and contribution.
- 17.28 Option One would primarily relate to issues contained within the new Act or their equivalent causes of action in foreign law, but it would include two issues of testate succession, namely material and essential validity and revocation.
- 17.29 The principal function of the validity rules is to determine whether there are any restrictions on the will-maker's freedom to dispose of their estate. Awards under the FPA involve invalidating dispositions under the will and are therefore treated as specific applications of the general conflict rules governing material or essential validity.³³ Forced heirship rules are also treated as affecting the validity of a will.³⁴ It may create difficulties of characterisation if the validity of a will continues to be governed by common law choice of law rules while family provision and contribution claims are governed by the new choice of law rules.
- 17.30 It is preferable that the question of whether a will has been revoked is governed by the same law as that which determines whether a will was validly made.
- 17.31 Option One would remove the scission principle in respect of many succession issues. However, there would still be some fragmentation of the choice of law rules, and this may result in difficulties for characterisation or different laws being applied in the same case. For example, a single case may raise issues of capacity and inadequate provision for a family member, and these issues may be dealt with by the laws of two countries.

Option Two: new choice of law rules for all matters of succession

- 17.32 Under Option Two, all matters of succession would be governed by new choice of law rules. These would be expressed in the proposed new Act and in the Wills Act.
- 17.33 We propose that the new rules would therefore cover successions with or without a will, relationship property claims on death and other claims against estates. This review is focused on claims against estates, but we have concluded that it would be a wasted opportunity not to seek feedback on the question of codifying choice of law rules for succession more broadly. Option Two could therefore also include repealing the current choice of law rules for formal validity contained in section 22 of the Wills Act and replacing this with a choice of law rule based on the habitual residence of the deceased.
- 17.34 This proposal would have the benefit of codifying the choice of law rules in succession, removing the scission principle and replacing it with a personal connecting factor, as

³³ *Re Roper (Deceased)* [1927] NZLR 731 (SC) at 743; and *Re Butchart (Deceased)* [1932] NZLR 125 (CA). See also Marcus Pawson *Laws of New Zealand Conflict of Laws: Choice of Law* (online ed) at [232]; and Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [8.109].

³⁴ Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [8.109].

discussed above. It would streamline the process for determining the applicable law in succession-related matters. However, this option would be a substantial change from the current law. There may be unintended consequences associated with altering the choice of law rules relating to other issues of testate succession. For example, the construction or interpretation of a will is currently governed by the law intended by the will-maker. This is presumed to be the law of their domicile unless there is a clear indication that the will-maker intended a different law to be applied. At this stage, we do not propose any change to the rule that the law applicable to the interpretation of a will should be that intended by the will-maker.³⁵ Rather, the change would be to the presumption that this is the law of the deceased's domicile.

- 17.35 Another potentially significant change would be the effect on the current choice of law rules around personal capacity to make a will or take under a will. Currently, personal capacity to make a will is governed by the scission principle. Capacity to make a will of immovable property is governed by the *lex situs*, while capacity to make a will of moveable property is governed by the law of the will-maker's domicile. Views differ about whether the point in time to determine the applicable law that decides capacity issues should be the time of making the will or the time of death.³⁶
- 17.36 Our preliminary view is that the applicable law for determining capacity to make a will would be the law of the deceased's habitual residence at the time of making the will and that capacity to take under the will would be determined by the law of the deceased's habitual residence at the time of death.

Foreign law agreements

- 17.37 Our preliminary view is that, during their lifetime, partners should be entitled to agree that the law of a country other than Aotearoa New Zealand should apply to some or all of their property on death. These agreements could extend to determining that the law of a country other than Aotearoa New Zealand should apply to any potential claims that the surviving partner might have against the deceased partner's estate. These agreements should be subject to the same validity requirements recommended in the PRA review and the court should retain residual jurisdiction to set them aside if applying the law of another country or giving effect to a foreign law agreement would be contrary to public policy.
- 17.38 We do not propose that family provision claims for children would be able to be the subject of a foreign law agreement. Similar to our views in Chapter 11 that agreements purporting to contract out of a deceased's obligations for their minor children and dependent disabled children should be prohibited, we have concerns that a foreign law agreement would be made to undermine vulnerable children's rights to adequate provision. There are also practical and legal issues about minor children's capacity to be party to such agreements.

³⁵ There may be merit in the Government undertaking a broader review of private international law in Aotearoa New Zealand, which could include further analysis of conflict of law rules in testate succession.

³⁶ Lawrence Collins (ed) *Dicey, Morris & Collins on the conflict of laws* (15th ed, Sweet & Maxwell, London, 2012) at [27-024]; Paul Torremans (ed) *Cheshire, North & Fawcett Private International Law* (15th ed, Oxford University Press, Oxford, 2017) at 1340; and Marin Davies and others *Nygh's conflict of laws in Australia* (10th ed, LexisNexis Chatswood (NSW), 2020) at [38.9].

- 17.39 Our expectation is that a foreign law agreement between the deceased and a contributor would take the form of a contract between these parties.

Enforcement

- 17.40 Our preliminary view is that the court should have broad powers to give effect to relationship property, family provision and contribution awards, and this should be expressed in statute. Where the estate property or relationship property includes property situated outside of Aotearoa New Zealand, the court's powers would allow them to make orders in respect of the property situated in Aotearoa New Zealand, taking account of the value of the overseas property. The court would also have the power to order a party to transfer property or pay a sum of money to the other party (in personam orders).

Renvoi

- 17.41 Our preliminary view is that the new legislative provisions should not refer to the application of renvoi.³⁷ This would allow the courts to determine the application of renvoi in a particular case when relevant. As far as we are aware, renvoi is not commonly applied in Aotearoa New Zealand.³⁸ Doctor Maria Hook and Jack Wass suggest that the doctrine is a potentially useful tool for the courts to retain as it may serve a jurisdictional function in cases where the Aotearoa New Zealand court seeks to recognise, support or supplement the subject-matter jurisdiction of the courts of the *lex causae*.³⁹ It may assist with the enforcement of a New Zealand judgment in the foreign jurisdiction.⁴⁰
- 17.42 We considered whether the new Act should expressly exclude renvoi. Under that option, the new Act would provide that when a New Zealand court determines that the law of another country is to apply, that country's conflict of law rules are to be excluded. However, a "no renvoi" solution may be viewed as simplistic and ignoring that a different result would be achieved if the case had been heard in the other country.

Jurisdiction

- 17.43 Our preliminary view is that the new Act should confirm the broad subject-matter jurisdiction of te Kōti Whānau | the Family Court (the Family Court) and High Court but should not otherwise include bespoke jurisdictional rules.⁴¹ We want to avoid provisions that operate as a unilateral choice of law rule and a constrained jurisdictional rule.⁴²

³⁷ Renvoi refers to the forum court's application of the foreign court's choice of law rules. This might exclude the foreign court's approach to renvoi (single or partial renvoi) or include it (double or total renvoi).

³⁸ Rina See "Through the Looking Glass: *Renvoi* in the New Zealand Context" (2012) 18 Auckland U L Rev 57 at 57–58. We are not aware of more recent case law applying renvoi. See also Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [4.52].

³⁹ Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [8.54].

⁴⁰ For example, where enforcement might impact the title of immovable property in that country.

⁴¹ See Chapter 12 for discussion on the respective jurisdictions of te Kōti Whenua Māori | the Family Court and te Kōti Matua | the High Court.

⁴² For example s 7 of the Property (Relationships) Act 1976 and s 40 of the Draft Succession (Adjustment) Act in Te Aka Matua o te Ture | Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at 108.

- 17.44 Personal jurisdiction of the court should continue to be established in the usual manner according to the Family Court Rules and High Court Rules.⁴³ We have heard that rule 6.27 of the High Court Rules may require amendment to enable service without leave of the court. For example, it appears that a personal representative would be prohibited from serving an interested party overseas without leave where the claim relates to succession and the deceased was domiciled in Aotearoa New Zealand but did not have land or other property situated here.⁴⁴

Abolishing the *Moçambique* rule

- 17.45 Our preliminary view is that it would be desirable for the new Act to confirm for the avoidance of doubt that the *Moçambique* rule⁴⁵ has no application in matters covered by that Act. Under this common law rule, the courts have no general jurisdiction in proceedings principally concerned with a question of title to, or the right to possession of, foreign immovable property, subject to two exceptions: the court's in personam jurisdiction to enforce contractual or equitable obligations⁴⁶ and the jurisdiction to determine questions of foreign title where they arise incidentally for the purpose of administering an estate. The rule has been the subject of much criticism with critics concerned that it produces illogical and unsatisfactory results.⁴⁷ Te Kōti Pira | the Court of Appeal is sympathetic to the criticism of the *Moçambique* rule.⁴⁸ The rule creates confusion, with practitioners and courts sometimes struggling to determine whether a claim falls within the rule or its exception.⁴⁹ The Australian Law Reform Commission considered that retaining the rule once the *lex situs* rule had been abolished would be anomalous.⁵⁰

⁴³ See the court rules relevant to the service of proceedings under the PRA, FPA or TPA: Family Court Rules 2002, r 130; District Court Rules 2014, rr 6.23–6.27; and High Court Rules 2016, rr 6.27–6.36.

⁴⁴ Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [8.85].

⁴⁵ Named after the leading House of Lords decision *British South Africa Co v Companhia de Moçambique* [1893] AC 602 (HL). The rule was treated as applicable in New Zealand in *Re Fletcher Deceased* [1921] NZLR 46 (SC).

⁴⁶ The leading authority is *Penn v Lord Baltimore* (1750) 1 Ves Sen 444 (Ch). See also *Birch v Birch* [2001] 3 NZLR 413 (HC) at [50].

⁴⁷ David Goddard and Campbell McLachlan "Private International Law – litigating in the trans-Tasman context and beyond" (paper presented to New Zealand Law Society seminar, August 2012) at 157. Goddard and McLachlan reference *Hesperides Hotels Ltd v Muftizade* [1979] AC 508 (HL) at 543–544. In that case, Lord Wilberforce described a "massive volume of academic hostility to the rule as illogical and productive of injustice": at 536. See also *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39, [2012] 1 AC 208 at [105].

⁴⁸ Most recently, in *Christie v Foster*, the Court stated that the criticisms of the rule appear to be well founded but that this was not the case to decide whether the *Moçambique* rule should be good law in New Zealand (as the case was considering land in New Zealand, not foreign land): *Christie v Foster* [2019] NZCA 623, [2019] NZFLR 365 at [75]. Similar sentiments were expressed by te Kōti Pira | the Court of Appeal in *Schumacher v Summergrove Estates Ltd* [2014] NZCA 412, [2014] 3 NZLR 599.

⁴⁹ See the comments in Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [7.74]–[7.77], citing *Schumacher v Summergrove Estates Ltd* [2013] NZHC 1387 and *Burt v Yiannakis* [2015] NZHC 1174, [2015] NZFLR 739.

⁵⁰ Australian Law Reform Commission *Choice of Law* (ALRC 58, 1992) at [9.10].

SUMMARY OF PROPOSALS FOR REFORM

- The applicable law for determining succession issues should be the deceased's last habitual residence.
- Habitual residence should be the country with the closest and most stable connection to the deceased determined with reference to an overall assessment of the specific circumstances of the case and the underlying aim of engaging the most relevant law for that case. The court should consider a range of factors including the deceased's social, professional, and economic ties to the country and the importance of giving effect to the interests of the deceased, of people close to the deceased and of creditors.
- A rule of adaptation should be included in legislation.
- Two options are proposed for the scope of the choice of law rules:
 - Option One – the new Act would specify multilateral choice of law rules for issues relating to intestate succession, material and essential validity, revocation, relationship property claims, and claims in the nature of family provision and contribution.
 - Option Two - all matters of succession (including potentially the formal validity rules contained in section 22 of the Wills Act) would be governed by new choice of law rules contained in the new Act and the Wills Act.
- Partners should be entitled to agree that the law of a country other than Aotearoa New Zealand should apply to some or all of their property on death provided the agreement meets the validity requirements recommended in the PRA review and giving effect to the foreign law agreement would not be contrary to public policy. These agreements could extend to determining that the law of a country other than Aotearoa New Zealand should apply to any potential claims that the surviving partner might have against the deceased partner's estate.
- Family provision claims for children or contribution claims would not be able to be the subject of a foreign law agreement.
- A court should have broad powers to give effect to relationship property, family provision and contribution awards, and this should be expressed in statute. The court's powers would allow them to make orders in respect of property situated in Aotearoa New Zealand, taking account of the value of the overseas property or to order one party to transfer property or pay a sum of money to the other party (in personam orders).
- The courts should continue to have power to determine the application of renvoi in a particular case when relevant.
- The new Act should confirm that the *Moçambique* rule has no application in matters covered by that legislation.

QUESTIONS**Q85**

Do you agree with the issues we have identified?

Q86

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

Q87

What are your views on the proposals for reform?

Q88

Do you have any other suggestions for reform?

CHAPTER 18

Other reform issues

IN THIS CHAPTER, WE CONSIDER:

- the need for education about the law relating to succession;
- revocation of wills upon marriage or entering a civil union and revocation of certain dispositions under a will at the end of a marriage or civil union;
- the court’s power to declare wills valid when they do not comply with the requirements of the Wills Act 2007;
- the application of the law relating to succession to multi-partner relationships;
- the threshold for administering an estate without the need for a grant of probate or letters of administration; and
- claims against an estate and the availability of social security.

THE NEED FOR EDUCATION ABOUT THE LAW RELATING TO SUCCESSION

18.1 The low levels of awareness and understanding of the law relating to succession, both among the public and professional advisers, has been a key theme emerging from our research and preliminary engagement.

18.2 For example, some lawyers have told us that will-makers, their surviving partners and many lawyers do not have much knowledge of the Property (Relationships) Act 1976 (PRA) and how it applies on death. Just over half (57 per cent) of the respondents in the Succession Survey were “fully aware” family members can challenge a will if they think it does not properly provide for them.¹ Respondents without a will (particularly younger respondents without a will) had lower levels of awareness.² Similarly, we have been told that many people have little or no awareness of other matters such as:

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

¹ Ian Binnie and others *Entitlements to deceased people’s property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [154].

² Ian Binnie and others *Entitlements to deceased people’s property in New Zealand: Public attitudes and values – A general population survey* (Te Whare Wānanga o Ōtākou | University of Otago, research report to the Michael and Suzanne Borrin Foundation, Dunedin, April 2021) at [155].

- (b) the consequences of holding property in such a way that it does not fall into an estate, such as jointly owned assets or property settled on trust; and
- (c) how to make or resolve claims against estates.

Proposal for reform

- 18.3 While the new Act should improve the accessibility of the law by drawing together relevant provisions under one statutory regime, we consider further education for the public and professional advisers is needed.
- 18.4 In our preliminary view, the Government should consider ways to improve understanding of the law, or the new Act if enacted. In the PRA review, we made a similar recommendation and suggested several steps the Government could take:³
- (a) A one-off public education campaign, which could be timed to coincide with the implementation of the recommendations in the review, if accepted.
 - (b) Education in secondary school programmes and for professionals such as financial planners, business advisers and chartered accountants.
 - (c) The provision of information at different points of interaction with government departments, such as when applying for a marriage or civil union licence, when applying for state benefits and when applying for New Zealand residency.
 - (d) Introducing requirements on registered professionals or organisations such as real estate agents and banks to provide some form of prescribed information to clients when buying or selling property, applying for credit or opening joint bank accounts.
 - (e) Producing and providing information online, in Family Courts around Aotearoa New Zealand and to community organisations such as Citizen Advice Bureau and Community Law Centres.
- 18.5 Given the overlap between succession law and relationship property law, the Government could consider including education about the new Act and wider succession law when taking these steps.

SECTIONS 18 AND 19 OF THE WILLS ACT 2007

- 18.6 Section 18 of the Wills Act 2007 revokes a person's will in its entirety when they marry or enter a civil union. The rule does not apply if it is clear from the will or the surrounding circumstances that the will was made in contemplation of the marriage or civil union.
- 18.7 Section 19 of the Wills Act applies when the court grants a dissolution or separation order under the Family Proceedings Act 1980 in respect of a marriage or civil union. The section applies to certain provisions relating to the will-maker's former spouse or civil union partner in the will-maker's will, namely:
- (a) the appointment of the spouse or partner as executor or trustee of the will;

³ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R5 and [2.72].

- (b) the appointment of the spouse or partner as a trustee of property disposed of by the will to trustees on trust for beneficiaries who include the spouse or partner's children;
 - (c) a disposition to the spouse or partner, except for a power of appointment exercisable by the spouse or partner in favour of the spouse or partner's children; or
 - (d) the disposition for the payment of a debt secured on –
 - (i) property that belongs to the spouse or partner; or
 - (ii) property that devolved by survivorship on the spouse or partner.
- 18.8 Section 19(4) provides that a provision of this kind is void. The will must be read as if the former spouse or partner died immediately before the will-maker. The provision will remain, however, if the will makes it clear the will-maker intended the provision to be effective even if a court grants a separation or dissolution order.
- 18.9 While sections 18 and 19 are located within the Wills Act, we consider they warrant our consideration in this review. Both provisions govern a person's entitlement to a deceased's estate solely based on the nature of the relationship (or termination of relationship) with the deceased. Our consideration of relationship property law on the death of a partner would be incomplete without considering these provisions.

Issues

- 18.10 Section 18 presumes that a marriage or civil union is such a significant event in a person's life that any prior will they had must no longer reflect their testamentary intentions.⁴ It assumes that the intestacy rules more closely reflect how the will-maker would wish their estate to be distributed.
- 18.11 We doubt these presumptions are accurate in contemporary Aotearoa New Zealand. It is now common for most couples to have lived for some time in a committed de facto relationship before choosing to marry or enter a civil union.⁵ A marriage is therefore often seen as a formalisation of an existing relationship rather than a material change in commitment and obligation.⁶ Most individuals we heard from during our preliminary engagement agreed section 18 requires reform as it no longer represents how people live their lives and organise their relationships.
- 18.12 We are also mindful that section 18 does not apply to people who enter long-term de facto relationships. That may mean the law provides different outcomes for relationships

⁴ See Te Aka Matua o te Ture | Law Commission *Succession Law: Wills Reforms* (NZLC MP2, 1996) at [120]–[121], which informed the Wills Act 2007.

⁵ Te Aka Matua o te Ture | Law Commission *Relationships and Families in Contemporary New Zealand | He Hononga Tangata, he Hononga Whānau i Aotearoa o Nāiane* (NZLC SP22, 2017) at 17.

⁶ See for example the recent case *Newton v Newton* [2020] NZHC 3337. A couple had executed wills while in a committed de facto relationship. Six years later, the couple married, not realising the law revoked their previous wills. Nevertheless, the Court accepted that at the time the partners made their wills, they contemplated the relationship would endure and would have the status of marriage: at [4].

that are substantively similar, which risks being discriminatory on the grounds of marital status under human rights law.⁷

- 18.13 Section 19 presumes that the will-maker would have wished to cut ties with their former spouse or civil union partner when the relationship is formally dissolved. Our preliminary view is that this is a reasonable assumption to make. However, we consider there are two main issues with section 19. First, like section 18, section 19 does not apply to de facto relationships meaning the law may provide different outcomes for relationships that are substantively similar. Second, we anticipate that there will be many cases where people will have wished to cut ties with their former partner before they obtain a formal separation or dissolution order from the court. It may be some time after separation that former partners apply for formal orders.

Proposals for reform

- 18.14 Because we are not satisfied that a marriage or civil union represents a point in time when most will-makers would wish to change who should or should not benefit under their will, we propose section 18 of the Wills Act should be repealed.
- 18.15 We propose two amendments to section 19. First, section 19 should apply to the end of all relationship types, namely marriages, civil unions and de facto relationships. It should not be necessary for the de facto relationship to have lasted three years. A three-year qualifying period is generally used to determine eligibility to entitlements to relationship property and in an intestacy.⁸ The three-year period is a measure of commitment and acts against the retrospective imposition of property sharing obligations on unsuspecting partners.⁹ In this context, rather than determine eligibility, the focus is whether the will-maker would have wished to cut ties with their partner because of the separation. It would be odd if gifts to a former partner of a three-year relationship were rendered void but gifts to a former partner of a two-year relationship remained.
- 18.16 We note that the Wills Act defines de facto relationship by incorporating the definition of de facto relationship under section 29A of the Interpretation Act 1999, which refers to two people living together in the nature of marriage or civil union. The PRA's definition, which the Administration Act 1969 incorporates, differs as its central concept is two people who "live together as a couple". Our preliminary view is that a uniform definition of de facto relationship across these closely related statutes (including the new Act) is desirable and the Government should consider revising the definition of de facto relationship in the Wills Act.
- 18.17 The second amendment we propose is that section 19 apply two years after the point when the partners in any relationship type ceased to live together in a relationship. We consider this point in time is more likely to reflect most people's intentions as to when they would wish their will to no longer provide for their former partner, regardless of whether a formal separation order or dissolution has been obtained. It also aligns with our

⁷ Section 19(1) of the New Zealand Bill of Rights Act 1990 and s 21(1)(b) of the Human Rights Act 1993 together affirm the right to be free from discrimination on the grounds of marital status, including being married, in a civil union or in a de facto relationship.

⁸ See the discussion of qualifying relationships in Chapters 3 and 6.

⁹ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [6.9].

proposals in Chapters 3, 4 and 6 that former partners cease to be eligible under the new Act for relationship property entitlements, family provision awards and entitlements in an intestacy two years after separation.

- 18.18 In Chapter 8 we ask whether these proposals for the reform of sections 18 and 19 of the Wills Act are problematic for Māori customary marriages.

POWER TO VALIDATE WILLS

- 18.19 During our preliminary engagement, several people raised issues with the court's validation power under section 14 of the Wills Act. Section 14 applies to a document that appears to be a will but does not comply with the requirements for a valid will set out in section 11 of the Act. The court is empowered under section 14 to make an order declaring the document valid, if it is satisfied that the document expresses the deceased person's testamentary intentions.

- 18.20 The court may only validate a non-compliant will when there is a "document", which is defined under the Wills Act as "any material on which there is writing". This precludes the court validating any evidence of testamentary intention in which there is not writing, such as oral or video recordings. Many individuals we heard from thought this was unsatisfactory. For example, the situation could arise where the court could not give effect to a video recording of a deceased's explanation of their testamentary intentions, but had someone made written notes instead (arguably far less reliable than a video recording), the court could exercise its validation power.

- 18.21 Our preliminary view is to note this issue as a matter the Government may wish to consider further, without making specific recommendations for reform. Section 14 is essentially about will-making, specifically when a record of the deceased's testamentary intentions can be declared to be a will. The focus of this review is people's substantive rights to an estate, assuming a valid will either exists or does not exist. We comment further on the court's validation power in the context of *ōhākī* (the Māori practice of making oral wills) in Chapter 8.

MULTI-PARTNER RELATIONSHIPS

- 18.22 The PRA is based on the notion of "coupledom".¹⁰ Relationship property entitlements only arise in marriages, civil unions and de facto relationships that are intimate relationships between two people. Although the PRA contemplates relationship property entitlements arising in the context of contemporaneous relationships (see Chapter 3), relationship property law does not apply to intimate relationships involving three or more people.¹¹ Instead, people in multi-partner relationships must rely on the general remedies in property law or equity.

¹⁰ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [7.62], citing the discussion in Margaret Briggs "Outside the Square Relationships" (paper presented to Te Kāhui Ture o Aotearoa | New Zealand Law Society PRA Intensive, October 2016) at 135.

¹¹ *Paul v Mead* [2020] NZHC 666, (2020) 32 FRNZ 513.

- 18.23 In the PRA review, we discussed how the PRA does not apply to multi-partner relationships and concluded that the property sharing regime should not be extended to multi-partner relationships at this time.¹² We reasoned that extending the regime to multi-partner relationships would be a fundamental shift in policy and should be considered within a broader context involving more extensive consultation about how family law should recognise and provide for adult relationships that do not fit the mould of an intimate relationship between two people. Extending the property sharing regime to multi-partner relationships would also be a complex exercise. Careful consideration would need to be given to determining when and how multi-partner relationships should attract property consequences and what those property consequences should be.
- 18.24 Our preliminary view is to repeat the recommendations from the PRA review in the final report in this review. The new Act should be premised on an intimate relationship between two people. We observed in the PRA review that it is likely multi-partner relationships will become more prevalent in the future.¹³ The Government should consider undertaking research in this area to support any future law reform relating to multi-partner relationships.
- 18.25 Lastly, we note that partners to a multi-partner relationship can make wills and contracts through which they can arrange how property is to be distributed on a partner's death. As discussed above, public education may be useful.

DISTRIBUTING AN ESTATE WITHOUT PROBATE OR LETTERS OF ADMINISTRATION

- 18.26 During our preliminary engagement, we heard concerns that the monetary threshold for administering an estate without the need for a grant of probate or letters of administration is too low.
- 18.27 Section 65 of the Administration Act provides that certain entities, such as superannuation funds, banks, or the employer of the deceased, can pay money to certain relatives of the deceased, such as a surviving partner, without administration of the estate needing to be obtained. The amount of money must not exceed the prescribed amount, which is currently set at \$15,000.¹⁴
- 18.28 Trustee companies hold powers under the Trustee Companies Act 1967 to administer small estates without a grant of administration.¹⁵ Instead, the trustee companies file with te Kōti Matua | the High Court an election to administer the estate. The requirements for exercising this power are:¹⁶

¹² Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at R35 and [7.75]–[7.77].

¹³ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [7.66] and [7.77].

¹⁴ Administration (Prescribed Amounts) Regulations 2009, reg 4.

¹⁵ Trustee companies include Trustees Executors Ltd, AMP Perpetual Trustee Company NZ Ltd, PGG Trust Ltd, New Zealand Permanent Trustees Ltd, and The New Zealand Guardian Trust Company Ltd: Trustee Companies Act 1967, s 2 definition of “trustee company”.

¹⁶ Trustee Companies Act 1967, s 36(1).

- (a) the deceased died either testate or intestate leaving property situated in Aotearoa New Zealand;
 - (b) the gross value of the property does not exceed \$120,000 (or such higher amount prescribed by regulations);
 - (c) no person has obtained a grant of administration; and
 - (d) the trustee company would, in any case, be entitled to obtain a grant of administration.
- 18.29 Public Trust enjoys similar powers under the Public Trust Act 2001, again provided the gross value of the estate does not exceed \$120,000.¹⁷
- 18.30 In our preliminary engagement, several people stressed that it should be possible to deal with estates of greater value without the need to obtain probate or letters of administration. Because the issue concerns matters of probate and administration rather than substantive rights to an estate, our preliminary view is that we should note these concerns and suggest the Government considers the issue further.

THE FAMILY PROTECTION ACT 1955 AND SOCIAL SECURITY

- 18.31 Section 203 of the Social Security Act 2018 applies where a person has applied for or is in receipt of a benefit under the Act and they have a tenable claim under the Family Protection Act 1955 (FPA) but have failed to take reasonable steps to advance the claim. The Ministry of Social Development may refuse to grant the benefit, grant it at a reduced rate or cancel a benefit already granted.
- 18.32 The predecessor provision to section 203 was first enacted in section 18(3) of the Social Security Amendment Act 1950. Parliamentary debate during the enactment explained that the provision was aimed at addressing what were known as “social security wills”.¹⁸ Will-makers were making wills that left the substantial part of their estates to their adult children, leaving their surviving spouse very little so they qualified for social security benefits.¹⁹

Proposal for reform

- 18.33 In our preliminary view, section 203 should be repealed. We doubt the problems that existed in 1950 when the provision was first introduced cause the same issues today.²⁰ In recent times, the provision has rarely come before the courts, suggesting people are rarely declined social security entitlements for failing to pursue an FPA claim. Further, there may be good reasons why a person may decide not to make a claim against an estate. For example, they may wish to preserve family relationships and avoid dispute, or their relationship with the deceased may have been of a such a nature that they feel uncomfortable seeking support from the estate.

¹⁷ Public Trust Act 2001, s 93.

¹⁸ (25 October 1950) 292 NZPD 3726–3727.

¹⁹ (25 October 1950) 292 NZPD 3726–3727.

²⁰ A potential issue may concern eligibility for residential care home subsidies, but they are governed by the Residential Care and Disability Support Services Act 2018 rather than the Social Security Act 2018.

QUESTIONS**Q89**

Do you agree with the issues we have identified?

Q90

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

Q91

What are your views on the proposals for reform?

Q92

Do you have any other suggestions for reform?



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