Te Aka Matua o te Ture

Review of Succession Law – Issues Paper 46

10/06/2021

About Chapman Tripp

1 Chapman Tripp is a leading law firm with offices in Christchurch, Wellington and Auckland. Our Private Client Team acts for individuals and families in arranging their affairs and varying arrangements during their lifetime and documenting their testamentary wishes. Te Waka Ture acts for iwi, hapū and whānau on a range of charitable, commercial, structural and governance matters. This response has been compiled by both of these teams.

2 The matters covered by the Succession Law Issues Paper (Issues Paper) are of direct interest to us as legal practitioners and to our clients. We welcome the opportunity to comment on the Issues Paper.

3 We have no objection to our submission being published on the Te Aka Matua o te Ture / Law Commission's website.

4 We would be happy to discuss any of our comments with the Te Aka Matua o te Ture / Law Commission.

5 Our key contacts are:

Jarrod Walker
Partner, Private Client

Email: jarrod.walker@chapmantripp.com
Direct: +64 9 357 9098
Mobile: +64 21 986 744

Te Aopare Dewes
Hoa Rangapū (Partner), Te Waka Ture

Email: teaopare.dewes@chapmantripp.com
Direct: +64 9 358 9839
Mobile: +64 27 209 0810

Phillippa Wilkie
Special Counsel (Poutoko), Private Client

Email: phillippa.wilkie@chapmantripp.com
Direct: +64 9 357 9275
Mobile: +64 21 322 137

Eru Kapa-Kingi
Rōia (Solicitor), Te Waka Ture

Email: eru.kapa-kingi@chapmantripp.com
Direct: +64 9 358 8459

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Hei Wāhi – Introduction

1 The extent to which the tino rangatiratanga and kāwanatanga interact and overlap is at the crux of this response to Chapters 2, 7 and 8. Tino rangatiratanga represents the guaranteed preservation of the right of Māori to be the captains of their own waka, while kāwanatanga accepts the state still must play a role in governing both tangata whenua and tangata tiriti. In regards to succession law, this provides Māori with the ability to choose how they manage matters of succession within their own whānau, hapū, or iwi, whether that be through tikanga law or state law.

2 In summary, our key submissions on Chapters 2, 7 and 8 are:

2.1 'taonga tuku iho' (as distinct from 'taonga' generally) ought to be removed from the reach of mainstream succession law, and be governed by tikanga by default, given their cultural significance;

2.2 in respect of items not considered taonga tuku iho, whānau Māori should have the option to elect between tikanga law and state law as the means of settling matters of succession to those items (after a grieving period for the whānau kirimate (immediate whānau of deceased) where appropriate);

2.3 the role of independent pūkenga (experts in tikanga) where tikanga is elected ought to be explored further;

2.4 whāngai and bereaved partners are still owed obligations under tikanga, in accordance with the principle of whanaungatanga; and

2.5 automatic provisions generally will not accord tikanga as they do not provide space to achieve balance through kōrero (discussion).

3 We also agree with the submissions of Te Hunga Rōia Māori o Aotearoa in relation to the exclusion of whenua Māori from review; expanding the jurisdiction of the Māori Land Court in dispute resolution; and alternative dispute resolution processes.

4 Our key submissions on the other Chapters are:

4.1 Adult children should not be able to make claims for recognition of their place in the family. Family provision claims should be able to be made by surviving spouses, children under the age of 20, disabled children of any age if they have financial need and other persons who were financially reliant on the deceased;

4.2 All potential contribution claims should be brought together in the one statute so that there will no longer be a menu of claims in contract, constructive trust, estoppel, unjust enrichment, quantum meruit and for a testamentary promise;

4.3 Our preference for the intestacy waterfall is a modification of your Option One that aims to treat all children of the deceased equally rather than enable children of one relationship to benefit twice – once on the death of the deceased and a second time on the death of the survivor. However we consider that this waterfall should be consistent with the rules for family

provision where (we suggest) adult children without financial need should not be able to claim. Intestacy should equally only benefit dependant children;

4.4 Individuals should have freedom to deal with their property during their lifetime as they see fit, subject to the existing provisions in the Property (Relationships) Act 1976 (PRA). We consider that adding further clawback mechanisms would be significant and unjustified restrictions on an individual's property rights;

4.5 We consider that partners should be free to contract out of the family provision legislation using the same formalities as exist for agreements that contract out of the PRA;

4.6 Other parties should be free to contract out, negotiate and settle without increased procedural formalities to encourage out of court settlements, improve efficiency and keep the costs low. In our experience settlement agreements are heavily negotiated from all corners;

4.7 We support an express statutory endorsement of out of court settlement agreements;

4.8 We support the facility to appoint a representative for an individual who lacks capacity but consider that an enduring power of attorney for property should be adequate representation for a person who has lost mental capacity;

4.9 We do not consider that the court should need to approve settlement arrangements where a person who lacks capacity is adequately represented in the negotiations;

4.10 We consider that parties should be able to opt out of pre-action procedures where all individuals involved have capacity; and

4.11 We support all matters of succession being governed by the new choice of law rules and the habitual residence test.

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Part 1: Succession Law for Contemporary Aotearoa New Zealand

Chapter 1: Developing good succession law

What are your views on the criteria we have identified that made good succession law?

5 We agree that your criteria covers the appropriate base for making good succession law.

Do you agree with our proposal for a single statute that governs claims against estates?

6 Yes. We think that the current 'menu of options' lacks cohesion and encourages claimants to take a scattergun approach and 'try for everything'. This would be improved by having them all in one statute, with the appropriate carve outs for those who choose to apply tikanga and exclusions for items that have cultural relevance and value (see further in our responses on Chapters 2 and 7).

Chapter 2: Te Ao Māori and succession

In your view, what is the role of the Treaty for this review? Do you agree with our approach? If not, why?

7 Te Tiriti o Waitangi (Te Tiriti) is integral to this review. The Commission has appropriately set out Te Tiriti as the guiding framework that outlines the interaction between tino rangatiratanga and kāwanatanga in Aotearoa. We also add that Te Tiriti is the interface between Te Ao Māori and the mainstream, which links to the Commission's duty to take into account Te Ao Māori when making recommendations.[1] We therefore agree with the Commission's approach in implementing the relevant text of Te Tiriti and its aspirations throughout this review.

8 We also agree with what the Commission has outlined as some of the key Treaty principles to guide this review, namely, partnership, active protection, and options.[2] These principles are useful in ensuring the review has a tangible outcome focus, as opposed to a proposed framework that references Te Tiriti and its principles, but does not provide for substantive tikanga-based succession outcomes.

Do you think the application of state law to succession is a problem?

9 The application of state law to succession is not problematic in and of itself. It may be that in certain circumstances state law is the most appropriate option. It should not however, be the only option. Māori should have the right to decide the means by which succession issues are resolved, whether that is through tikanga or state law.

10 Where taonga tuku iho are involved, however, state law should step aside and tikanga processes should assume authority (expanded on further below).

11 We also note here that recent jurisprudence demonstrates that it is no longer necessary to consider state law and tikanga as distinct and mutually exclusive

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1 Law Commission Act 1985, s 5(2)(a).

2 See pp 28-30 of the Paper.

systems of law. The momentum of recent cases and academic commentary confirms that tikanga Māori is an integral part of the law of Aotearoa, and that values such as mana, whakapapa and whanaungatanga should inform the development of the law.[3]

Have we appropriately identified the tikanga principles relevant to succession? Are there any we have misunderstood or not included?

12 We agree that the identified tikanga principles are relevant to succession. We emphasise in particular the importance of whanaungatanga in tikanga-based succession processes which acknowledges the familial and relational ties that exist in Te Ao Māori. A sound understanding of this concept is crucial for meaningful reform of succession law.

13 Whanaungatanga, most simply, is the rights, responsibilities, and expected mode of behaviour that accompanies relationships. While these are usually kinship relationships, the term has been widened by modern Māori to include kin-like reciprocal relationships among people generally.[4]

14 It is important to note that understandings of the way in which these tikanga principles manifest in practice will differ between rohe, iwi and hapū, and so the proposed reforms should provide for deference to the tikanga-based practice of particular whānau, hapū and iwi. If there is a dispute as to the meaning of a particular tikanga that should guide a succession issue, then the proposed reforms should anticipate the ability to receive independent advice on the matter from a pūkenga (explained further below).

Should tikanga govern succession for Māori?

15 Yes. At least as a starting point, tikanga processes should always be an option regarding succession law for Maori. This approach recognises that not all whānau Māori may be familiar with tikanga Māori due to loss of culture, but, that there are also other whānau that govern their lives through tikanga Māori wherever possible.

16 The extent to which tikanga Māori applies therefore should be left to whānau to determine. Māori have tino rangatiratanga which should allow Māori to decide how to engage with succession law. We consider that tikanga should not be mandated generally or the basis of a prescriptive process that governs succession, but instead be an option recognised and affirmed by state law.

17 In any case, we refer to our comments above about the increasing recognition of tikanga Māori as part of the law of Aotearoa, and would expect to see a reclamation of Māori culture within whānau progressing alongside these bi-legal developments.

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[3] *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733; *Ngāti Whātua Ōrākei Trust v Attorney-General & Ors* [2018] NZSC 84, [2019] 1 NZLR 116; *Peter Hugh McGregor Ellis v R* [2020] NZSC 137; *Ngawaka v Ngati Rehua-Ngatiwai Ki Aotea Trust Board* [2021] NZHC 291; *Re Edwards (No 2)* [2021] NZHC 1025. See also N Coates "The Recognition of Tikanga in the Common Law of New Zealand" [2015] NZ L Rev 1; J Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1; J Ruru "First Laws: Tikanga Māori in/and the Law" (2018) 49 VUWLR 211.

[4] Richard Benton, Alex Frame, Paul Meredith *Te Mātāpunenga: a Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 524.

If so, how would you like this to happen in practice?

18 Tikanga is derived from a segment of the wider pool of mātauranga Māori (the accumulated knowledge and intellectual property of Māori acquired over generations), and therefore can be interpreted and modified across generations.[5] These modifications would likely be influenced by changes in social circumstances, and this adaptability must be kept in mind as part of this review.

19 We agree that it is more suitable for certain assets regarded as taonga tuku iho to automatically be removed from the reach of state law because they are so culturally significant. This is explained further below under the responses to Chapter 7.

20 However, in respect of other general assets affected by succession law, and in acknowledging tino rangatiratanga, whānau Māori should be able to elect between either a tikanga-based process or a state law process at the time of a death or in a will. We also acknowledge that in any case a grieving period should be provided to the whānau kirimate before having to make such an election in the case of a mate (death).

21 We provide more detail on such processes in the following.

What would the role of state law be?

22 Tikanga Māori is a legal system which has existed for centuries. Its predominance in Aotearoa has of course been superseded by colonisation and state law, however, as mentioned above, tikanga lives on and is finding its feet again as law in Aotearoa.

23 State law could never create tikanga, and nor should it. However, because state law is the dominant legal system, it of course influences if and how tikanga Māori survives into the future. Therefore, the role of state law now is to give space and authority to tikanga Māori to operate meaningfully within the lives of whānau Māori who wish to reclaim their tikanga.

[5] Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 15-16.

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Part 2: Claims and Entitlements

Chapter 3: Relationship property entitlements

Do you agree with the issues we have identified?

24 Yes and in particular the concept that on death the survivor of a couple should be no worse off than if they had separated.

What are your views on the proposals for reform?

25 We are happy with your suggestions for reform, subject to our comments below. In particular we agree with the top up approach described in paragraph 3.35.

26 We presume that if a partner chose Option A that would take into account any contracting out agreement that the partners have entered into.

27 We suggest, in relation to spouses who have separated prior to the death of one of them, that a more comprehensive test is applied to determine whether the survivor is eligible for a relationship property claim than simply the passage of time (two years). If for example the couple are already living separate lives and have separated their assets then the survivor should not have an opportunity to make a further claim for two years after the death of the deceased.

Chapter 4: Family provision claims

Do you agree with the issues we have identified?

28 Yes, in particular we consider that the common law established under this Act has weighed in favour of awards for adult children in reflection of a moral duty owed to them by a deceased parent. This opportunity for adult children with no financial need to destroy a family for a supposed recognition award should be removed.

What are your views on the proposals for reform?

29 In our view, claims for family provision should only be made for financial necessity and reliance.

30 We agree with Options One and Two. In relation to Option Two, family provision awards for children, we suggest that the age of a child for this purpose be 20 years, in recognition of the fact that children of that age are unlikely to be financially independent from their family.

31 We also agree with Option Three – that disabled children may make claims against their parent's estates for provision where they do not have sufficient resources to maintain a reasonable standard of living, regardless of their age. However, we think that this category should be broader to include any persons who are financially reliant on the deceased, for example, a disabled sibling or elderly parent.

32 We reject Option Four – we do not think that adult children should be able to make claims against their parents' estates for recognition of their position in the family. We do not see any place for recognition awards in a just succession law. We consider that an adult child receiving a court-awarded amount out of an estate is somewhat of a pyric victory – it does not amount to recognition of that child by the deceased parent. Further, in the ordinary course the litigation involved damages the relationship between the surviving family members irreparably. If one of the criteria for making good succession law is to promote positive outcomes for family and whānau, then minimising litigation to situations of family provision (i.e. where there is financial need) furthers that criteria.

33 We agree that grandchildren and parents per se should not be eligible to claim for family provision as they may currently, however we consider there should be a category for dependent relatives as set out below.

Do you have any other suggestions for reform?

34 We consider that there could be a category of person who may make a claim, being a person that is financially reliant on the deceased, for example, an incapacitated adult sibling, elderly parent or grandchild that is being raised as if a child. This would recognise that the fabric of households has changed and the cost of living is greater. To the latter point, it is now apparent in some parts of New Zealand that government paid welfare is insufficient for an individual to pay rent food and standard living costs, therefore in many situations extended family share accommodation with non-nuclear family. We see this as an extension of Option 3.

Chapter 5: Contribution claims

What are your views on the proposals for reform?

35 We consider that Option One is the right proposal for reform and not Option Two. There should be a single cause of action and set of criteria for a claim that someone has contributed to the life of the deceased and deserves compensation for that. We like the simplicity and clarity of the solution drafted.

Chapter 6: Intestacy entitlements

What are your views on the proposals for reform?

36 We consider that the new proposals should remain in the Administration Act so that administering an estate and dealing with intestacy are in one place. The new Act is the place to go for people who see to challenge what has been given to them in a will. That is Option Two.

37 In relation to whāngai we agree with Option Two, on the understanding that different hapū and whānau take different approaches to the question of whether whāngai are descendants. Please see our response to Chapter 8 for more detail.

38 In relation to children born from posthumous reproduction we agree with Option One – retain the existing law excluding children from posthumous reproduction.

39 We agree that the prescribed amount should be repealed.

40 We agree that where there is a partner and no descendants the surviving partner should take the entirety of the estate.

41 Where the deceased leaves behind a partner and descendants our suggestion is a modification of your Option One. We are happy with the concept that if all of the children are of the relationship then the partner receives the entire estate. However, if there are children of more than one relationship we consider the split should be as follows:

41.1 The spouse takes the personal chattels

41.2 The estate is divided into fractions depending on the total number of children plus the partner (i.e. partner plus five children from two relationships, two from previous relationship and three from current, is divided into sixths)

41.3 The partner takes the fraction that represents the partner's fraction plus the fractions of all his or her children (i.e. four sixths); and

41.4 The children of the other relationship take their own fractions (one sixth each).

42 This would deal with the otherwise unfairness of children from one different parent being treated differently. It treats the surviving spouse as the conduit for his or her children. Although there is a risk of a parent being an unreliable conduit we think the unfairness of the children from the current relationship benefitting twice, on the death of both parents, warrants the conduit option.

43 We note however that if the descendants are adults the rules on intestacy will be inconsistent with the rules for family provision – it would be unfortunate to have adult children of an earlier marriage taking a share of the estate on intestacy but with no ability to make a claim if a will existed. Our preference would be for consistency between the two fact scenarios which would mean that only dependent children benefit on an intestacy.

44 In terms of the rules for distributions to grandparents, aunts and uncles, we agree with Option One, retaining the existing law splitting the estate equally between the paternal and maternal grandparents and then aunts and uncles.

45 Please see our response to Chapter 8 where we say that there should be a facility for a family to ask for an intestate estate to be dealt with in accordance with tikanga Māori and not the default provisions that currently sit in the Administration Act.

Chapter 7: Succession and taonga

Is taonga an appropriate description of items that might be excluded from general succession law? If not, is there a more appropriate kupu Māori to use?

46 The term 'taonga' on its own is likely to be too broad to cover the property envisaged here.

47 Taonga can include most things of value, whether tangible or intangible. For example, taonga may describe te reo Māori, as well as a pounamu necklace. Taonga in modern times may even be used to describe things of value which likely would not be viewed as part of Māori culture. For example, anything gifted such as a watch or a ring could fairly be described as a taonga. The breadth of the term 'taonga' might therefore present difficulties in demarcating what should and should not fall within the jurisdiction of general succession law. However, there are other te reo terms available that may be more appropriate and more likely to achieve a more targeted removal of items of cultural significance from general succession law.

48 Another term might be a modification of the word taonga itself – using instead the term 'taonga tuku iho'. 'Tuku' here means to give, and 'iho' denotes a downward trajectory. 'Taonga tuku iho' therefore describes things of value which are handed down through generations (similar to the Western idea of an heirloom) and therefore is specific to things which are worth maintaining due their own cultural relevance to Te Ao Māori.

49 Another term is 'manatunga'. Similarly, a manatunga is a prized possession or valuable object handed down generationally, also akin to an heirloom. Though manatunga overlaps with 'taonga' in that they are both things that have value, manatunga seems to be specific to things which have been or will be intentionally passed on through generations. Generic taonga are not necessarily subject to this same practice.

50 Manatunga and taonga tuku iho can both describe the intangible, however, these terms are useful in that they limit the potential pool to things which are bound up in a philosophy that makes them culturally pertinent. Moreover, these terms are imbued with a history and expectation of intergenerational transmission, which in our view justifies the removal of such items from the scope of general succession law – that is, to ensure taonga tuku iho/manatunga are not at risk of being removed from the rightful custody of whānau, hapu and/or iwi.

Should taonga be excluded from general succession law?

51 However described, items within whānau, hapū, iwi which are both culturally relevant and valuable, and have been handed down through generations (e.g. a korowai, or a heitiki) ought to be excluded from general succession law by default.

52 The value of such items is not economic, but cultural. Succession law is underpinned by the principle of achieving a balance between testamentary freedom and ensuring people close to the testator are looked after financially once the testator has passed. That general principle is inconsistent on its face with the notion of taonga tuku iho. Rather than items being succeeded to in order to look after the successor, taonga tuku iho are handed down through generations to ensure the items themselves are looked after by the successor. This practice guarantees the mātauranga (knowledge) and tapu (sanctity) associated with the taonga tuku iho are maintained.

53 Therefore, we consider that a legal framework derived from a worldview that contains many inconsistencies with Te Ao Māori should not dictate what happens with items within whānau which are so culturally significant. There is also a risk that decision-makers in the current system of succession will be blind to the context and realities which make taonga tuku iho so special, and thereby fail to administer and manage these items appropriately.

54 To be clear, taonga tuku iho would occupy a special space removed entirely from the reach of state law. Other items within whānau Māori which fall outside the scope of taonga tuku iho would give rise to a right to elect between tikanga or state law. If a whānau wishes to deal with taonga tuku iho in accordance with state law (which we imagine might be rare situation), this would require opting into a state law process (again, after an appropriate grieving period where a mate is involved).

Should taonga be subject to tikanga to determine how it is succeeded to? If so, how should this be given effect?

55 Tikanga Māori and taonga tuku iho are both born out of Te Ao Māori, the latter being a manifestation of the former. Therefore, we agree that the practice of taonga tuku iho is shaped by tikanga Māori.

56 Tikanga Māori and its principles are emulated differently among whānau, whilst still underpinned by the same defining philosophy. Therefore, whānau ought to determine amongst themselves how tikanga Māori can be achieved in respect of their taonga tuku iho through their own practices. This likely already happens within whānau who practice tuku taonga, a process whereby possessors of taonga tuku iho (often kaumātua or elders) call a hui to give their taonga tuku iho to their uri (relatives) to look after before they pass on. There is also the practice of ōhākī, where one openly expresses a sentiment to their whānau before they pass, which

sometimes relates to whom a taonga tuku iho should pass to once the giver of the ōhākī passes (expanded on further below).

57 However, the dominant legal system ought to be prepared for questions of taonga tuku iho to come before it. In such an event, tikanga Māori ought still to influence who will come to look after the taonga tuku iho in question. Ideally, if there is a dispute about whom the carer might be, whānau should be guided through a tikanga-based resolution process to achieve consensus, led by a pūkenga. Failing that, any adjudicative function with regard to taonga tuku iho should also be made by pūkenga.

Should taonga, or some other appropriate kupu, be defined by reference to tikanga Māori? If so, should the relevant tikanga be that of the relevant whānau, hapū or iwi?

58 As above – yes, and yes. Taonga tuku iho is a product of tikanga Māori, and therefore, there is no other appropriate manner of defining this term other than by reference to tikanga Māori. The specific tikanga-based practice of taonga tuku iho employed must also be that determined and used by the relevant whānau, hapū, and iwi, assuming there is such a process among the relevant parties.

59 If there is no such practice, an independent (i.e. not part of the whānau) pūkenga should then be appointed to guide the whānau involved, if they still wish to use tikanga to determine who will be the receiver of the taonga tuku iho in question.[6]

Should taonga, or some other appropriate kupu, be limited to items that are connected to Māori culture?

60 By definition, yes. Items which are taonga tuku iho gain such status by their cultural connection and relevance to Te Ao Māori. For example, a rākau whakapapa handed between generations is adorned with indications of genealogical links to tūpuna (ancestors), which also means it is an item with associated mana and tapu. This rākau whakapapa would be handed down generations to ensure the genealogical ties of a whānau are never forgotten. This is a plain example of taonga tuku iho. Contrast this to a car, for example, though undoubtedly of some value and pragmatic utility, which indeed might be handed down from a parent to a child, is not formally a taonga tuku iho. Why? Because the item does not have an associated tapu or mana which connects it to Te Ao Māori. In other words, it falls outside the relevant cultural reality of Te Ao Māori, and therefore becomes irrelevant to tikanga Māori.

61 There may well be items not connected to Māori culture passed on generationally which have sentimental value and therefore one could argue they are at least similar to taonga tuku iho. However, such items could simply be described as heirlooms and could be covered by state law without reference to tikanga Māori. In any case, we consider non-Māori items of significance should not be confused with taonga tuku iho and tikanga Māori. To do so would run the risk of those ignorant to tikanga co-opting a regime that treats taonga tuku iho differently to generic family heirlooms, which would be entirely inappropriate.

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[6] See for example s 99, Marine and Coastal Area (Takutai Moana) Act 2011; and s 32, Te Ture Whenua Maori Act 1993 – both sections provide for the appointment of pūkenga and members with expertise in tikanga.

Chapter 8: Weaving new law

What value is placed on testamentary freedom in tikanga, and how might this be appropriately recognised in state law?

62 The idea of testamentary freedom as an overriding principle would not sit comfortably in the paradigms of tikanga Māori. Though mana tangata (personal authority) is important, it must be balanced against expectations derived through whakapapa under the practice of whanaungatanga. There is also the concept of utu, which gives rise to obligations of reciprocity.

63 There is a maxim in Te Ao Māori, "he tapu tō te kupu", meaning words carry with them sanctity and therefore importance. Thus, an ōhākī as a collection of words expressed by an individual ought to hold weight. However, this maxim also accentuates the importance of conversation and robust discussion to achieve an optimal outcome. So, again, there must be a balance between individual desires and whakapapa-based expectations in respect of the collective to which an individual belongs (i.e. whānau, hapū, iwi).

64 State law must be aware of this requisite balance between individual choice and collective responsibility to achieve a state of tika first and foremost. Overriding principles and automatic provisions skip out this balancing process, which does not abide tikanga Māori. Wānanga (discussion) processes should then be provided for to achieve this balance.

Should ōhākī be recognised in state law as a will or an alternative but equally valid form of testamentary disposition? What would be appropriate requirements to evidence ōhākī?

65 Ōhākī should be recognised as ōhākī.

66 The tikanga of ōhākī has its own mana and tapu, which existed for centuries before the arrival of state law in Aotearoa, and this needs to be recognised up-front. The mana and tapu of ōhākī need not be equated to a will to continue to exist.

67 Some might also view ōhākī as a more authoritative form of testamentary disposition than a will, again, 'he tapu tō te kupu'. However, state law is not presently equipped to acknowledge the significance of ōhākī, yet has the power to diminish their effect. Therefore, it is the state law's view of ōhākī that needs to be remedied through reform.

68 Whether circumstances deem the tikanga of ōhākī appropriate should be guided by independent pūkenga on a case-by-case basis.

Do written wills also provide a valuable opportunity for Māori to express testamentary freedom?

69 Yes, and many Māori may opt to write a will to express testamentary freedom (though statistically, Māori are less likely to write wills than non-Māori[7]). However, the relevant whānau members should still be able to challenge the substance of a will on the basis of tikanga Māori through mechanisms of state law.

[7] See Parts 8.16-8.17 of Issues Paper.

How does tikanga respond to a situation where someone dies without expressing any testamentary wishes?

70 Mā te whānau e whakatau – the relevant whānau ought to discuss and come to a consensus as to how the estate should be divided in the absence of any ōhāki or other expression of testamentary wishes. If there is no consensus, a tikanga-based resolution process, guided by a pūkenga, would take place. Other interested parties (kin and non-kin), where relevant, would also be provided an opportunity to express their whakaaro (thoughts) and participate in the process.

Does a default system of rules for the distribution of property when a person dies intestate accord with tikanga?

71 No. Tikanga lives through people and actions, not through a default system of rules. Each intestate death ought to be treated in accordance with its own circumstances, and whānau should be given the first opportunity to come to a consensus on how an estate is divided (as above).

Do the current rules or one or more of our reform proposals set out in Chapter 6 reflect tikanga and/or what Māori think about who should receive their estate if they die without a will?

72 Not entirely. The general proposition that the intestacy regime should be designed to replicate what most intestate people would have done had they made a will does not fully align with tikanga because it gives supremacy to the individual's wishes, without taking into account how to balance those wishes with obligations to the collective derived from whakapapa and whanaungatanga – values that guide whānau by imposing a collective lens, which are often determinative in Te Ao Māori.

73 Also, the option to exclude whāngai does not reflect tikanga – provision for whāngai ought to be determined by relevant whānau members in accordance with their own tikanga-based protocols, but there should be an expectation that at least some provision is given. Excluding whāngai entirely does not accord with the tikanga obligations of whanaungatanga (this is expanded on below in light of intestacy and family provision).

Is there merit in a statutory approach that allows Māori to request that an intestate estate be distributed in accordance with tikanga?

74 Yes, there is merit in this position. As stated above, whānau should be able to elect between either state law or tikanga Māori when managing matters of succession.

75 The reality is that not all whānau may be prepared to use tikanga as a means of resolution and may wish to use the state law system instead, which is understandable. Therefore, tikanga Māori as a default position for the entire estate may not be appropriate (with exception to taonga tuku iho, given their cultural significance).

76 For clarity, we agree that the proposed reforms should of course be consistent with Te Tiriti and its principles, while also allowing the flexibility for bereaved whānau to exercise tino rangatiratanga by choosing not to interact with a black letter succession framework.

Should whāngai be eligible to succeed in an intestacy regime? Should eligibility be determined in accordance with the tikanga of the relevant whānau or hapū?

77 Whāngai should be eligible to succeed in an intestacy. Whāngai are more often than not part of the whānau, and therefore have a shared whakapapa giving rise to clear whanaungatanga obligations owed to them. Whāngai from outside of a whānau are less likely, but can happen. In those situations, there is still a commitment to care for a child, in accordance with the principles of manaakitanga and aroha, which also gives rise to obligations of whanaungatanga (in the modern, wider, non-kin sense). Therefore, not only should whāngai be eligible to succeed under tikanga, but there would be an expectation through tikanga that they are provided for to some extent.

78 Interested whānau members should be able to decide the extent of whāngai provision in accordance with their own tikanga-based practices. Guidance from an independent pūkenga should also be provided where appropriate and possible.

79 The level of obligations to children who have been the subject of whāngai practice is likely to differ among different whānau and iwi, however, there ought to be at least some provision for whāngai. An overall rule excluding whāngai in the first instance would not be consistent with tikanga.

80 A middle-ground position where there is contention could be that a whāngai is granted a life interest in property, reverting back to the whānau once that interest expires. This was indeed a common practice in traditional Māori society.[8]

Should Māori customary marriage be recognised in state law separately from meeting the requirements of a de facto relationship?

81 State law must recognise the equal authority of a Māori customary marriage in comparison to that of a de facto relationship.

Do obligations sourced from tikanga exist from a deceased partner to a surviving partner in relation to property and, if so, how might they be expressed?

82 Yes, in fact there are some practices of tikanga which would dictate that the surviving partner would receive most, if not all, the relevant property, especially if it were a relationship of rangatiratanga (high-ranking). For example, Sir Apirana Ngata's daughter (of Ngāti Porou) married into the iwi of Tūhoe, and upon her husband's passing, it was the expectation through tikanga that Sir Apirana's daughter would inherit all of his whenua (land), though she decided to gift it back to his whānau and to this day a strong connection remains between those peoples.[9]

83 Such tikanga is less pertinent to modern contexts, and is further challenged where Māori-non Māori relationships are formed. What remains is the expectation that obligations to a surviving partner should and do exist.

84 Of course, these obligations need to be balanced with wider whanaungatanga obligations and responsibilities (kin and non-kin alike). The expression of these obligations would be determined through a consensus by the whānau (including non-descendants) who hold relevant interests in the property in question, guided by an independent pūkenga.

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[8] Richard Benton, Alex Frame, Paul Meredith Te Mātāpunenga: a Compendium of References to the Concepts and Institutions of Māori Customary Law (Victoria University Press, Wellington, 2013) at 526.

[9] This is an historical kōrero from Ngāi Tūhoe which explains how the wharenui of Ōwhakatoro Marae, in Rūātoki, came to be named "Tā Apirana Turupa Ngata", in honour of this event.

Does the presumption of equal sharing of relationship property in the PRA accord with tikanga?

85 The presumption is inconsistent with tikanga to the extent it does not necessitate kōrero (dialogue). Automatic provisions or presumptions are opposite to tikanga as there is no balancing of the relevant circumstances involved.

86 If equal provision is a result of kōrero between interested whānau members, then that would be consistent with tikanga. However, this position is not likely and should not be imposed upon relevant parties.

If not, how might tikanga respond to the division of property between partners when one has died?

87 Again, through kōrero between interested whānau members, guided by an independent pūkenga. This could be a process provided for through state law, but ought to be conducted in accordance with tikanga.

88 There should in these cases be an expectation that the widowed partner is looked after. Similar to the situation with whāngai, there is still a commitment which forms obligations under whanaungatanga (in the wider non-kin sense). This too may be achieved through a life interest granted to the partner, reverting back to the whānau once expired.

Are our reform options in relation to sections 18 and 19 of the Wills Act 2007 problematic for Māori customary marriages?

89 If a person who has made a will enters into a Māori customary marriage (presumably recognised under state law in the same way as a marriage or de facto relationship), an automatic revocation of that person's will under s 18 would not accord with tikanga Māori. Again, this is because there is no kōrero involved. Therefore, removing s 18 is not likely to be problematic.

90 Section 19 does not accord tikanga Māori for that same reason. Also, tikanga Māori may still deem obligations to a formal partner appropriate, especially if children have come from that former relationship.

What does tikanga have to say about the rights of whānau members to challenge a deceased's testamentary wishes?

91 Challenging the wishes of the deceased would be a natural part of kōrero amongst interested whānau members, and whānau members would have every right to speak their mind. Whanaungatanga does not require everyone agreeing with each other all the time, indeed, that would be an unreasonable expectation. However, as a principle, it encourages kōrero and a balanced outcome. There would need to be an eventual agreement between the whānau involved as to how such challenges should be addressed and disputes resolved.

Are our preliminary views on family provision (expressed in Chapter 4) consistent with tikanga? If so, what factors are relevant in determining the outcome of a family provision claim? If not, what would an approach to family provision based on tikanga look like?

92 As above, the position that separated partners ought to be able to claim family provision is not inconsistent with tikanga (though a strict timeframe of two years is less consistent, as it would depend more on the wider circumstances and any obligations derived under whanaungatanga). Specific factors ought also to be taken

into account, such as whether there are children from the relationship, and the relevant contributions giving rise to utu (expectation of reciprocation).

93 An age limit for a family provision claim for children may not necessarily clash with tikanga. However, it may not pay sufficient attention to the wider and unique circumstances of each case. Also, thought should be given to mokopuna (grandchildren) obligations in the event there is no valid child claim, as the mokopuna-tupuna relationship in tikanga Māori is very important (and was usually the framework within which whāngai was traditionally practiced). This may also be a specific factor to take into account.

How should whāngai be treated in this context?

94 The Commission's view that, for the purpose of family provision and recognition awards, a child of the deceased would include children for whom the deceased had assumed, in an enduring way, the responsibilities of a parent, is consistent with tikanga in respect of whāngai. Whāngai ought to be included and provided for to some extent by the deceased's estate, in accordance with whanaungatanga.

What role might the concepts of utu play in understanding how contributions to a deceased or their estate should be treated?

95 Utu would play a significant role in determining how contributions to an estate should be treated. There is an expectation through tikanga that actions are responded to in kind to maintain balance, whether between kin or non-kin.

96 Through tikanga, one could claim a rightful stake in an estate if they had acted in a manner which helped or benefitted the deceased in a meaningful way (e.g. looking after them in their old age). However, this would not be an automatic right to the estate, again, the principle of utu would be but one (albeit potentially significant, depending on the facts of the case) factor that ought to be taken into account during the kōrero process to resolve how claims to an estate should be treated.

Are there other tikanga concepts that might assist?

97 Tuku ihotanga, as articulated above, is an important concept. This is the philosophy that things (tangible and intangible) of cultural significance and relevance ought to be maintained through intergenerational transmission, in order to inculcate the principles, beliefs, and knowledge systems that define Te Ao Māori within whānau, hapū, and iwi Māori.

98 Whanaungatanga ought also to be thought of in wider sense, encapsulating kin and non-kin relationships. There is a significant whakataukī in te reo which states, "ko te here o te aroha, tē taea te wetewete" – the bond of compassion is unbreakable. Though whakapapa is an important base for whanaungatanga, there are other relationships built on compassion that ought also to carry the same expectations of care and reciprocity.

How might tikanga respond to a situation where someone has contributed significantly to someone who has since died or to their estate?

99 As above in respect of the role of utu, through tikanga, there would be an expectation that such a contribution is paid in turn. However, this would not be automatic. The principle of utu would need to be balanced against other principles

of whakapapa and whanaungatanga in determining the appropriate response and level of reciprocity.

Part 3: Making and resolving claims

Chapter 9: Awards, priorities and anti-avoidance

What are your views on the proposals for reform?

100 We agree with the issues raised and solutions regarding property available to make awards and priorities.

101 Our view on the anti-avoidance mechanisms is that the status quo should remain, in other words the only potential clawback mechanisms would be those in the Property (Relationships) Act, which would move into the new Act. This is Option One.

102 In our view both of the other Options proposed represent significant incursions into the right of an individual to deal with his or her property as he or she chooses, during his or her lifetime. To undermine structuring arrangements that have been carefully considered and planned by a thoughtful testator during his or her lifetime would be egregious. It is many parents' carefully considered wishes that their children not receive property on the death of their parents but rather that property is entrusted to trustees who are bound by fiduciary duties to administer the property for the benefit of the discretionary beneficiaries over their lifetimes. Reasons for this might include:

102.1 that wealth can disincentivise individuals from forging their own path in life;

102.2 some individuals are vulnerable and need protection from others; and

102.3 parents may wish family wealth to be protected from spousal claims.

103 Now that the Trusts Act has substantially clarified the rights of beneficiaries to information and the duties of trustees it has paved the way for beneficiaries to have more visibility of how trustees are carrying out their responsibilities towards them and to engage in dialogue. Trust law provides causes of action and remedies for beneficiaries who consider that trustees have not fulfilled their fiduciary duties towards them.

104 Furthermore, if the number of transmissions by survivorship is roughly equal to the transmissions to executors, Options Two and Three could have the effect of disturbing the plans of half of the landowners who die each year in New Zealand. People purchase land jointly precisely for the reason that they agree that the other should have the whole of the property on the death of the first and it is usually consistent with corresponding debt.

Chapter 10: Use and occupation orders

What are your views on the proposals for reform?

105 The proposals state that occupation orders could be granted in respect of any property of the estate and include any property not in the estate that was jointly owned by the deceased and passed to a third party. An example of this could be where the deceased owned a property with his or her sibling or his or her new (or other) partner. We would want to ensure that when making occupation orders the court takes into account whether the child was living in the accommodation prior to the death of the deceased and also whether the living situation enhances the wellbeing of the child. For example, it would be counterintuitive to grant an occupation order to a surviving partner and children for a home in which a new partner lived.

Do you have any other suggestions for reform?

106 We think that the appropriate place for these provisions is with the Property (Relationships) Act (*PRA*) provisions in the new Act.

Chapter 11: Contracting out and settlement agreements

What are your views on the proposals for reform?

Contracting Out Agreements

107 We are happy with the suggestion that partners can contract out of family provision law as well as the PRA. When we draft contracting out agreements for couples we deal with what is to happen to their property on the death of the first of them. Quite often most of the assets are in trust and there is little reliance on the terms of a will. This would be the right place to also agree that a partner will not make a claim against the executors of the deceased for family provision. We would be happy with the same procedural formalities applying to partners contracting out of family provision as with relationship property agreements.

108 There is also a category of agreement where family members agree not to make a claim in the future, not in the context of a partnership. It is not uncommon for a testator who has made arrangements for the passing of assets during her lifetime to agree with one or more recipients that the assets received by the recipients are in full and final settlement of all entitlements and that the recipients will not make any claims against the estate under any relevant legislation. There are no particular formalities required of such an agreement currently and that freedom should continue.

109 We would want to ensure that any change to the law is only prospective and should have no effect on arrangements and agreements that have already been concluded.

110 We do not consider that the court should be able to revoke any such agreement (for example for serious injustice) other than for ordinary contractual remedies and challenges.

Mutual Wills

111 Although in our view mutual wills are not advisable, if a couple do decide to make them we agree that there should be an agreement in writing agreeing that and appropriate formalities given that it relates to a will. We have seen expensive and unpleasant litigation ensuing in this area.

Settlement Agreements

112 We support Option One – the Act does not provide any procedural safeguards. We consider that parties should be able to settle differences and claims without a set of procedural formalities to abide by, other than the law of contract. Under existing law, if there is a dispute over a will and the parties settle then all of the beneficiaries of the estate need to agree to the departure from the terms of the written will. Invariably all parties would have independent legal advice or at least would be advised by the executors to do so and given sufficient time to obtain it. In some cases we have seen the cost of that advice paid out of the estate to ensure that no beneficiary is prejudiced by not being able to afford independent advice. We consider that this freedom to contract is appropriate and desirable and encourages settlements rather than making them more difficult.

113 It should be clear that if there is a relationship property settlement in the wider settlement agreement that does not impose "contracting out agreement" formalities on the whole settlement agreement, or, if it does, they only apply in relation to the partner.

Chapter 12: Jurisdiction of the courts

No response.

Chapter 13: Resolving disputes in court

No response.

Chapter 14: Resolving disputes out of court

What are your views on the proposals for reform?

Legality of out-of-court resolution

We have advised many parties over the years through family disputes culminating in deeds of settlement without the involvement of the court. These disputes are inherently adversarial, involve historical grudges and are usually harrowing for many of the parties. The parties choose not to involve the court, knowing the time, cost and loss of privacy in a court proceeding. As such we support an express statutory endorsement of out of court resolution in the new Act. It must be clear that it does not prejudice any agreements made before the legislation is passed.

Out-of-court resolution for minors, etc

We support the proposal for the court to appoint a representative for beneficiaries without capacity or who are unascertained and the proposal that that representative can then agree to any settlement reached. However we do not see the need for the court to need to approve any settlement reached or to vary or set aside any such agreement. We consider that the involvement of the representative is sufficient protection for the beneficiaries lacking capacity.

We also consider that where a person who lacks capacity has an enduring power of attorney for property, that or those individuals should be able to act as the representative of the donor of the power of attorney thereby forgoing the need for an additional representative.

Pre action procedures

We acknowledge that there will be family disputes that would benefit from the imposition of pre-action procedural rules. However, we consider that where there are no minors/unascertained beneficiaries/individuals lacking in capacity, families should be able to opt out of the pre-action procedure if they all agree. If for example there is an arrangement between a mother and daughter under which the daughter agrees not to make a claim against her mother's will, those two individuals should be able to opt out of pre-action procedures.

Chapter 15: Tikanga Māori and resolution of succession disputes

We support the submissions of Te Hunga Rōia Māori o Aotearoa on this Chapter.

Chapter 16: Role of personal representatives

What are your views on the proposals for reform?

We support the duties being imposed on personal representatives to notify surviving spouses and children under the age of 20 (that is the age that we suggest is the cut off in our response to Chapter 4). We agree that it should aid in the efficient progress of administration of an estate and avoid out of time claims. Consistent with our response on Chapter 4 we consider that the notice requirement should extend to disabled adult children or persons who were financially dependent on the deceased.

We are happy with the other suggested reforms.

Chapter 17: Cross-border issues

What are your views on the proposals for reform?

Our overarching comment is that scenarios involving global assets requiring application of choice of law rules are complex and would benefit from clear rules in one piece of legislation.

Choice of law rules based on personal connection

We support the suggestion of habitual residence as the appropriate concept for choice of law, especially if that concept has international recognition. However, increasingly, people do have a residence and life in more than one jurisdiction so there would need to be a comprehensive test to determine which is dominant.

Choice of law rules

We support Option Two, that all matters of succession would be governed by new choice of law rules. We will be interested to see how this looks on paper, especially if it does not preclude rules of the lex situs continuing to apply to the administration of estates as indicated in paragraph 17.26 of the Issues Paper. Does this mean that a testator could still make a will in Switzerland dealing with Swiss-based immovable property and another in New Zealand to deal with all other property? And if so, and if a partner in New Zealand had a relationship property claim on death would that be in relation to property of the relationship outside of New Zealand as well as within New Zealand?

We agree that the applicable law for determining capacity to make a will would be the law of the deceased's habitual residence at the time of making the will and in respect of taking under a will would be the date of death of the testator.

Foreign law relationship property agreements

We agree that the current law is confusing and does not support a couple's right to choose which law applies to them. In particular we support the changes to the PRA so that partners can agree, in an agreement that meets the requisite formalities, that a law other than New Zealand law should apply to them on divorce (and death, as proposed) and/or an agreement governed by that other law (the latter being subject to the court's existing ability to ignore it if it goes against public policy). This would provide some certainty for families that live in more than one jurisdiction and have global assets. It also discourages jurisdiction shopping in relationship property disputes.

Moçambique rule

We agree that it makes sense to confirm that the Moçambique rule does not apply to claims under the new Act if the distinction between movable and immovable property is removed.

Do you have any other suggestions for reform?

We have created an example that we would like to ensure can be resolved clearly under the new legislation:

A European family (mother, father, two minor children) has been habitually resident in New Zealand for 5 years and intends to stay here indefinitely. The father owns their home and part of a business in their 'home country'. The father also owns their family home in New Zealand. He has a will in their 'home country' but not in New Zealand. If he were to die and he was habitually resident in New Zealand we would hope that his wife could make a claim under the PRA elements of the new Act choosing either Option A (applying the PRA) or Option B (applying the European will), depending on the outcome, and perhaps the family provision elements, if she had not been provided for adequately.

Chapter 18: Other reform issues

What are your views on the proposals for reform?

The need for education

We support the need for education about how the law operates in terms of making a will and when a family member dies. Information provided on websites such as the Ministry of Justice website is useful and accessible for people wanting to understand their rights on separation and would also be a good place for information about the new Act.

Sections 18 and 19 of the Wills Act

We agree that these issues need to be dealt with, in particular due to the fact that the provisions ignore de facto relationships.

We agree that section 18 of the Wills Act should be repealed.

We agree that section 19 should apply to all relationship types. We support a uniform definition of de facto relationship being two people who "live together as a couple".

We disagree with the time frame for revocation of elements of a will (in section 19(3) of the Wills Act) two years following a break up of a relationship. We would suggest that as soon as a couple has permanently separated then any provisions under a will where one benefits the other should terminate.

We support repealing section 203 of the Social Security Act 2018.


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