

LAWS OF SUCCESSION

Big changes coming for our laws of succession

By Anthony Grant

The Law Commission has published its **initial thoughts** on the laws concerning succession.

Many readers may not be familiar with this term. The laws of succession refers to laws allowing the living to take assets from the dead.

As the commission has a good record of persuading Parliament to enact its recommendations, readers who are interested in the commission's suggestions should learn about them since there's a good prospect that its final recommendations will be approved by Parliament.

The current means by which people can succeed to the assets of a person who has died are:

- ◆ the Administration Act, which identifies the people who are to take the assets of people who died without making a will;
- ◆ the Family Protection Act, which permits spouses, some parents, children and grandchildren to make claims against a person's estate;
- ◆ the Testamentary Promises legislation, which empowers a living person to enforce the promises of the dead;
- ◆ the Property (Relationships) Act, which empowers a spouse/co-habitee to make claims against the estate of a dead partner; and
- ◆ claims of a constructive trust and some other claims in equity.

The commission suggests the different regimes might be rolled collectively into a new Act.

Considerable emphasis is placed on the possibility of a separate regime for aspects of Māori succession – a move that is said to be justified by the Treaty of Waitangi which, according to the Waitangi Tribunal, requires the Crown “to allow Māori to manage their own affairs in a way that aligns with their customs and values” (para 2.17).

The commission would reduce potential claimants under the Family Protection regime to spouses, infant children and children with disabilities. Parents and grandchildren would no longer have the right to make claims. The term ‘children’ would include ‘accepted children’ and unborn children. ‘Recognition’ awards could also be made for children of all ages.

Claims in equity for compensation for contributions that have added value to an asset (via constructive trusts, estoppels and claims of unjust enrichment etc) might be rolled into a statute and classified as ‘contribution’ claims. The ease with which such claims can be made has made them popular with plaintiffs and it's foreseeable that claims of this



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type could delay the distribution of estates for years.

The commission would allow property owners to enter into contracting-out agreements in respect of contribution claims and owners of assets would be well advised to enter into agreements with everyone they anticipate might make such claims.

The current regime for distributing the assets of intestate estates is criticised and a number of replacement regimes are suggested.

The way in which taonga, a Māori term for ‘treasures’ or heirlooms, might devolve could be given a separate regime for Māori.

One of the most interesting proposals from my perspective is the proposed statutory adoption of anti-avoidance measures that would give the courts power to restore assets to estates.

The commission wants to apply these measures to ‘any contracting-out or settlement agreement entered under the new Act that had the effect of defeating a right or claim under the new Act’ (para 9.46.)

I have found it difficult to discern from the report whether the commission proposes to allow assets to be extracted from trusts, but it looks as though this may be a possibility. If so, it will be a development of real significance for trusts.

The commission proposes that the courts would be empowered to make occupation orders, tenancy orders and furniture orders in respect of the assets of the dead. It acknowledges that applications for such orders would delay the distribution of estates, but the commission thinks the potential benefit of such orders outweighs the harm that would be caused by the delays in making them.

If the laws concerning succession are to have any meaningful impact on the community, some anti-avoidance measures will be needed since people are avoiding succession laws at present by alienating assets during their lifetime by making gifts and making settlements on trusts.

I conclude this article with a comment on some Māori elements of the commission's report. Names of New Zealand, the commission and other bodies are invariably recorded in both Māori and English with the Māori name taking precedence over the English-language name. The report reminds me in part of academic writings in Quebec that are typically fully bilingual in both French and English.

There are extensive references to Māori academic writing and there are proposals to have some separate legal regimes for Māori.

The current president of the Law Commission is former Associate Professor Amokura Kawharu – I assume from the distinguished Kawharu family in Auckland.

In 1967 I studied Māori at Auckland University, mainly under the tuition of Pat Hohepa. At that time, the Māori language and culture were struggling for acceptance in a white community which sought to suppress indigenous aspirations. Fast forward to 2021 and it's remarkable to see how confidence in both the language and the culture has flourished.

Anthony Grant is an Auckland barrister specialising in trusts and estates. He is a presenter at the ADLS *Cradle to Grave*™ conference next week. The keynote address will be on succession, presented by Nicola Peart, Professor Emerita, and Helen McQueen, Deputy President of the Law Commission. ❄️