TRUST LAW

Reinterpreting the Family Protection Act 1955: the problem with 'moral duty'

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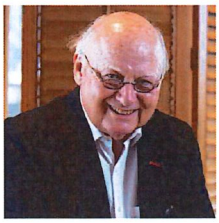

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The courts have said that a person making a claim under the Family Protection Act must be able to show that a will-maker has been in breach of a moral duty that "a just, but not unloving, husband or father owes towards his wife or towards his children".

This test has a fundamental problem in that "moral duties" are neither taught nor identified anywhere in our laws.

The Law Commission has recognised this fundamental failing and said "the court's reliance on morality is problematic. In any situation, there can be a wide variety of views about what, if any, moral obligation the deceased has, particularly in a culturally diverse society or where there are differences in wealth and social perspective."

Because of the uncertainty concerning the nature and/or existence of the alleged moral duties of a will-maker, the premise of the law is fundamentally flawed, meaning no lawyer can tell a client with confidence what orders a court will make.

Parliament asked the Law Commission some time ago to investigate the Act and make recommendations for any changes it thought should be made to it.

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Commission's findings

To its credit, the commission decided to make some empirical investigations into what "moral duties" New Zealanders think should apply to people who make wills. The commission arranged for survey evidence to be undertaken and its research showed there was little enthusiasm for the Act in its present form.

In essence, the commission recommended that the powers of the court should be confined very considerably. It considered from its research that a surviving partner who has insufficient resources should be able to make a claim against a deceased partner's estate and a child who is no older than 18, 20 or 25 (politicians are to choose which of these ages is appropriate) should be able to make a claim for an award. These would be the only available awards.

The commission's conclusions are awaiting parliamentary consideration but as the commission has historically had a take-up rate for its recommendations of just under 80%, there would appear to be a reasonable prospect that the Family Protection Act will be modified in the way it has recommended.

This is not a case when the commission's proposals should be put on ice, as it were, until Parliament has had time to consider its proposals. The courts have said the Act must be interpreted by reference to the moral obligations of a will-maker.

So far as I am aware, the only objective criteria that exists for determining the "moral obligations" that New Zealanders believe should govern a will-maker's decision is the survey evidence the commission has conducted on that express topic. Judges no longer have to guess which moral obligations are believed to exist. They can look at the commission's survey evidence and learn the answers.

There is therefore good reason for the courts to give consideration now to the commission's research and not to wait for Parliament to review its consideration of the Act. ■

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