Successions – restrictions on testamentary freedom

Options for challenging a will

Challenges to the will-maker's decision

- Capacity
- Undue influence

Restrictions on Testamentary Freedom

- Testamentary promises
- 'Family protection'
- Relationship property
- Challenge provision or lack of provision in the will even though the will is perfectly valid and not set aside

Testamentary freedom and restriction

- A person has the right to use their property as they wish during their lifetime
- Should they be free to determine, during their lifetime, what will happen to their property when they die?
- 'Anglo-American' jurisdictions usually provide more testamentary freedom
- European and Asian jurisdictions usually have more testamentary restrictions – "forced heirship" – over the deceased's property
- Forced heirship – have to give certain amount of property guaranteed to particular heirs. NZ does not have fixed system on who gets what in shares, but have other restrictions

Testamentary promises

- A person might make a contract taking the benefit of services in return for provision under a will
- This will be a contact enforceable against the estate if all the requirements for a valid contract are met. There may be other kinds of claim that are possible in estoppel or unjust enrichment
- The Law Reform (Testamentary Promises) Act 1949 provides a legal remedy where an enforceable contract was not concluded, but services were provided on the basis that provision would be made in the recipient's will
- Anyone may make a claim – including former partners, children
- Family court and High Court have concurrent jurisdiction
- A court may uphold the promise even if not a binding legal contract
- What did the will-maker promise to someone they will receive under the will.

"The present position is that if services have been rendered to or work performed for the deceased, and there are promises made by that deceased to reward the claimant for those services, the claimant may bring a claim against the estate of the deceased where that promise has not been fulfilled. The promise need not be a contractually binding one; and it may be made either before or after the services have been rendered or the work performed. Our Courts have taken a liberal approach to what amounts to a promise, which includes, by virtue of amendments to the Act, a statement of intention. But our Courts have stressed that there *must be a nexus* between the promise on the one hand and the work or services on the other."

Hammond J *Kite v May* [2001] NZFLR 514

- Promise were made but not fulfilled, promisee can make a claim against estate and does not matter that they do not have a recognised legal claim eg. contract lacking formality
- Promise can be made after services provided – consideration has already occurred.
- But there has to be a connection between promise and promise eg. Re Welch, the Court: cast doubt on idea of nexus between promise and services
- Unless can be shown promise made in connection to services rendered by claimant, not enough nexus for court to make an award under legislation

Testamentary promises – 'services'

- 'Services' has a wide meaning, and could include companionship and emotional support, as well as accommodation, general help with life's tasks
- But "To qualify as "services" or "work" under the Act, what has been done for the deceased must have been **beyond the normal expectations of family life or social interaction**. Services can include not only things done for the deceased but also companionship, affection and emotional support exceeding what is normally to be expected of a relative, a member of the same household, a neighbour or friend" *Byrne v Bishop* 3 NZLR 780 at [6].
- "Something extra" than normal family relationships and help is needed: *Samuels v Atkinson* [2009] NZCA 556

Re Welch
Facts: • Questionable claim to "services" • Step-son made a claim that he did things families would do lived with will-maker Welch and also assisted with business although for a reciprocal advantage • Relationship of joy, comfort and companionship with will-maker, social gathering and step-son bought his children which will-maker liked
Result: • Straining scope of the Act to bring the natural incidents of life from a close family group within the concept of "services" • Services can be anything but has to go beyond the ordinary expectations from a normal family relationship • Does not have to be a financial benefit to the will-maker, it can be of a domestic nature but has to be more than usual in family life eg. extra companionship, emotional support etc

Testamentary promises – promise; quantum

- There must be a promise to make testamentary provision for the claimant in return for the rendering of services ('nexus')
- Does not need to have been made before services, or to person performing services
- If these requirements are satisfied, the quantum awarded is what is reasonable in the circumstances, having reference to matters stated at end of s 3(1)
- Re Welch emphasises the court needs to order reasonable renumeration:
  - considering the circumstances the promises made:
  - the services or work rendered
  - the value of the services or work
  - value promised by will-maker – not merely market value.
  - the amount of the estate

    - and the nature of the claims from other persons against the estate
- People who would otherwise receive property from the estate lose property proportionately when given under the testamentary promises claim, unless the court determines otherwise.
- s 3(5) payments ordered fall rateably [proportionately] upon the whole estate of the deceased. Discretionary restriction on testamentary freedom which court decides

Family Protection – claimants and test
- Who may claim s 3(1): spouse, civil union or de facto partner living with deceased; children; grandchildren; stepchildren wholly or partly maintained; parents (conditionally -- have to be maintained wholly or partly or none of the others are living).
- Test s 4(1): if deceased's estate does not provide adequate provision for the proper maintenance and support of the applicant – court may at its discretion make an order which provisions a part of the deceased's estate for the applicant.
- Claim exists if can show a relationship, rather than a promise/consented obligation.
- Whether will-maker disappointed family and society's expectation of what they morally owe to family.

- Proper maintenance and support
- Maintenance – ensure person can provide for themselves, i.e. providing a minimum
- Williams v Aucutt – not just a minimum level because "support" cannot mean merely "maintenance"
- Court has to find a breach of moral duty judged to the standard of a wise will-maker. The award is only the minimum necessary to repair the breach of the moral duty.
- Court considers:
    - Size of estate
    - Other moral claims
    - Changing societal attitudes
- Courts will enforce the will-maker's moral obligation if they do not discharge it. It will not re-write wills merely because of unfairness or children given differing amounts.
- Emphasis on not just about keeping people from destitution or poverty
- Vague standard on what morally has to be done

Family Protection – quantum
- Not a matter of mathematical or scientific calculation: *Warboys v Jones* [2004] (HC)
- But there are general norms of quantity that courts usually apply
- Small estates – up to around 10%
- Large estates – 12%-20%
- For larger estate easier to provide for some while not taking away from others. If smaller estate, then more likely to take away from others if provide an award under Act
- Discretionary – in what is morally required

Family Protection – courts' approach *Williams v Aucutt*
- History and purpose of FPA – [33]
- *Little v Angus* – "breach of moral duty judge by the standards of a wise and just" willmaker. Size of estate, other moral claims. [35]

- Not just ‘need’ / maintenance. ‘Support’ relates to recognition of belonging and role in deceased’s life [52]
- Can make a claim even if living comfortably

Criticisms of Family Protection – Law Commission

- Court’s present powers are broad and discretionary
- Acceptable when there was a common, gendered, monocultural vision of family but today families are different due to culture and structure and should not be treated the same.
- Values system of a prevailing culture or particular type of family should not be applied indiscriminately.
- Current system makes it difficult for the will-maker to give effect to family expectations.
- Courts are in fact remaking the will for the will-maker due to their extensive power.
- Concept of a “moral duty” to family is too vague to ensure meaning of the law is clearly communicated.
- Avoids the need to express uniform and certain reasons for why testamentary freedoms should be restricted. Courts become uncertain as to who and how much should be awarded, will-makers cannot comply with their duties.
  - Questionable if judges should have the power to make a moral judgment.
  - Today’s society has people with different moral views and kinds of families. Judges not proportionately representative of the community – making moral decision when will-maker should be making the moral decision.
  - Judges’ view on moral duties are likely to vary and moral duties are personal to each will-maker. Law supposed to unify on particular view of morality but does not achieve it.
  - Inconsistency with testamentary autonomy where will-maker makes a decision they thought they were morally bound to do only for a court to intervene.

Relationship Property

Relationship property on partner’s death

Prior to amendments to the Property (Relationships) Act 1976 [PRA], the principle of equal sharing of relationship property – s 11 PRA – did not apply to marriages in which death had parted the spouses. An older approach that looked for contributions by one spouse to another’s property applied. A FPA claim might also be made.

- Different from a family protection claim:
  - Less discretion – under PRA claim is 50/50 or equal sharing as starting point.
  - FPA – bound to give effect to claims which are not legal obligations when alive, including a duty to support.
  - PRA gives effect to a claim outside testamentary situation – applies as it would if parties separated during deceased’s lifetime
- Similarity with FPA:
  - Easier to see moral obligation on will-maker who did something to generate a claim which the law recognises one should give effect to.
- Early PRA regime looked to contributions rather than 50/50 split. Also less generous to claims against a deceased spouse relative to splitting up during lifetime. Anomaly.

- This was changed by the Property (Relationships) Amendment Act 2001, which basically extended the equal sharing regime to operate in the succession context – now in relation to marriages, civil unions, or de facto relationships.
- In other words, the same rights under the PRA will apply whether the relationship terminated through separation or death - s 10B and Part 8.

The Option under the PRA

- The key feature of Part 8 of the PRA is that the surviving spouse can elect to take under the will or to take their (generally) equal share of the relationship property
- The survivor may make the claim, as well as the personal representative of the deceased if this is necessary to avoid serious injustice
- The options are stated in s 61.
    - Option A is to take under the PRA. (as if they separated during lifetime)
    - Option B is to take under the will and/or intestacy rules.
- Can still make family protection [FP] or testamentary promises [TP] claim – s 57

- Not an automatic 50/50 split
- In choosing an option, consider:
    - Other claims i.e. challenges to the will
    - Amount received under will/intestacy rules vs claim under PRA

Formalities

- Must give notice, signed and written, of choice made to administrator or HC registry – s 65
- Time limit for choice - s 62:
    - Large estates – 6 months after grant of administration in NZ
    - Small estates – within 6 months of death, or 6 months of grant of administration in NZ or within 6 months of death
    - Court may grant extension if final distribution not made
- If no choice is made, taking under the will (opt B) is deemed to be the choice – s 68

- Administrator must know about claim as have to delay distribution with formal notice and within a time limit. No claim against the administrator if they distribute after the time

- The choice is irrevocable: the survivor cannot simply change their mind – s 67.
- However the choice of Option B may be set aside – s 69 – so long as the estate has not been finally distributed – s 70
    - If the choice was not freely made; the survivor did not understand the effect of the choice; the survivor has new information relevant to the choice; a FPA or TP claim has been made.
    - And it would be unjust in the circumstances to enforce the option

Option B – take under the will or intestacy (Status Quo)

- PRA rules do not apply to distribution under will or intestacy
- Consider other claims which may arise if do not choose option A
- Alternative ways of ensuring relationship partner receives property:
    - Trust, which takes it outside of the intestacy context as trust determines who owns the property and also outside the PRA context provided the trust was not meant to be shared as relationship property. Relationship property cannot be settled on trust.
    - Contract out of PRA under s 21 agreement – if not unfair
- Hold property jointly
    - Option A: apply PRA and s 83: any property of the deceased that passes to the survivor is not automatically to be treated as the separate property of the surviving spouse. The status of the property is to be determined as if the deceased spouse had not died. Do not keep property merely because joint-owner and once other dies become sole owner. Baseline is 50/50 – less than being sole owner.
    - Option B: if one dies then the other owners automatically take their share

Option A – take under the PRA

- By electing option A, the survivor takes their equal share of relationship property according to the PRA. Section 11 provides for equal sharing of relationship property
- Any gift to the claimant under the will is treated as revoked, unless the contrary is expressly stated in the will – s 76
- This share takes priority over the interests under the will or intestacy, and over any family protection or testamentary promises claims – s 78
- The court can, to "avoid injustice", order that the survivor should receive the gifts under the will – s 77 eg. family heirloom despite PRA claim
- Option A – division as if deceased had not died
- s 11 PRA – mandates equal sharing as the baseline. Do not take under the will unless the will says if relationship partner chooses option A then still receive gift under the will
- Receive nothing under the will, intestacy rules or via jointly owned property.
- Eg. In Flathaug v Weaver, PRA claim where half the estate is given to the widow. Everyone else's claim must therefore be portioned out of the other half.
- Other people receive left over amount after make option A claim
- *Can also make other claims under Option A eg. FPA, testamentary promises

Relationship property (under Option A)

- Sections 8-9 define relationship and separate property
- Basically, relationship property is: family home and chattels; property acquired during marriage, civil union or de facto relationship; property owned jointly or in equal shares
- Separate property is everything else; includes gratuitous transfers eg. gifts to one of the relationship parties during relationship and property acquired either before or after relationship - property not shared.
- In relationships of short duration, property shares are determined on a contributions basis unless there is a child of the relationship or there is a substantial contribution that would make unequal sharing unjust – s 14

- Relationship property share is determined at date of death, or when relationship ended – s 79.
- All the deceased's property is **presumed** to be relationship property – s 81. (for those who would otherwise take property if it was not relationship property eg. under will or intestacy rules to argue it was separate). Presumption does not apply to that referred to in s 10(2): gifts, inheritances, beneficial rights under a trust, survivorship.
- Jointly owned assets must be dealt with as if deceased had not died – don't just pass to survivor - s 83
- s 81 recognises the surviving partner has a legitimate claim under the PRA, concession to them that they do not need to prove its relationship property.

- Residual claimants will be able to take property if not relationship property - arguing under will or intestacy property that it was separate property: eg.
    - came into partner's ownership before relationship
    - is a gift
    - not family chattel
    - joint ownership