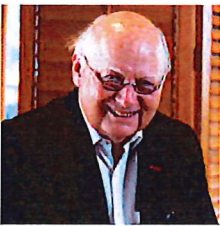


An update on 'moral duty' and the Family Protection Act 1955

If the commission's recommendations are adopted, the number of claims under a revised FPA regime will be reduced considerably



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In a recent *LawNews* [article](#) I wrote about the Law Commission's proposals for changing the Family Protection Act (FPA). The commission said there was a fundamental problem with the courts' requirement that a claimant must show that a will-maker had breached his or her "moral duty". There are so many different perceptions of morality in the community these days, the court said, that it is not possible to identify with any certainty what a person's moral obligations to family members might be.

However, until the law is changed, judges are required to say whether a will-maker has breached his/her moral duty to a claimant. In this context, I referred to survey evidence that the commission had amassed in its attempts to discover the kind of factors New Zealanders think should govern the financial provision people should make for their families. I said judges, when determining whether there has been a breach of a moral duty, could look to the results of the commission's survey of public opinion for answers.

A reader contacted me and said the commission's survey

evidence ought not to be viewed too definitively and that I should focus more on the commission's final report.

I am therefore writing a little more about this topic. At the outset, I wish to say that the commission described the FPA and other legislation involving claims to the succession of property as "old" and "out of date" – an irrefutable assessment.

The commission said of the FPA that "the law relies heavily on judicial discretion to assess whether there has been a breach of 'moral duty'" and that such a test should be rejected as "in many cases, reasonable minds will differ on the 'moral' way of distributing an estate among family".

The commission concluded that the law should be changed to allow the following claims, and no more:

- a spouse or *de facto* partner who has been left with "insufficient resources to maintain a reasonable independent standard of living" should be entitled to make a claim against a deceased partner's estate;
- a deceased person's children and grandchildren should

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be eligible to make a claim if they are in "financial need" or if the deceased failed "to recognise the child or grandchild"; or

- as an alternative, only a child under 25 years of age, or a child of any age who is disabled, should be eligible to make a claim and a child under 25 could make a claim if it "does not have sufficient resources ... to be maintained to a reasonable standard and, so far as is practical, educated and assisted towards the attainment of economic independence".

Those are the only claims the commission considers should survive a review of the Family Protection Act. The concept of a "moral duty" is to be removed from the law.

The commission's specific recommendations, listed above, presumably reflect its perception of the moral duties that exist for people these days when making their wills. If the commission's recommendations are adopted, the number of claims under a revised FPA regime will be reduced very considerably.

The concept of a "moral duty" is to be removed from the law

The purpose of my earlier article was to suggest that in the period prior to the implementation of new legislation, when courts consider whether a deceased will-maker has breached his/her moral obligations, they could look to the commission's survey of the opinions of New Zealanders to learn the obligations that will-makers should have.

If it is thought the research is capable of different interpretations, the courts can nevertheless look to the commission's recommendations for the future law on this topic since its recommendations were the subject of significant research and must presumably reflect the commission's perception of the duties that will-makers should have these days towards their partners, children and grandchildren.

The narrow scope of the commission's recommendations can be seen as a significant brake on the concept of "moral duties" and this development may help the courts during the period leading up to the changes likely to be made to the Act. ■

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