

## 21st Annual New Zealand Law Foundation Ethel Benjamin Commemorative Address 2017

### Property Rights on Death: Policies in Conflict

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#### Introduction

On 4 May 1897 Mr Justice Williams admitted Ethel Benjamin as a barrister and solicitor of the Supreme Court of New Zealand, the first woman to be admitted to legal practice in New Zealand.<sup>1</sup> Much has changed in the intervening 120 years, particularly in regard to women's property rights.

My focus in this address is on property rights on death, both of women and of men. I have chosen this topic because succession law has been largely ignored as an area worthy of serious study and comprehensive legislative attention. Yet, we all die and what happens to our assets is generally of concern to us and to those we leave behind. Such legislative attention as succession law has received in the last 120 years has been piecemeal and based on conflicting policy objectives. An attempt by the New Zealand Law Commission in the 1990s to take a holistic approach to reform of succession law stumbled at the first hurdle. Its first Report, dealing with claims against estates, was never introduced into Parliament.<sup>2</sup> Now, in 2017, the New Zealand Law Commission is reviewing the Property (Relationships) Act 1976, part of which deals with relationship property rights on death. While this Act deals with only one aspect of property rights on death, reform of this area could remove at least some of the current inconsistencies and provide greater certainty for testators, their spouses or partners, and their families.

I begin by going back in history to the first 25 years of Ethel's life, because those were years of great social change and legislative reform in New Zealand. I will then briefly review the legislative and judicial developments during the 20th century, before turning to the more recent changes in the 21st century. I will conclude by proposing reforms to

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<sup>1</sup> Ethel was the second woman in the British Empire to be admitted to legal practice. The first woman in the British Empire was Clara Brett Martin, who was admitted in Canada on 2 February 1897, three months before Ethel Benjamin.

<sup>2</sup> Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997).

redress the conflicting policies and conceptual confusion that currently plague property rights on death.

### The 19th century

Ethel Benjamin was born on 19 January 1875, the eldest of ten children.<sup>3</sup> Her parents, Lizzy Marks and Henry Benjamin were both Jewish immigrants. They came to New Zealand in the late 1860s. They made their home in Dunedin, which by then had become a prosperous city, as a result of the gold rush. It was the commercial capital of New Zealand and placed a high value on culture and education.<sup>4</sup> Otago Boys High School and Otago Girls High School had been established in 1863 and 1871 respectively, and the University of New Zealand in 1869.

When Henry and Lizzy married in about 1873 the principle of matrimonial unity applied. On marriage, husband and wife became one person in the eyes of the law, represented by the husband.<sup>5</sup> A wife's legal existence was suspended for the duration of the marriage. She had no independent capacity to enter into legal relations. Instead, she lived under her husband's "coverture", or protection. He acquired ownership of all her personal property, including any money she brought into or acquired during the marriage, and he controlled and managed any interests in land she had, retaining any income derived from it.<sup>6</sup> His obligation to his wife was limited to providing for her necessaries.<sup>7</sup> On his death, his widow regained control of any land she owned, but she had no protection against disinheritance. The widow's dower,<sup>8</sup> that had constrained testamentary freedom in England until the early 19th century, had limited application by the time New Zealand was colonised

<sup>3</sup> Janet November *In the Footsteps of Ethel Benjamin* (Victoria University Press, Wellington, 2009) at ch 1.

<sup>4</sup> November, above n 3, at 3–9.

<sup>5</sup> William Blackstone *Commentaries on the Laws of England* vol 1 (London, 1809) at 441; Bettina Bradbury "From Civil Death to Separate Property: Changes in the Legal Rights of Married Women in Nineteenth-Century New Zealand" (1995) 29(1) *New Zealand Journal of History* 40; Robert Fisher (ed) *Fisher on Matrimonial and relationship Property* (looseleaf ed, LexisNexis) at 1.4; Margaret Briggs "Historical Analysis" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thompson Brookers, Wellington, 2004) at 1.2.

<sup>6</sup> Briggs, above n 5, at 1.2.

<sup>7</sup> Blackstone, above n 5, at 442.

<sup>8</sup> The right of dower entitled the widow to a life interest in one third of any freehold land that her husband had owned during the marriage. That interest attached to the land and survived any disposition to third parties. The adverse effect of dower on commercial exploitation of the land and the ability of the land owner to pass his land to his heirs led to its restriction to intestacy by the English Dower Act 1833 and its eventual abolition in Australia, England and New Zealand. See Briggs, above n 5.

in 1840 and became obsolete in 1874.<sup>9</sup>

These early colonial years were dark times for wives, widows, and dependent children in New Zealand. The migratory character of New Zealand's population led to a high rate of wife desertion.<sup>10</sup> Any income earned by a wife during her husband's absence would be taken by him on his return. Unless property had been settled on trust for her separate use, she was financially vulnerable, both during her marriage and after her husband's death. In 1869, John Stuart Mill published *The Subjection of Women* in England in which he characterised the legal position of married women as akin to slavery.<sup>11</sup>

During the 1870s there was mounting agitation about the vulnerable position of married and unmarried women, both in New Zealand and overseas. Some legislative steps were taken to allow wives to retain income they had earned during their husband's absence, but they had the embarrassing responsibility of proving that they had been deserted or mistreated.<sup>12</sup>

Robert Stout, a fiercely freethinking Scot, who had immigrated to Dunedin in 1864, was a strong proponent of equal rights for men and women.<sup>13</sup> He joined the law firm of Downie Stewart in 1867 as an articulated clerk and was called to the bar in 1871. The day after his admission he enrolled as Otago University's first student, where he relished learning

<sup>9</sup> EC Adams *Garrow's Law of Real Property* (5th ed, Butterworths, Wellington 1961) at 141. The laws of England that New Zealand received in 1840 included the Dower Act 1833, which allowed husbands to alienate their land during their life time and by will free from the widow's dower, thus depriving the right of much of its effect. To the extent that dower still affected land in New Zealand, the Real Estate Descent Act 1874 (NZ) rendered it obsolete and the Property Law Amendment Act 1905 (NZ), s 21 formally abolished it. For the Australian position see Rosalind Atherton "Expectation Without Right: Testamentary Freedom and the Position of Women in 19th Century NSW" (1988) 11(1) UNSWLJ 133.

<sup>10</sup> The number of deserted wives in New Zealand far exceeded the number in the "Mother-country": (21 June 1881) 38 NZPD 133 and (23 September 1884) 48 NZPD 491.

<sup>11</sup> JS Mill *The Subjection of Women* (London, 1869), referred to by Rosalind Atherton "New Zealand's Testator's Family Maintenance Act of 1900 – The Stouts, the Women's Movement and Political Compromise" (1990) 7(2) Otago LR 202 at 205.

<sup>12</sup> Married Women's Property Protection Act 1860, s 2 allowed a deserted wife to apply to the Resident Magistrate to retain any income she earned and property she acquired by succession after her husband's desertion, provided she could satisfy the Resident Magistrate that her husband had deserted her without reasonable cause. The Married Women's Property Protection Act 1870 extended the protection to other cases, such as where the husband was living in open adultery, habitually drunk, or cruel to his wife. See the comments of Stout when moving the second reading of the Married Women's Property Bill 1884: (5 September 1884) 48 NZPD 155.

<sup>13</sup> Waldo H Dunn and Ivor LM Richardson *Sir Robert Stout* (AH & AW Reed, Wellington, 1961) at 27 and 119–120.

about mental and moral philosophy and political economy.<sup>14</sup> When law teaching commenced in 1873, he was the first lecturer.<sup>15</sup> He cared passionately about education, and about equal education for men and women.<sup>16</sup> It was one of his platforms as a politician at the local and provincial level, and when he was elected to the House of Representatives in 1875 as the member for Caversham.

In 1884, when he was Premier of New Zealand, he moved the adoption of the Married Women's Property Act, to put an end to the unfairness of matrimonial unity and allow married women to retain their own property, just like married men did. Objecting strongly to comments that the Bill was socialist, Stout said:<sup>17</sup>

It is the opposite – it is individualistic. It is to defeat what Socialists wish. They do not wish individuals to have perfect freedom to deal with property of their own at all. That is the very thing Socialists object to. I am an Individualist of what may be termed an extreme type. I have no sympathy with any kind or phase of Socialism. What I wish to see is Individualism encouraged; believing, as I do, that the world can never progress if Individualism be interfered with. This is the opposite of Socialism; it is Individualism. It tends to do what? It tends to give equal rights to both sexes; and a state of society based on any other doctrine than equal rights will never last long without doing evil to both parties.

Stout did not share the concerns of some of his fellow MPs that the Bill would cause a social revolution.<sup>18</sup> But it was a radical change. It liberated married women from legal disabilities and gave them control of their property. The Act was subsequently hailed as an even greater triumph for women than getting the vote!<sup>19</sup>

That liberty was of little value to women who lacked property of their own or the means to acquire it. Ethel's mother Lizzy, for example, spent most of her married life "bearing and caring for children". She died in 1896 at the age of 47, when her youngest child was only two years old and Ethel was 21, in the final year of her LLB degree.<sup>20</sup>

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<sup>14</sup> Dunn and Richardson, above n 13, at 27.

<sup>15</sup> Dunn and Richardson, above n 13, at 27–28.

<sup>16</sup> Stout was a member of Senate of the University of New Zealand for 45 years, from 1885–1930, and a member of Council of the University of Otago from 1891–1898: David Hamer "Stout, Robert" in *Dictionary of New Zealand Biography*, vol 2 (Te Ara – The Encyclopedia of New Zealand, 1993).  
<sup>17</sup> (9 September 1884) 48 NZPD 202.

<sup>18</sup> Ibid. See also the divergent views expressed in the newspapers at the time. Most saw the change as beneficial and even overdue: *The New Zealand Times* (3 December 1884); *The Press* (11 October 1884), *Evening Star* (17 September 1884), *Wanganui Herald* (11 September 1884), and *The Colonist* (Nelson, 20 October 1884), while the *Timaru Herald* (12 September 1884) and the *Taranaki Herald* (24 September 1884) saw it as going too far and unnecessary.

<sup>19</sup> Mary Ann Muller's comment to Kate Sheppard, quoted by Bradbury, above n 5, at 66.

<sup>20</sup> November, above n 3, at 52.

Ethel's father, Henry, had been successful in business as a financial agent and had built up considerable land holdings during his marriage, all of which he owned personally or through his company, Henry Benjamin & Co. If he had been the one to die in 1896, rather than his wife, her marriage would not have given her a legal entitlement to any of his property, not even the family home. The separate property system introduced by the Married Women's Property Act 1884 had the effect of treating husband and wife as strangers in relation to property, with independent rights of disposition and testation.<sup>21</sup>

Testamentary freedom was absolute at this time. So, Henry could have made a will leaving all his property away from his wife and children. Testamentary freedom was regarded "as one of the most valuable of the rights incidental to property" and was "founded on the assumption that a rational will [was] a better disposition than any that can be made by the law itself."<sup>22</sup> It allowed the testator to reward "dutiful and meritorious conduct" and it was therefore a "useful auxiliary" to "parental authority".<sup>23</sup> However, "a moral responsibility of no ordinary importance" was said to attach to the exercise of this freedom.<sup>24</sup> Testators were expected to provide for those nearest in kindred to them and for those who in life had been the objects of their affection.<sup>25</sup> Yet, that moral responsibility was clearly not always observed. Wives and children were disinherited and left destitute. If their family did not come to the rescue, they had to appeal to charity, such as the Otago Benevolent Society, or the state for support.<sup>26</sup>

That was the reality that Ethel encountered when she commenced legal practice in Dunedin in 1897. Acting for deserted wives to compel their husbands to pay maintenance became an important part of Ethel's legal practice.<sup>27</sup> She also worked as a volunteer for the Society for the Protection of Women and Children as one of its honorary solicitors.<sup>28</sup>

<sup>21</sup> JR Hanan "The Future of Family Law" in BD Inglis and AG Mercer (eds) *Family Law Centenary Essays* (Sweet & Maxwell, Wellington 1967) at 12. The ordinary rules of common law and equity applied to questions of ownership. Unless the non-owning spouse made financial contributions to the acquisition of the property, as the wife did in *Hendry v Hendry* [1960] NZLR 48 (SC), thus giving rise to a resulting trust, the non-owning spouse had no entitlement to any of the beneficial interest in the property and could be ordered to relinquish or vacate the property, as the wives were in *Hill v Hill* [1916] WN 59 (Ch); *Kain v Kain* [1943] NZLR 342 (CA); and *Masters v Masters* [1954] NZLR 82 (SC).

<sup>22</sup> *Banks v Goodfellow* (1869-70) LR 5 QB 549 at 564 and 565.

<sup>23</sup> *Ibid*, at 564.

<sup>24</sup> *Ibid*, at 563.

<sup>25</sup> *Ibid*, at 563.

<sup>26</sup> The Destitute Persons Act 1894 empowered the court to order relatives of destitute persons to provide financial support to avoid dependence on the State.

<sup>27</sup> November, above n 3, at 12-14.

<sup>28</sup> November, above n 3, at ch 5.

Concern about testamentary abuse was gaining momentum by this time. Having won the suffrage in September 1893, the Women's Movement turned its attention to limiting testamentary freedom. Rosalind Atherton (now Rosalind Croucher), an Australian legal historian, found that the Women's Movement was responsible for a dramatic shift in the characterisation of testamentary freedom in New Zealand in the 1890s. Testamentary freedom was no longer seen as a power to provide, but as a power to disinherit.<sup>29</sup> As men owned most of the wealth, testamentary freedom was harming women, rather than benefiting men.<sup>30</sup> There was also at this time a change in liberal ideas, away from pure individualism towards a more humanist and interventionist State.<sup>31</sup> Even Sir Robert Stout, once a staunch liberalist, adjusted his views as he became aware of the vulnerability of women in the home and in the work place.

It was Sir Robert Stout who made limiting testamentary freedom an election issue in October 1893, only a month after women had been given the vote.<sup>32</sup> He was strongly encouraged in his quest by his wife, Lady Anna Paterson Stout.

Anna Paterson Logan was born in Dunedin in 1858, the daughter of Scottish immigrants, who had "a keen sense of social and personal duty".<sup>33</sup> Like Stout, her parents believed in individualism and the development of individual human potential. Stout was a regular visitor to the Logan household and married Anna in 1876, when she was 18 years old. Like her family and her husband, Anna believed in women having equal rights with men and the freedom to develop their intellectual ability to its fullest potential. But having six children and travelling between Dunedin and Wellington in support of her husband limited her ability to give public voice to her beliefs. That changed in the 1890s, when she joined the suffragists and became one of the "New Women".<sup>34</sup>

In 1896, as Vice-President of the newly formed National Council of Women of New Zealand, Lady Anna moved a motion at the Council's first meeting that "every man owning property, and having a wife, or wife and children, should be compelled to make provision for them out

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<sup>29</sup> Atherton, above n 11, at 204.

<sup>30</sup> Atherton, above n 11, at 202.

<sup>31</sup> Atherton, above n 11, at 204.

<sup>32</sup> He was returned to the House of Representatives in the 1893 election as a member for City of Wellington, even though he still lived and practiced in Dunedin. Stout moved his family to Wellington in 1895 where he started a new firm, Stout, Findlay and Company: Hamer, above n 16.

<sup>33</sup> Raewyn Dalziel "Stout, Anna Paterson" in *The Suffragists: Essays from the Dictionary of New Zealand Bibliography* (Bridget Williams Books, Wellington, 1993) at 137.

<sup>34</sup> Dalziel, above n 33, at 139; Anna P Stout "The New Woman" Citizen (vol 1, December 1895) at 153–159, reprinted in *Women and the Vote* (Hocken Library, University of Otago, Dunedin, 1986) at 16–20.

of his property".<sup>35</sup> Her proposal was to limit a husband's testamentary power by allocating one third to his widow and a further third to his children. The idea of fixed shares for family members had its roots in the Scottish system and derived from Roman Law.<sup>36</sup>

Later that year, Sir Robert Stout introduced a Bill along those lines. The Limitation of the Power of Disposition by Will Bill 1896 restricted testamentary freedom to one third of the estate if the testator left a widow and children or one half if he left a widow or children. The remaining part was freely disposable. Sympathetic as many of his fellow MPs were with the principle that testators should not disinherit their wives and dependent children, they did not support such a radical limit on testamentary freedom.<sup>37</sup> It might encourage a libertine son "to lie about and loaf until his father died, knowing that he was sure to get a third of his father's property" and leaving a widow a third of the estate "to do with it as she chose was a change in the law that many would not approve of."<sup>38</sup> Stout's second Bill in 1897 increased the free portion to half the estate, but it suffered the same fate.<sup>39</sup> The principle of fixed shares did not take account of life time arrangements, such as gifts to a child or provision for a separated spouse, and it risked rewarding the undeserving.<sup>40</sup> A widow might remarry and use her inheritance to support her new husband and his family.<sup>41</sup>

Following Stout's retirement from politics in 1898,<sup>42</sup> Robert McNab, a lawyer and farmer from Southland, took up the baton of limiting testamentary freedom. He took a radically different approach. Rather than restricting testamentary power to a portion of the estate, his Bill gave the courts discretion to override a will by ordering provision from the estate if the testator had failed to make "due provision for the maintenance and support for his or her wife, husband, or children".<sup>43</sup> This discretionary model was praised as a significant improvement on

<sup>35</sup> "Constitution of the National Council of Women of New Zealand and Minutes of the First Meeting held in the Provincial Council Chambers, Christchurch, April 1896" (Christchurch, 1896) at 11, quoted by Atherton, above n 11, at 208.

<sup>36</sup> (2 July 1896) 92 NZPD 585 (Sir R Stout introducing the Bill).

<sup>37</sup> (2 July 1896) 92 NZPD 586–7.

<sup>38</sup> (2 July 1896) 92 NZPD 586 (T Mackenzie).

<sup>39</sup> If the deceased left a spouse and children, they would take one quarter each: (13 October 1897) 98 NZPD 546. See also the comments on these Bills in the debates on the Testator's Family Maintenance Bill: (12 July 1900) 111 NZPD 508 and (12 September 1900) 113 NZPD 618.

<sup>40</sup> (13 October 1897) 98 NZPD 546 (Seddon); 547 (Montgomery); 548 (Hutcheson); 549 (McLean).

<sup>41</sup> (13 October 1897) 98 NZPD 547 (Russell).

<sup>42</sup> Citing financial pressures and family responsibilities: Dunn and Richardson, above n 13 at 127.

<sup>43</sup> Testator's Family Provision out of Estate Bill 1898, cl 2. There was legislative precedent for a discretionary model of constraint on testamentary freedom of Māori in the Native Land Court Act 1894, although it served a different purpose: Atherton, above n 11 at 214.

Stout's mandatory shares.<sup>44</sup> The debate then focused on the meaning of "due provision". At what point would the Court be permitted to intervene and change the testamentary provision?

McNab and others who had supported Stout's Bills favoured a liberal approach to the assessment of maintenance and support, taking account of the applicant's station in life.<sup>45</sup> But the majority thought it should be confined to necessities of life, an extension of the Destitute Persons Act 1894, to avoid the burden of maintenance falling on the State.<sup>46</sup> Realising that the liberal approach would not gain majority support, McNab introduced his final Bill in narrow terms, linking it to the Destitute Persons Act:<sup>47</sup>

All that was asked for in this Bill was that similar powers be given in the event of a person dying ... [This Bill] says: 'Before you dispose of your property, first carry out your obligations; first see that you do not leave any person destitute; first see that any person who is at present dependant on you for his or her support and maintenance is not left on the State for support.

At the Committee stage the wording of the provision was subtly changed from "due provision for the maintenance and support" to a failure to make "adequate provision for the proper maintenance and support" of an eligible claimant.<sup>48</sup> The insertion of the word "proper" paved the way for a liberal approach to the jurisdiction, going well beyond relief from destitution. But that may not have been fully appreciated when the Testator's Family Maintenance Act passed its final reading in 1900. It seems that the Act meant different things to different people. Whatever its meaning, it was hailed as one of many achievements of women's suffrage.<sup>49</sup> And it became one of New Zealand's first social exports. The Australian and Canadian jurisdictions soon followed New Zealand's

<sup>44</sup> (10 August 1898) 102 NZPD 419 (Seddon); 423 (Kelly); 424 (Hutcheson); 427 (Meredith).

<sup>45</sup> McNab's support for the Stout Bills is evident when he is finally compelled to suggest a compromise: (12 July 1900) 111 NZPD 504. See also Hogg and Sligo, (10 August 1898) 102 NZPD at 423 and 426 respectively; Hanan (12 July 1900) 111 NZPD 504–505 and the Legislative Council (12 September 1900) 111 NZPD 613–619.

<sup>46</sup> Hutcheson and Stewart, (10 August 1898) 102 NZPD 424 and 425; Meredith makes the link to the Destitute Persons Act at 427 and McLean in the Legislative Council in (12 September 1900) 113 NZPD at 615.

<sup>47</sup> (12 July 1900) 111 NZPD 503–504.

<sup>48</sup> (15 August 1900) 111 NZPD 648.

<sup>49</sup> Lady Anna Stout "Woman Suffrage in New Zealand" *The Woman's Press* (1911) at 2.



lead, and England did so in 1938.<sup>50</sup> Given Ethel's concern for deserted wives and children, she would have welcomed the Act, though it seems she never took a case under the Act.

### The 20th Century

The 20th century began with more or less consistent policies on family property rights. The separate property system of the Married Women's Property Act 1884 meant that spouses had no entitlement to share in each other's property, either on divorce or on death. Men were free to dispose of their property during their life time and on death, but they were expected to provide for their wives and dependent children, though on death there was uncertainty as to the extent of a testator's support obligations. Was it limited to providing necessities of life, as it was during his life time, or did it go beyond that?

#### *The meaning of "adequate provision"*

The judges were divided on the meaning of "adequate provision". Two judges set the tone for the early application of the Testator's Family Maintenance Act 1900: Justice Worley Edwards and Sir Robert Stout, who had been appointed Chief Justice in 1899.

Justice Edwards represented the conservative view, a reflection perhaps of the harsh and straitened family circumstances in which he grew up on a remote farm on the Otago Peninsula.<sup>51</sup> He was a controversial judge, with a reputation for arrogance, ill-temper, and a strong dislike of some counsel appearing before him.<sup>52</sup> He thought the Testator's Family Maintenance Act should be treated as primarily for the benefit of those who would have had a claim against the testator if he were living: the widow and dependent or destitute children.<sup>53</sup> A widow had the first claim on her late husband's estate. She did not have to be destitute, but her husband's duty was merely to provide her with adequate maintenance during her lifetime. "It did not extend to providing her with a fund which she could give to others at her death."<sup>54</sup> Awards should therefore be limited to periodic payments and not go beyond the testator's life time

<sup>50</sup> Rosalind Croucher "A Lament for 'Testator's Family Maintenance' – A Good Idea Gone Wrong? Australian Reflections" *Modern Family Finances – Legal Perspectives* (Intersentia, Cambridge, 2017) at ch 6 (forthcoming). See also the comments by the Hon Marshall in the debates preceding the adoption of the Family Protection Act 1955: (25 October 1955) 307 NZPD 3292.

<sup>51</sup> Bernard Brown "Edwards, Worley Bassett" in *Dictionary of New Zealand Biography*, vol 3 (Te Ara – the Encyclopedia of New Zealand, 1996).

<sup>52</sup> DF Dugdale *Lawful Occasions – Notes on the History of the Auckland District Law Society 1879-1979* (Auckland District Law Society, Auckland, 1979) at 26.

<sup>53</sup> *In re Rush* (1901) 20 NZLR 249 at 253.

<sup>54</sup> *Ibid*, at 254. See also *Laird v Laird* (1903) 5 GLR 466, where Edwards J makes the same point.

duty of providing his widow with necessaries.<sup>55</sup> So, in 1901 in the first case to be decided under the Act, Edwards J replaced the widow's £200 legacy out of an estate of £1500 with an annuity of £1 per week, which was the maximum amount that could be awarded under the Destitute Persons Act 1894.<sup>56</sup> Her legacy was to be applied towards providing the annuity. In subsequent cases Edwards J softened his stance on quantum for widows, depending on the size of the state and competing claims, but he remained resolute in his view that the Act did not authorise the court to make lump sum awards to widows.<sup>57</sup>

In regard to adult children, Edwards J acknowledged that they were eligible to make a claim under the Act, but as their father had no legal duty to support them, unless they were destitute, Edwards J thought it would require a very strong case to justify an order in their favour.<sup>58</sup>

Unsurprisingly perhaps, Stout CJ had a more liberal view of the jurisdiction. In regard to widows, he thought "adequate" provision should be read in relation to the value of the estate and the position the wife had held immediately before her husband's death.<sup>59</sup> He did not see the Destitute Persons Act as either a measure or a reference point. His awards were intended to allow the widow to live out her life in the style she had enjoyed while married, which could either be achieved by means of a capital award or periodic payments.<sup>60</sup> He did not share Edwards J's concern that a capital award could be used to support others after the widow's death.

Similarly, he did not regard destitution as a pre-requisite for intervening in favour of adult children. He took a dim view of testators who left their estates to charity or remote family members rather than their

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<sup>55</sup> Denniston J was similarly conservative in his approach to widows' claims: *In re the Will of James Rees* (1902) 5 GLR 145; *In the Matter of the Will of James Tobin* (1903) 6 GLR 86. See also Williams J in *In re Russell, Russell v Dunn* (1907) 9 GLR 509 where his Honour held that the deceased's 70 year old widow, who was an invalid and incapable of earning an income, was entitled to no more than necessary to avoid her being a burden on her children.

<sup>56</sup> *In re Rush*, above n 53, at 253–4.

<sup>57</sup> *Plimmer v Plimmer* (1906) 9 GLR 10 at 20–21.

<sup>58</sup> *In re Rush*, above n 53, at 254.

<sup>59</sup> *In re Phillips* (1902) 4 GLR 192.

<sup>60</sup> *Ibid*, where Stout CJ increased the widow's annuity of £100 by £30 out of an estate of £4,500. In *Plimmer v Plimmer*, above n 57, Stout CJ and Cooper J, sitting at first instance, made a capital award of £1000 to the separated widow to supplement the £150 allowance her husband had provided for her since their separation 30 years earlier and had continued under his will. On appeal, Edwards, Denniston and Chapman JJ, who sat with Stout CJ and Cooper J as the Court of Appeal, overruled the lump sum award, believing that the Act was limited to providing maintenance for the lifetime of the widow and hence the court's jurisdiction was limited to periodic sums. They increased the allowance by £100, given her age and the increased cost of living since the allowance was set.

own children, but he accepted that he was constrained to providing maintenance, and could not do what he thought was fair.<sup>61</sup>

In 1906, after the Court of Appeal had overruled a decision of Stout CJ awarding a widow a capital sum and replaced it with periodic payments, the Legislature amended the Act to allow awards of lump sums.<sup>62</sup> That amendment persuaded Edwards J in 1909 to formulate a test for intervention which referred to the testator's moral duty, rather than his legal duty, and thus allowed for the more liberal approach advocated by Stout CJ.<sup>63</sup>

It is the duty of the Court, so far as possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not loving, husband or father owes towards his wife or towards his children, as the case may be.

The Act was renamed the Family Protection Act in 1908,<sup>64</sup> and has since been amended to extend its application to intestacies<sup>65</sup> and a wider range of applicants.<sup>66</sup> The moral duty test formulated in 1909 is still used today, but its application has become very much more liberal over time.<sup>67</sup>

Until the 1960s the courts continued to treat the jurisdiction as a maintenance provision, albeit viewed broadly. Applicants had to show some financial need, relative to their position in life, their age and health, and their likely future needs, moderated by their conduct, the size of the

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<sup>61</sup> *Munt v Findlay* (1905) 8 GLR 197, where he regretted not being able to make provision for two of the deceased's three sons who made a claim because they had provision for their maintenance. He did make an award in favour of the third son who was an invalid and was in poor financial circumstances. The deceased had left all of his estate to his nephews and nieces. *In re Cameron* (1905) 8 GLR 428.

<sup>62</sup> Testator's Family Maintenance Act 1906, s 3(3).

<sup>63</sup> *Allardice v Allardice* (1909) 29 NZLR 959 at 972–973.

<sup>64</sup> The Family Protection Act 1908 is a consolidation of the Protection of Family Homes Act 1895 and the Testator's Family Maintenance Act 1906.

<sup>65</sup> Statutes Amendment Act 1939, s 22.

<sup>66</sup> The classes of eligible claimants were extended to include illegitimate children (Statutes Amendment Act 1936, s 26); parents (Statutes Amendment Act 1943, s 14); grandchildren, adopted children and adopted grandchildren (Statutes Amendment Act 1947, s 15); stepchildren (Family Protection Act 1955, s 3(1)(d)); surviving de facto partners (Family Protection Amendment Act 2001, s 5), and civil union partners (Relationships (Statutory References) Act 2005, s 7).

<sup>67</sup> The Australian jurisdictions subsequently followed New Zealand's lead and relied on the moral duty test in *Allardice*, above n 63. See further, Nicola Peart and Prue Vines "Family Provision in New Zealand and Australia" in Kenneth G C Reid, Marius J de Waal and Reinhard Zimmermann (eds) *Comparative Succession Law: Volume III* (forthcoming) at ch 15.

estate and the strength of competing moral claims.<sup>68</sup>

In an estate large enough to do justice to all moral claims,<sup>69</sup> adequate provision for a widow's proper maintenance and support meant providing her with sufficient means "to live with comfort and without pecuniary anxiety in such state of life as she was accustomed to in her husband's lifetime, or would have been so accustomed to if her husband had then done his duty to her".<sup>70</sup> But awards to widows still took the form of periodic payments for the duration of their widowhood.<sup>71</sup> As the Court of Appeal explained in *In re Crewe* in 1956:<sup>72</sup>

No doubt in these days there are husbands who may consider that they do owe a duty to make some provision for their widows irrespective of their remarriage, but, from the earliest times, the law has recognized that a husband has such an interest in his wife's widowhood as to make it lawful for him to restrain her from making a second marriage by making a condition that on such remarriage any provision he may have made for her shall cease....

That view persisted until the 1970s, when it was finally abandoned, as a reflection of a general change towards women and society's expectation that more should be done for widows.<sup>73</sup> Widows have since received capital awards and annuities are no longer limited to their widowhood.<sup>74</sup>

The reasons for limiting widows to periodic payments for their widowhood did not apply to children. It was natural for a parent's estate to pass to the next generation, and hence the courts felt no constraint in making capital awards to children of the deceased, if they could establish some form of financial need relative to the size of the estate and competing moral claims.

<sup>68</sup> *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 at 476; *In re Crewe* [1956] NZLR 315 (CA) at 323. Separated spouses remained eligible and, if the deceased had been providing for her during his lifetime and she was not guilty of disentitling conduct, an award could be made in her favour, as the Court did in *In re Crewe*.

<sup>69</sup> In *In re Allen*, *Allen v Manchester* [1922] NZLR 218 at 222 the Court distinguished between two classes of case. In the first class of case the claimant is complaining about an unjust distribution of an estate that is too small to provide adequately for all moral claims, in which case the Court's task is to distribute the insufficient fund among the various dependants according to their relative needs and deserts. In the second class of case the applicant is complaining that the testator has failed to make adequate provision out of the abundance of his resources sufficient provision for the applicant's proper maintenance of the claimant. In that case the Court has the more difficult task of determining the absolute scope and limit of the moral duty of a wealthy husband or father to make testamentary provision for the maintenance of his widow and children.

<sup>70</sup> *Allen v Manchester*, above n 69, at 222, citing earlier case law.

<sup>71</sup> *Winder v Public Trustee* [1931] GLR 459; *In re Williamson*, *Glentworth v Williamson* [1954] NZLR 288 (CA).

<sup>72</sup> *In re Crewe*, above n 68, at 327.

<sup>73</sup> *Re Wilson* [1973] 2 NZLR 359 (CA).

<sup>74</sup> *Re Wilson*, above n 73; *Re Z* [1979] 2 NZLR 495 (CA).

Widowers were treated much less favourably than widows during most of the 20th century. Although the Act had always been expressed in gender neutral terms, the courts openly acknowledged that they exercised their jurisdiction more sparingly in relation to widowers than to widows. There was a reluctance to accept that a widower could be dependent on his wife.<sup>75</sup> But if an order was justified, the courts saw no reason to restrict the award to periodic payments for the husband's widowhood, because:<sup>76</sup>

[a] husband may well expect that, if his wife remarries, she will be supported by her second husband while a wife should contemplate that, if her husband remarries, he will have to support his second wife.

### *Marriage as a partnership*

This gendered view of spousal roles and their economic value came under increasing pressure from the 1960s onwards. Marriage began to be characterised as a partnership to which both spouses contributed, albeit in different ways. There was a growing appreciation of the economic value of domestic work. As Lord Simon of Glaisdale, the last President of the old Probate, Divorce and Admiralty Division, otherwise known as the Division of Wills, Wives and Wrecks, so aptly put it in an address to the Holdsworth Club at the University of Birmingham in 1964:<sup>77</sup>

The cock bird can feather his nest precisely because he is not required to spend most of his time sitting in it.

Parliament stepped in by passing the Matrimonial Property Act 1963, giving the courts the power to adjust legal title as between spouses based on their direct and indirect contributions to the property in question.<sup>78</sup> This power could be invoked by either spouse on divorce as well as on death.<sup>79</sup> After death, surviving spouses usually applied for an order to improve their asset position and reduce the estate available to beneficiaries under the will or claimants under the Family Protection Act.<sup>80</sup> The personal representative of the estate generally applied against the surviving spouse to recover assets for the estate to provide for beneficiaries under the will or claimants against the estate.<sup>81</sup>

<sup>75</sup> *Re Williams* [1953] NZLR 151 at 153.

<sup>76</sup> *Bailey v Public Trustee* [1960] NZLR 741 (CA), at 745.

<sup>77</sup> Lord Simon of Glaisdale "With All My Wordly Goods ..." (Address to the Holdsworth Club, University of Birmingham, 20 March 1964) at 32. Matrimonial Property Act 1963, s 5.

<sup>78</sup> Matrimonial Property Act 1963, s 5A.

<sup>79</sup> *Robinson v Public Trustee* [1966] NZLR 748. Prior to the abolition of estate duty in 1993, applications were also made to reduce the estate's liability for estate duty: *Mora v Mora* (1988) 4 NZFLR 609 (CA).

<sup>80</sup> *Morris v Miles* [1967] NZLR 650 (SC); *Poppe v Gross* [1982] 1 NZLR 491 (CA); *Re Welch* [1989] 2 NZLR 1 (HC).

The Act explicitly stated that monetary as well as non-monetary contributions were relevant.<sup>82</sup> But in practice financial contributions carried more weight than domestic contributions, particularly in regard to non-domestic assets. The courts struggled to appreciate that a wife's work in the home freed her husband to accumulate the family assets.<sup>83</sup> As a result, wives and widows seldom received an equal share of the assets to which they had contributed, not even after a long marriage.<sup>84</sup>

There was considerable confusion as to how the Act should operate on death. The Act was primarily designed to apply on separation and divorce.<sup>85</sup> It did not address the relationship between matrimonial property orders and inheritance rights. There was no power under the Matrimonial Property Act to vary the provision that the surviving spouse was entitled to under the will or the intestacy rules. The only way to adjust any perceived unfairness was to reduce or decline an award under the Matrimonial Property Act if the surviving spouse's inheritance rights were commensurate with or greater than a matrimonial property award the court might make.<sup>86</sup>

It was also unclear whether matrimonial property claims should take precedence over family protection claims. Some judges thought that prioritising the matrimonial property claim eroded the principles of the Family Protection Act.<sup>87</sup> Others saw the two statutes as serving very different purposes, with the Matrimonial Property Act awarding the

<sup>82</sup> Matrimonial Property Act 1963, s 6(1A), inserted in 1968 for clarification by the Matrimonial Property Amendment Act 1968, s 6(1).

<sup>83</sup> The typical amount allocated to a former wife was one per cent of the husband's property for each year of marriage: Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 2–3. See also, Mark Henaghan and Nicola Peart "Relationship Property Appeals in the New Zealand Court of Appeal 1958–2008: The Elusiveness of Equality" in Rick Bigwood (ed) *The Permanent New Zealand Court of Appeal* (Hart Publishing, Oxford, 2009) at 99–149.

<sup>84</sup> Even in the late 1980s widows struggled to achieve equality. In *Mora v Mora* (1988) 4 NZFLR 609 (CA) the widow received only 40% of the couple's assets, despite having worked exceptionally hard on the farm on top of her work in the home and the care of their seven children.

<sup>85</sup> *Re Snow* [1975] Current Law (NZ) 1192; *Re McNaughton (deceased)* [1976] 2 NZLR 538 (SC).

<sup>86</sup> In *West v West* (1985) 2 FRNZ 1, Holland J held that the testamentary provision made for the widow would have to be taken into account in any order he made under the Matrimonial Property Act 1963. In *Re Mora* HC Christchurch, M 160/84, 11 July 1985, the same judge declined to make an order under the Act, because the widow would receive more under the intestacy rules than the award he would make under the Matrimonial Property Act. That decision was overruled on appeal, where the Court of Appeal allowed Mrs Mora to retain her intestate provision in addition to awarding her 40% of her husband's estate: above n 84.

<sup>87</sup> In *Re McNaughton (deceased)* [1976] 2 NZLR 538 (SC) the Court declined the widow's matrimonial property claim, awarding her further provision under the Family Protection Act, because it would be wrong to erode the principles of the Family Protection Act.

spouse what was truly his or her property and the Family Protection Act enforcing the deceased's moral duty to make provision for his or her spouse from what was truly the deceased's property.<sup>88</sup> Hence the matrimonial property claim had to be dealt with first and any award made under that Act would then be taken into account in the spouse's family protection claim.<sup>89</sup>

Central to these problems was the uncertain status of the matrimonial property award. It was not a property entitlement, because the award was at the discretion of the Court. The claimant had nothing until the Court exercised its discretion in the claimant's favour and determined quantum.<sup>90</sup> On the other hand, once the award was made, it reduced the estate both for purposes of estate duty,<sup>91</sup> and for purposes of distribution under the will or intestacy rules.<sup>92</sup> Nonetheless, the discretionary nature of the award prevented it from becoming property of the applicant until the order was made.<sup>93</sup>

In 1972 a Special Committee of representatives from the New Zealand Law Society and the Department of Justice recommended the adoption of a code to regulate property relations between spouses, based on the concept of marriage as a partnership to which both spouses contributed equally if differently.<sup>94</sup> Three years later, the Select Committee on Women's Rights, appointed to examine the role of women in New Zealand society, recommended that the concept of partnership in marriage be advanced by a law that presumed that "the husband's and wife's respective contributions to the marriage assets [were] of equal value, thereby entitling each to an equal share in these assets".<sup>95</sup> That recommendation was adopted in 1976 when a new Matrimonial Property Act was adopted. Unlike orders under the 1963 Act, orders under the 1976 Act were declaratory of a pre-existing property interest.<sup>96</sup> As the

<sup>88</sup> *Re Barna* (1985) 1 FRNZ 521 (HC) at 523. See also *Re Anderson* Court of Appeal CA116/94, 10 November 1995.

<sup>89</sup> *Re Baigent (dec'd)* (1988) 4 FRNZ 170 (HC).

<sup>90</sup> *Byfield v Public Trustee* [1976] 2 NZLR 442 (SC).

<sup>91</sup> Estate and Gifts Duties Act 1968, s 31A; *Thompson and Preest v CIR* (1982) 5 MPC 157 (CA).

<sup>92</sup> *Re Snow* [1975] Current Law (NZ) 1192, cited in *Re McNaughton* (deceased) [1976] 2 NZLR 538; *Thompson and Preest v CIR* (1982) 5 MPC 157 (CA).

<sup>93</sup> H Sargisson "Matrimonial Property Legislation – Its History, and a Critique of the Present New Zealand Law" (1976) 3(1) Auckland U L Rev 82 at 96–97; *West v West* (1985) 2 FRNZ 1 at 5, disapproving of dicta in *Richards v Brown* unreported, New Plymouth Registry, M35/77, 18 October 1978, suggesting that the Matrimonial Property Act 1963 gave the applicant spouse a legal interest in the assets of the respondent spouse.

<sup>94</sup> BJ Cameron *Matrimonial Property: Report of a Special Committee* (Ministry of Justice, June 1972) at [19].

<sup>95</sup> Women's Rights Committee *The Role of Women in New Zealand Society* (June 1975) at 75.

<sup>96</sup> Working Group on Matrimonial Property and Family Protection and Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, October 1988) at 40.

Minister of Justice, the Hon Dr AM Finlay, said when he introduced the Matrimonial Property Bill in 1975:<sup>97</sup>

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

But the 1976 Act applied only during the joint lifetime of the spouses.<sup>98</sup> The Matrimonial Property Act 1963 continued to apply to marriages ending on death, with all the disadvantages of a discretionary system and the burden of proving contributions to property. Equal division remained the exception rather than the rule, even in long marriages where both spouses had contributed fully to the partnership.<sup>99</sup>

Parliament recognised the anomaly it would create by excluding marriages on death from the new Act. A spouse whose marriage had failed could be better off than a spouse whose successful marriage ended on death.<sup>100</sup> But the effect on succession law and estate duty raised delicate and complex questions, and the demand for reform of the law on separation was urgent.<sup>101</sup> So, the Government decided not to delay the introduction of the Bill, promising to introduce a comprehensive measure for marriages ending on death as soon as possible.<sup>102</sup>

### *Family protection*

For surviving spouses the disadvantage caused by the uncertainty of their rights in respect of matrimonial property was exacerbated by an increasingly liberal approach to Family Protection claims by adult children. The view of Justice Edwards in 1901 that it would take a very strong case to justify an order in favour of adult children capable of supporting themselves was abandoned early on. By the 1960s moral and ethical considerations as well as changing social attitudes were influencing family protection claims, which allowed for a much broader approach to claims by adult children.<sup>103</sup> The absence of financial need was no longer an obstacle to a successful claim.<sup>104</sup>

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<sup>97</sup> (3 October 1975) 402 NZPD at 5115.

<sup>98</sup> Matrimonial Property Act 1976 (NZ), s 5.

<sup>99</sup> For example, *Mora v Mora* (1988) 4 NZFLR 609, the Court of Appeal awarded the widow 40 per cent of the farm, in spite of her exceptional contributions around the farm, because her husband was more directly involved in the farm and had acquired it on favourable terms from his parents.

<sup>100</sup> Working Group on Matrimonial Property and Family Protection, above n 96, at 3.

<sup>101</sup> AM Finlay "Matrimonial Property – Comparable Sharing; an Explanation of the Matrimonial Property Bill 1975" [1975] AJHR E6 at 13.

<sup>102</sup> Finlay, above n 101, at 14.

<sup>103</sup> *Little v Angus* [1981] 1 NZLR 126 (CA); *Re Leonard* [1985] 2 NZLR 88 (CA).

<sup>104</sup> *Re Harrison (deceased)* [1962] NZLR 6 (CA).



In *Foote v Foote*, for example, Mr Foote was survived by his second wife and his 37 year old son, Murray, from his first marriage.<sup>105</sup> His wife had five children from her earlier marriage. In terms of Mr Foote's will, his son was to receive 1/7 of his estate, about \$50,000, and his widow the remaining 6/7, amounting to about \$300,000. She also owned half the home and had some investments. Murray was unhappy about the terms of the will and made a claim under the Family Protection Act. He had no capital assets, but he was in good health and earning a reasonable income. The Court of Appeal awarded him \$150,000 plus the family set of King William silver cutlery. Although the deceased's paramount obligation was to his widow, the provision he had made for his son was in breach of his moral duty. His will allowed his estate to pass to persons who in the eyes of the son were unrelated family.

Surviving spouses, especially widows, had no security of entitlement at this time, being at the mercy of the court's discretion, both in terms of sharing matrimonial property and in the context of family protection claims.

***Report of the Working Group on Matrimonial Property and Family Protection 1988***

In 1988, a Ministerial Working Group was appointed to advise on Matrimonial Property and Family Protection, as part of the Government's social policy reform programme.<sup>106</sup> Janice Lowe, the Chief Legal Adviser in the Department of Justice, convened the Working Group. Its consultants included two Law Commissioners: Sian Elias QC, now the Chief Justice, and Margaret Wilson, who later became Attorney-General and Speaker of the House and was the founding Dean of the Law School at Waikato University, Warwick Gendall, then a barrister and subsequently a High Court Judge, and Bill Atkin, then a Senior Lecturer and now Professor of Law at Victoria University of Wellington.

This formidable group of legal experts recommended that the equal sharing regime applicable to marriages ending on separation should also apply to marriages ending on death. Surviving spouses should be "no worse off" than spouses whose marriage had ended on separation.<sup>107</sup> They should be entitled to receive what was rightfully their own property and that entitlement should take precedence over inheritance law. Inheritance law should apply only to the property that truly belonged to the deceased.<sup>108</sup>

If a testator disposes of more than the testator's share of matrimonial property by will, he or she is plainly purporting to give away something that already "belongs" to someone else.

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<sup>105</sup> *Foote v Foote* (1988) 4 FRNZ 57 (CA).

<sup>106</sup> Working Group on Matrimonial Property and Family Protection, above n 96, Foreword.

<sup>107</sup> Working Group on Matrimonial Property and Family, above n 96, at 40.

<sup>108</sup> Working Group on Matrimonial Property and Family, above n 96, at 41.

That statement of principle made perfect sense, but the Working Group then went on to make two further recommendations which were inconsistent with that principle. The first was to give surviving spouses a choice whether to claim their matrimonial property entitlement or inherit from the deceased.<sup>109</sup> They could not have both. Surviving spouses who chose to claim their matrimonial property entitlement would lose their inheritance. That blurred the distinction between matrimonial property law and succession law. If electing the matrimonial property entitlement left the surviving spouse with inadequate provision, he or she could apply under the Family Protection Act for further provision. The Working Group referred to the decision in *Foote v Foote* as an example of the tendency to make awards based on the blood relationship, rather than a need for maintenance, and recommended that children be eligible only if they were dependent on the deceased. While that would have reduced competition against a surviving spouse's Family Protection claim, it would still have left provision for the spouse at the discretion of the court rather than the testamentary wishes of the deceased.<sup>110</sup>

The second inconsistency with the principle that a matrimonial property claim was in the nature of a property entitlement was the Working Group's recommendation that the estate of the deceased spouse have no right to apply for a division of matrimonial property.<sup>111</sup> That meant that if the surviving spouse owned most of the assets, he or she would retain more than their entitlement, thereby depriving the estate of assets to provide for beneficiaries and dependants of the deceased. The Working Group saw no reason to give the estate a claim, because on death the contest is no longer between the two spouses but between the surviving spouse and the testamentary or intestate beneficiaries or family protection claimants.<sup>112</sup> This reason suggests that testamentary beneficiaries and claimants against the estate are less deserving than a surviving spouse, even where they were dependent on the deceased.<sup>113</sup> In any event, it was inconsistent with the stated principle of a property entitlement.

No action was taken in the wake of that Report. Awards under the Matrimonial Property Act 1963 became more generous, but remained unpredictable and dependent on proof of contributions to property. Family Protection awards also became more generous, particularly for adult children who by then were the largest class of claimants under the

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<sup>109</sup> Working Group on Matrimonial Property and Family, above n 96, at 44.

<sup>110</sup> Working Group on Matrimonial Property and Family, above n 96, at 51. The Working Group referred at 50 to the decision in *Foote v Foote* (1988) 4 FRNZ 57 (CA) as an example of the courts' tendency to make awards solely on the basis of the blood relationship, commenting that it was a considerable departure from the earlier interpretations of moral duty based on a need of maintenance and support.

<sup>111</sup> Working Group on Matrimonial Property and Family, above n 96, at 46.

<sup>112</sup> Working Group on Matrimonial Property and Family, above n 96, at 46.

<sup>113</sup> See *Public Trust v Whyman* [2005] 2 NZLR 696 (CA), discussed below, where the intestate beneficiaries were the deceased's minor children.

Act. The primacy of the parent-child relationship deserved recognition, even if that came at the expense of the surviving spouse.<sup>114</sup> In effect, children had acquired a right to inherit, regardless of financial need. Testators were strongly discouraged from leaving their children less than a fair share and after death those whom the deceased had preferred would often feel compelled to settle, regardless of the merits of the claim, to avoid the human and financial cost of litigation. Testamentary freedom had become a myth.<sup>115</sup>

*New Zealand Law Commission Review of Succession Law 1993-1997*

That was the unsatisfactory state of the law of property rights on death when the New Zealand Law Commission commenced a review of the law of succession in 1993.<sup>116</sup> Its purpose was to reform the Matrimonial Property Act 1963, the Family Protection Act 1955, the Testamentary Promises Act 1949, the Wills Act 1837 (Imp) and the intestacy provisions in the Administration Act 1969 and bring them all together in one comprehensive statute. It was an ambitious project, led by Commissioner and former colleague the late Professor Richard Sutton, to whom I am indebted for sparking my interest in succession law and supporting the early development of my career in New Zealand. Sadly, the project did not achieve its first aim, which was to get agreement on the types of claims that could be made by or against a deceased estate. The purpose of the proposed legislation on claims against estates was to align them with life time claims, so that rights and obligations on death of a spouse or parent reflected those during the deceased's lifetime.<sup>117</sup> The existing law did not do that. It treated matrimonial property claims differently on death and imposed moral obligations on death that went well beyond the obligations during a property owner's life time.<sup>118</sup> The Law Commission concluded that the law governing property rights between spouses and de facto partners was anomalous and uncertain, while the courts' treatment of family protection claims by adult children was indefensible.<sup>119</sup>

The Law Commission proposed instead that surviving spouses and de facto partners be given the choice of either applying for a division of partnership property on the same basis as separated spouses or taking their inheritance.<sup>120</sup> In addition, they could make a support claim to achieve a reasonable standard of living, but only until they could reasonably be expected to become self-supporting.<sup>121</sup> That limit on a

<sup>114</sup> Working Group on Matrimonial Property and Family, above n 96, at 50.

<sup>115</sup> Nicola Peart "Towards a Concept of Family Property in New Zealand" (1996) 10 IJLPF 105.

<sup>116</sup> Law Commission *Succession Law – Testamentary Claims* (NZLC PP24, 1996) at vii.

<sup>117</sup> NZLC PP24, above n 116, at 23.

<sup>118</sup> NZLC PP24, above n 116, at 2.

<sup>119</sup> NZLC R39, above n 2, at 2.

<sup>120</sup> NZLC R39, above n 2, at cl 10(1) and 11.

<sup>121</sup> Draft Succession (Adjustment) Act, s 24 in NZLC R39, above n 2.

deceased's support obligation for a surviving spouse or partner was consistent with the spousal support rules on separation and divorce.<sup>122</sup> In contrast to the 1988 Working Group, the Law Commission recommended that the administrator of the deceased's estate also be given the right to apply for a property division.<sup>123</sup>

Minors and children under the age of 25 taking educational or vocational training, and children unable to earn a reasonable, independent livelihood because of physical, intellectual or mental disability which occurred before they attained the age of 25 would also be eligible to make a support claim.<sup>124</sup> But adult children would not otherwise be eligible to make a claim unless they were in genuine financial need or had conferred a valuable benefit on their parent.<sup>125</sup>

Despite extensive public consultation, during which the Commission formed the view that their proposals reflected society's expectations in regard to property claims on death, the proposals were not implemented. The restrictions on adult children's claims may have been too radical. That appears to have been the view of the Court of Appeal when it dealt with a claim by a wealthy daughter against her mother's estate.<sup>126</sup> Susan felt aggrieved at her mother's grossly unequal treatment of her and her sister, Christine. Susan had been left a legacy of \$50,000 and some precious family chattels, while Christine inherited the rest of their mother's \$1m estate. Her mother had done so because Susan was well off with assets of about \$1m, whereas Christine had virtually no assets and was in financial need. The Court of Appeal held that the mother was in breach of her moral duty to Susan and doubled her legacy from \$50,000 to \$100,000, leaving Christine with about \$900,000. Richardson P rejected the argument that the Court had to find a need for proper maintenance and support and explained:<sup>127</sup>

The test is whether adequate provision has been made for the proper maintenance and support of the claimant. Support is an additional and wider term than maintenance. In using the composite expression, and requiring "proper" maintenance and support, the legislation recognizes that a broader approach is required and the authorities referred to establish that moral and ethical considerations are to be taken into account in determining the scope of the duty. Support is used in its wider dictionary sense of "sustaining, providing comfort". 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. Just what provision will constitute proper support in this latter respect is a matter of judgment in all the circumstances of the

<sup>122</sup> NZLC R39, above n 2, at 81.

<sup>123</sup> Draft Succession (Adjustment) Act, s 10(2), above n 121.

<sup>124</sup> Draft Succession (Adjustment) Act, s 27, above n 121.

<sup>125</sup> Draft Succession (Adjustment) Act, ss 29 and 31, above n 121. They could also apply for a memento claim: Draft Succession (Adjustment) Act, s 30.

<sup>126</sup> *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [45] and [68].

<sup>127</sup> *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [52].

particular case. It may take the form of lifetime gifts or a bequest of family possessions precious to its members and often part of the family history. And where there is no economic need it may also be met by a legacy of a moderate amount. On the other hand, where the estate comprises the accumulation of the family assets and is more than sufficient to meet other needs, provision so small as to leave a justifiable sense of exclusion from participation in the family estate might not amount to proper support for a family member.

### The 21st century

And so we enter the 21st century amidst a sea of conflicting policies and principles. Parliament was all too aware of the problems facing spouses and de facto partners and in 2001 the Hon Margaret Wilson introduced an amendment to the Matrimonial Property Act 1976 to extend the equal sharing regime to relationships ending on death and to de facto partners who had lived together for three or more years.<sup>128</sup> The amended Act was renamed the Property (Relationships) Act 1976, reflecting the wider range of relationships to which it would apply.<sup>129</sup>

The new death provisions are largely based on the Report of the 1988 Working Group. They give surviving spouses and partners a choice of two options.<sup>130</sup> Under option A they apply for a division of relationship property.<sup>131</sup> If they choose that option, any intestate entitlement or gifts in the deceased spouse's will are automatically revoked unless the will expresses a contrary intention, or the court reinstates some or all of the inheritance to avoid injustice.<sup>132</sup> The relationship property claim takes priority over any succession claims.<sup>133</sup> That acknowledges that this claim is a property entitlement and that succession law should be confined to the assets that truly belong to the deceased.

Under option B the surviving spouse or partner retains any property they own or take by survivorship, such as a joint tenancy of the family home, and inherits such provision as is available to him or her under the will or the intestacy rules. The surviving spouse may also apply for further provision from the estate, whichever option is chosen.<sup>134</sup>

The personal representative of the deceased may also apply for a division of the relationship property, but only with leave from the

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<sup>128</sup> Property (Relationships) Act 1976, s 1M. The Act was amended again in 2005 to include civil unions: Property (Relationships) Amendment Act 2005.

<sup>129</sup> Property (Relationships) Amendment Act 2001, s 5(2).

<sup>130</sup> Property (Relationships) Act 1976, s 61. The choice of option has to be made within six months of death or grant of administration, whichever is the later (s 62), and must be made by signing a written notice accompanied by a certificate from a lawyer that the lawyer has explained the effect and implications of the notice to the surviving spouse or partner (s 65).

<sup>131</sup> Property (Relationships) Act 1976, s 61(2).

<sup>132</sup> Property (Relationships) Act 1976, ss 76 and 77.

<sup>133</sup> Property (Relationships) Act 1976, s 78.

<sup>134</sup> Property (Relationships) Act 1976, s 57.

court if serious injustice would otherwise result.<sup>135</sup> The Bill as originally drafted followed the Working Group recommendation that the estate have no right to apply for a division. The inclusion of a qualified right allows applications for division when meritorious claims against the estate would otherwise fail for lack of assets. An obvious example is *Public Trust v Whyman*, where all of the deceased's assets passed by survivorship to his de facto partner, Ms Whyman, leaving no assets in the estate to provide for his two children from his former marriage, who were aged 12 and 14.<sup>136</sup>

Permitting the estate to apply for a division of relationship property avoids any serious injustice to those with a legitimate interest in the estate, including those to whom the deceased owes a moral obligation to make provision. But in the context of the Property (Relationships) Act, the leave requirement is conceptually problematic, because it treats spouses and partners differently on death as compared to separation. Whereas on separation, the policy objective is equality as between the parties, on death the policy objective is that the surviving spouse should be "no worse off". Inequality is tolerated, even preferred. If death and separation are to be treated differently, the death provisions have no place in a statute designed to deal with division based on equality.

### **Wills Act 2007**

In 2007 Parliament replaced the Imperial Wills Act 1837 with a new Wills Act, the first home grown Wills Act for New Zealand! The Imperial statute had served New Zealand's needs very well for 170 years, but it was old, expressed in archaic language, and it had strict formalities for the making of wills.<sup>137</sup> Any slight departure from those formalities, such as not having the required two witnesses present at the same time, rendered the will invalid and of no effect.<sup>138</sup> Clearly expressed testamentary intentions could easily be defeated by a minor technical error.

The principal purpose of the new Wills Act is to give better effect to a testator's ascertainable intentions.<sup>139</sup> To that end the formalities have been relaxed to some extent.<sup>140</sup> More importantly, the courts now have the power to validate documents that appear to be wills but do not comply with the formal requirements for making a will, provided the court is satisfied that the document expresses the testator's testamentary

<sup>135</sup> Property (Relationships) Act 1976, s 88(2).

<sup>136</sup> *Public Trust v Whyman* [2005] 2 NZLR 696 (CA).

<sup>137</sup> Wills Act 1837 (Imp), s 9. Law Commission *Succession law – A Succession (Wills) Act* (NZLC R41, 1997).

<sup>138</sup> In *Re Colling* [1972] 1 WLR 1440, for example, the will was void because the witnesses witnessed different acts.

<sup>139</sup> NZLC R41, above n 137, at 1, where the New Zealand Law Commission lists this principle as one of the two governing principles of the law of wills. The second principle being the need for caution because the testator is dead.

<sup>140</sup> Wills Act 2007, s 11 no longer requires the will to be signed at the foot or end of the document.

intentions.<sup>141</sup> This power has been used many times in the past 10 years to validate documents ranging from professionally drawn documents witnessed by only one witness, to unsigned and unwitnessed wills, suicide notes and even a solicitor's file note of instructions given over the phone.<sup>142</sup>

Other provisions in the new Wills Act are also aimed at giving better effect to testamentary wishes, including provisions dealing with revocation,<sup>143</sup> amendment,<sup>144</sup> and correction of wills,<sup>145</sup> the effect of a marriage or civil union on a prior will,<sup>146</sup> the effect of beneficiaries or their partners witnessing wills,<sup>147</sup> and the extrinsic evidence that may now be admitted in respect of wills.<sup>148</sup> All of these changes to the law of wills and the policy that underpin them sit uncomfortably alongside the Property (Relationships) Act 1976 and the Family Protection Act 1955, both of which override testamentary wishes.

There is currently a real tension in succession law between testamentary freedom and family obligations, which makes it difficult for property owners to make reliable arrangements for the disposal of their property after death. Little wonder that property owners have sought refuge in the law of trusts. Through trusts they are able to control the destiny of their property and know that by and large their arrangements are safe from challenge, certainly from claims under the Family Protection Act.<sup>149</sup>

## Conclusion

In May 2016 the New Zealand Law Commission commenced a review of the Property (Relationships) Act 1976. Its terms of reference include the death provisions in the Act. The Commission will be issuing a discussion paper in October 2017 and is expected to report back to the Minister of Justice in November 2018. This review, and the public consultation process that is a necessary part of it, provides an opportunity to resolve some of the current tension in property rights on death. While the Commission's terms of reference do not allow it to address issues

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<sup>141</sup> Wills Act 2007, s 14.

<sup>142</sup> *Estate of Cottrell* [2012] NZHC 1046 (one witness); *Re Rejouis* [2010] 3 NZLR 422 (unwitnessed); *Re Estate of Hickford* HC Napier CIV-2009-441-369, 13 August 2009 (unsigned and unwitnessed); *Re MacNeil* (2009) 10 NZCPR 770 (suicide note); *Will of Parker* [2017] NZHC 415 (solicitor's file note of verbal instructions).

<sup>143</sup> Wills Act 2007, s 16.

<sup>144</sup> Wills Act 2007, s 15.

<sup>145</sup> Wills Act 2007, s 31.

<sup>146</sup> Wills Act 2007, s 18.

<sup>147</sup> Wills Act 2007, s 13.

<sup>148</sup> Wills Act 2007, ss 14(3) and 32.

<sup>149</sup> For example, *Penson v Forbes* [2014] NZHC 2160. There is no claw back provision in the Family Protection Act. The Succession (Adjustment) Act proposed by the New Zealand Law Commission would have allowed for inclusion and recovery of non-probate assets to satisfy claims under the Act: Draft Succession (Adjustment) Act, ss 52–55, above n 121.

relating to the Family Protection Act, resolving the conflicting policies in the Property (Relationships) Act would be a good start.

Reform is needed to provide certainty and predictability. In my view that is best achieved by accepting that death is different from separation. Property rights on death are best regulated through succession law, covering both the property entitlements of spouses and partners, based on the principle of equality, and the deceased's support obligations to family members based either on need or contribution to the deceased.

As a first step, I hope that the Law Commission recommends that the Property (Relationships) Act be left to deal with the property rights on separation, while relationship property rights on death are dealt with in a separate statute to which at a later stage support obligations could be added. In my view that would provide a more coherent approach to property rights on death, and remove at least some of the current conflict in policies governing relationship property and succession law.