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Strict adherence must be made to name suppression orders and provisions in the Family Courts Act 1980, ss 11B–11D, and the Children, Young Persons, and Their Families Act 1989, ss 437A–438.

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(2021) 10 NZFLJ 101

Bad law makes hard cases — the case for repealing or limiting the Family Protection Act 1955

William Porter*

Introduction

In 1955, Sidney Holland, the leader of the first National Government, was Prime Minister of New Zealand. John Kennedy was still the junior senator from Massachusetts. It had been only 10 years since the end of the Second World War. It was also the year that the Family Protection Act 1955 (the FPA or the Act) was enacted, a law that is still commonly litigated over nearly 70 years later. Given its age, it is timely for the New Zealand Law Commission to have recently released an *Issues Paper* as part of its review on the laws of succession.[1] I will comment on this *Issues Paper* where relevant below.

The FPA provides that family members of a deceased may apply to court for an order that provision be made for them from the estate. The court has a discretion to make an award if it is satisfied that the deceased's will does not make adequate provision for the proper maintenance and support of the applicant.

In recent times, the vast majority of claims under the FPA have involved adult children, many of whom have not been in financial need.[2] It is these cases which primarily motivate this article.

The principles underpinning the FPA no longer reflect New Zealand society, perhaps unsurprisingly, given the passage of time since it was enacted. Its application is uncertain and haphazard. The time has come for Parliament to repeal or significantly reduce the scope of the Act.

This article makes three arguments in support of this proposition:

1. The FPA is out of step with societal values about testamentary freedom.
2. The broad discretion given to the court means the application of the FPA is unacceptably uncertain, leading to prolonged, costly and often bitter litigation.
3. The application of the FPA is arbitrary, given that it only applies to property within the deceased's estate upon death.

The article begins by giving a brief overview of the history of the FPA, both legislatively and how the law has been interpreted by the courts. It then explains the relevant statutory provisions and the current approach to the interpretation of the Act. Finally, the article expands on the three arguments referred to above. It concludes that the case for repealing or significantly reducing the scope of the FPA is overwhelming.

The Family Protection Act 1955

A brief history

It is useful to begin with a brief history of the FPA. The first iteration of the Act, the Testator's Family Maintenance Act 1900, was designed to prevent testators from leaving their estates to strangers, making their dependents — at that time, widows and children — reliant on the charity of the state. This Act was more conservative than two earlier Bills, introduced by Sir Robert Stout, which would have introduced a fixed entitlement for surviving spouses and children. Those Bills were met with strong opposition on the grounds that they interfered too greatly with testamentary freedom.[3]

Initially, the Testator's Family Maintenance Act was interpreted conservatively in line with Parliament's purpose.[4] In 1901, Edwards J expressed the role of the courts as follows:[5]

> The Legislature has instructed to the Court the duty of seeing that a testator does not sin in his grave by leaving those whom nature has made dependent upon him unprovided - for; and this duty is properly discharged by providing in the first place for those who were dependent upon the testator, and to whom the law gave rights against him, in his lifetime.

The reference to "rights against him, in his lifetime" was to the Destitute Persons Act 1894, which created an obligation for relatives to maintain — that is, to lodge, feed, clothe and teach — destitute persons. Edwards J went on:[6]

> Adult children capable of supporting themselves may come within the statute of 1900. As to this I express no opinion. It would, however, I think, require a very strong case to justify the Court in making an order under that statute in favour of such a child overriding the will of the testator.

The conservative approach did not last long. The roots of a more liberal application can be traced to the 1909 case of *Allardice v Allardice*, where Edwards J (now sitting in the Court of Appeal) introduced the idea of a "moral duty":[7]

> It is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be.

The Testator's Family Maintenance Act was amended from time to time, extending its application to cases of intestacy and to other classes of persons, such as adopted children.

In 1955, the FPA was passed to make certain other changes, though it is evident that Parliament did not intend to fundamentally change the law.[8] The changes included:

- further extending the benefit of the Act to other classes, principally children and parents that were being maintained by the deceased;

- providing for the establishment of class or group funds;
- providing protection for administrators who, in good faith, made distributions under a will; and
- expressly allowing the court to consider evidence of the testator's reasoning.

The provisions of the Act

Turning then to the provisions themselves, the operative provision is in s 4(1), which provides:

> **4 Claims against estate of deceased person for maintenance**
>
> (1) If any person (referred to in this Act as the deceased) dies, whether testate or intestate, and in terms of his or her will or as a result of his or her intestacy adequate provision is not available from his or her estate for the proper maintenance and support of the persons by whom or on whose behalf application may be made under this Act, the court may, at its discretion on application so made, order that any provision the court thinks fit be made out of the deceased's estate for all or any of those persons.

The only other provision that sheds light on how s 4 should be applied is s 11, which says that "the court may have regard to the deceased's reasons, so far as they are ascertainable, for making the dispositions made by his will".

Section 3 sets out the persons that are entitled to make a claim. This includes the spouse or civil union partner, a de facto partner who was living in a de facto relationship with the deceased at the time of death, children and stepchildren, and grandchildren. Sections 3(1)(d), 3(1A) and 4A place additional jurisdictional requirements on stepchildren, parents and de facto partners.

The wide discretion of the court in deciding matters under the FPA is underscored by s 5. That section provides:

> **5 Terms of order**
>
> (1) The court may attach such conditions to any order under this Act as it thinks fit or may refuse to make such an order in favour of any person whose character or conduct is or has been such as in the opinion of the court to disentitle him to the benefit of such an order.
>
> (2) In making any such order the court may, if it thinks fit, order that the provision may consist of a lump sum or a periodical or other payment.

Continued judicial expansion

Parliament's gradual extension to the classes of persons eligible under the FPA was accompanied by an increasingly liberal interpretation by the courts. For example, in 1962, the Court of Appeal explicitly abandoned financial necessity as a prerequisite for an award under the FPA.[9] This was reaffirmed by the Court of Appeal in 1985:[10]

> The question of whether the testator was in breach of his moral duty to his daughters as claimants on his bounty must be determined in the light of all the circumstances and against the social attitudes of the day. Mere unfairness is not sufficient and it must be shown that in a broad sense the applicant has need of maintenance and support. But an applicant need not be in necessitous circumstances: the size of the estate and the existence of any other moral claims on the testator's bounty are highly relevant and due regard must be had to ethical and moral considerations, and to contemporary social attitudes as to what should be expected of a wise and just testator in the particular circumstances.

The effect of this liberal application of the FPA was to, in essence, allow courts to rewrite wills. The learned authors of *Brookers Family Law — Family Property* explain:[11]

> The Courts would commonly say that testamentary freedom was the starting point and that they did not have the power to rewrite a will in the interests of fairness, but they would then proceed to override the testators' wishes in almost every case. The size of the estate, competing moral claims and estrangement could reduce the moral duty, but seldom eliminate it altogether. Even a child's disentitling conduct was often explained away as being in part attributable to the deceased parent. A survey of 235 cases decided between 1985 and 1994 found that in 91.5 per cent (215 cases) the deceased parents were held to be in breach of their moral duty towards their children. The vast majority of claimants were not in financially necessitous circumstances and 27.6 per cent had no financial need at all, not even in the broadest sense. But in the absence of disentitling conduct and strong competing moral claims in an estate too small to do justice to all claimants, the parent child relationship justified recognition by more than a nominal award: Re Fowler HC Auckland M1805/91, 5 April 1993. See N Peart, "Awards for children under the Family Protection Act" (1995) BFLJ 224.

A call for conservatism

The courts' expansive approach to deciding cases under the FPA was subject to increasing academic criticism, perhaps best reflected in the Law Commission's 1996 report on the law of succession.[12] That report contained an extensive critique of the FPA, excerpts of which are referred to below.

The Court of Appeal responded to the criticism in its decision in *Williams v Aucutt*. In that case, the testatrix's estate was worth around $920,000.[13] Of that, she left $870,000 to one daughter, Christine, and only $50,000 to the other, Susan. The rationale for the disparity was expressly stated in the will: "… Christine's financial position is much worse than that of … Susan …"[14] Notwithstanding her lack of economic need, Susan argued that she deserved greater provision to recognise that she belongs in the family and the contribution made to her mother's life.[15] The High Court found that there had been a breach of moral duty and awarded Susan 25 per cent of the estate. Christine appealed.

Richardson P (delivering the judgment for the majority) cited, with approval, Cooke J's approach in *Little v Angus*:[16]

> The inquiry is as to whether there has been a breach of moral duty judged by the standards of a wise and just testator or testatrix; and, if so, what is appropriate to remedy that breach. Only to that extent is the will to be disturbed. The size of the estate and any other moral claims on the deceased's bounty are highly relevant. Changing social attitudes must have their influence on the existence and extent of moral duties.

Richardson P went on to explain the applicable test as follows:[17]

> The test is whether adequate provision has been made for the proper maintenance and support of the claimant. "Support" is an additional and wider term than "maintenance". In using the composite expression, and requiring "proper" maintenance and support, the legislation recognises that a broader

> approach is required and the authorities referred to establish that moral and ethical considerations are to be taken into account in determining the scope of the duty. "Support" is used in its wider dictionary sense of "sustaining, providing comfort". A child's path through life is supported not simply by financial provision to meet economic needs and contingencies but also by recognition of belonging to the family and of having been an important part of the overall life of the deceased. Just what provision will constitute proper support in this latter respect is a matter of judgment in all the circumstances of the particular case.

That passage is still regarded as the authoritative statement of the correct approach to deciding FPA claims.[18] The majority reduced Susan's award to an additional $50,000 or around 10 per cent of the total estate.

Blanchard J, delivering a separate but concurring judgment, warned that the FPA was not to be used to re-write the testator's will:[19]

> Nonetheless, there is substance in the criticisms of the way in which Courts sometimes apply the present law. It is to be remembered that the Court is not authorised to rewrite a will merely because it may be perceived as being unfair to a family member, and it is not for a beneficiary to have to justify the share which has been given. Rather, it is for a claimant to establish that he or she has not received adequate provision for proper maintenance and support.
>
> …
>
> It is not for the Court to be generous with the testator's property beyond ordering such provision as is sufficient to repair any breach of moral duty. Beyond that point the testator's wishes should prevail even if the individual Judge might, sitting in the testator's armchair, have seen the matter differently.

In *Auckland City Mission v Brown*, Richardson P, delivering judgment for the Court, reaffirmed the test he had set out in *Williams*.[20] His Honour agreed with Blanchard J's comments in *Williams* that courts had been too willing to refashion wills that were perceived to be unfair.[21]

The courts often express the principles that the Court's powers do not extend to rewriting a will. In *Henry v Henry*, the Court of Appeal explained it as such:[22]

> However, the call for conservatism is not limited to the question of what should be done to remedy a failure to make adequate provision. It applies also to the assessment of the issue as to whether adequate provision has been made. Again a mere perception of unfairness is not a good enough reason to disturb the will: the Court must conclude that the claimant has established that he or she has not received adequate provision for proper maintenance and support. That assessment must be made applying the test enunciated by Richardson P in *Williams v Aucutt* … In making the assessment, however, the Judge must remind him or herself that there is no basis for the Court to override the testamentary freedom of the testator or testatrix if that test is not met, even if it appears to the Judge that a fairer distribution of the estate would have been desirable.

But, as the learned authors of *Family Property* note in the passage set out above, it is not uncommon for the courts to make this point before doing exactly what they warn against. I will return to this below.

The FPA is outdated and no longer reflects New Zealand society

To begin, then, with the critique. The FPA is premised on the idea that a testator has a moral duty to provide for their family. At first, that was based on the idea that a testator should not escape their obligations under the Destitute Persons Act upon death. However, over time, this narrow idea has been transformed by the judiciary into a duty that extends to adult children who are not in any financial need. In that way, the FPA has little or nothing to do with the wrongs its predecessor Acts were designed to remedy.

The cases recognise that the FPA should be interpreted with a view on the societal attitudes of the day — indeed, McCarthy P once said, "the Family Protection Act is a living piece of legislation and our application of it must be governed by the climate of the time".[23]

Throughout the 20th century, that meant gradually expanding the scope of the Act as society became more inclusive. Now, I believe there is a general sentiment that testators should have greater control — if not total control — over their assets upon death. By way of example, in 2017, an unscientific poll conducted by *Stuff* asked: "[D]o parents have a moral duty to provide for their independent, adult kids in their will?" An overwhelming majority of the approximately 11,600 respondents, around 76 per cent, answered no — parents should be able to divide their estate how they want.[24] That aligns with what the Law Commission said in its 1997 report:[25]

> As far as the Commission can determine from the sociological advice and the submissions it has received, there is no clear and uniform expectation that all New Zealanders must leave their property to their adult children either equally or at all.

More recently, a University of Otago study commissioned to assist with the Law Commission's ongoing review of the law of succession found that 80 per cent of respondents either agreed or strongly agreed that a person should be able to leave family members out of their will.[26] The findings were, however, more mixed when respondents were presented with specific scenarios and asked whether a person in that scenario should be able to challenge a will. For example, the Law Commission noted in its recent *Issues Paper* that there were "high levels of support for young or disabled children of the deceased being able to challenge a will".[27] I will return to this point below.

General public support for testamentary freedom should not come as a surprise. Many families no longer fit the traditional mould, which makes traditional notions of inheritance more difficult to apply and more difficult to justify.[28] At the same time, attitudes towards inherited wealth have changed. While they are extreme examples, many celebrate the decisions of Bill and Melinda Gates and Warren Buffett to limit the amount of wealth that passes to subsequent generations.[29]

I do not think it is speculative to say that people generally value the ability to control the distribution of their property upon death as they have in life. As the Law Commission has previously explained:[30]

> A widely held view in our society is that, because in many cases a person has accumulated property through hard work and effort, they deserve to have an absolute right to dispose of their property.

It is likely that many of those that answered "no" in the *Stuff* survey, or agreed that people should be able to leave family members out of a will in the University of Otago study, were of

the view that they were better placed to determine what happened to their property than a Judge.[31] This sentiment was reflected by Taylor J in *Stott v Cook*, a High Court of Australia decision:[32]

> There is, in my opinion, no reason for thinking that justice is better served by the application of abstract principles of fairness than by acceptance of the judgment of a competent testator whose knowledge of the virtues and failings of the members of his family equips him for the responsibility of disposing of his estate in far better measure than can be afforded to a Court by a few pages of affidavits sworn after his death and which only too frequently provide but an incomplete and shallow reflection of family relations and characteristics.

Despite the change in societal views, and the judicial recognition that the FPA ought to be interpreted so as to reflect those views, the expansive judicial approach continues. So while there is authority that testamentary freedom ought to be respected, there is also contrary authority emphasising "the importance of family connection over testamentary intention".[33] The fundamental issue is that the abstract judicial construct of the "moral duty" is now apparently "too deeply embedded to be open to judicial reconsideration now".[34]

In my view, if the courts are not willing to bring the archaic FPA in line with community attitudes, Parliament ought to.

The application of the FPA is uncertain

There is a tension in the case law between the idea that, out of respect for testamentary freedom, the courts should not rewrite wills, and the idea that the courts retain a broad judicial discretion to remedy breaches of moral duty. This tension is captured in the following passage from the Court of Appeal decision in *Fisher v Kirby*:[35]

> [119] The more recent decisions of this Court have re-emphasised what has always been understood: that mere unfairness is not sufficient to warrant disturbing a testamentary disposition and that, where a breach of moral duty is established, the award should be no more than is necessary to repair the breach by making adequate provision for the applicant's proper maintenance and support.
>
> [120] The decisions of this Court from and including *Little v Angus* are properly viewed as a timely reminder that awards should not be unduly generous. But, in our view, neither should they be unduly niggardly, particularly where the estate is large and it is not necessary to endeavour to satisfy a number of deserving recipients from an inadequate estate. A broad judicial discretion is to be exercised in the particular circumstances of each case having regard to the factors identified in the authorities.

Equally in *Cartwright v Joseph*, the High Court explained that:[36]

> Only provision sufficient to remedy the breach is required. The Court is not authorised to rewrite a will merely because of perceived unfairness; the question is what sum is required to give adequate provision for proper maintenance and support. In determining whether testamentary freedom should be interfered with, the Court is given a wide discretion by the statutory scheme of the Act. The assessment of quantum does not require a mathematical or scientific calculation. Rather:
>
> There will always be a band of answers within which individual judges make decisions on the facts of particular cases. It is difficult to say that one award is right and another is wrong.

At least in cases which are of "more of a moral kind" rather than financial need, there is an acceptance that the courts are required to exercise "broad value judgments".[37]

There is an element of absurdity in this approach: the courts should be careful not to rewrite wills because of mere unfairness, but they retain a broad discretion and should not be too ungenerous, particularly with large estates.

It is this broad discretion which is particularly problematic from a legal perspective. In 2006, Lord Bingham (writing extra-judicially) identified eight sub-rules which together made up the otherwise elusive concept of the rule of law. Two of these principles are relevant here. First, "[t]he law must be accessible and so far as possible intelligent, clear and predictable". One of the rationales for this was said to be:[38]

> If we are to claim the rights which the civil … law gives us, or perform the obligations which it imposes on us, it is important that we know what our rights and obligations are. Otherwise we cannot claim the rights or perform the obligations.

The second relevant principle is that "[q]uestions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion". Relevant to this idea, Gleeson CJ (writing extra-judicially) has explained:[39]

> Dicey contrasted the rule of law with discretionary power. Much of the power exercised by courts, whether given by statute or common law, involves discretionary decision-making. Discretion implies choice between legally available alternatives. The law limits the judge's area of choice. From the point of view of a litigant, the rule of law suggests that the outcome of the litigation should depend as little as reasonably possible upon the identity of the judge who hears the case. It also suggests that Parliament, in enacting law, and appellate courts, in developing the common law, should pay attention to the importance of establishing principles of general application rather than widening the scope for ad hoc discretionary judgment. The concept of laws as rules of general application, capable of being known in advance by citizens who may exercise choice, and order their affairs, accordingly, is part of the idea of the rule of law.

In my view, the FPA offends both of Lord Bingham's principles. Even if a testator provides for all potential claimants and explain their reasons for each provision, they nevertheless risk a judge exercising their "broad judicial discretion". That discretion could be exercised one way or another, or not at all, depending on which judge is assigned to hear the case.[40] The Law Commission recognised these issues in its 1997 review where it noted that:[41]

> The law has become unclear in its purposes. Failure by the courts to articulate (beyond the obscure concept of moral duty) why precisely they are altering a will-maker's arrangements results in a situation where wills are varied according to the subjective values of the particular judge who chances to deal with the matter. This makes it difficult to assess whether the court's distribution is more commendable than the will-maker's. There are appreciable differences in the awards made to adult children. These differences mean that conscientious will-makers find it hard to know and comply with the requirements of the law, and bring the law into

> disrepute. Even though it is not clear now (if it ever was) that the reasons for court intervention are understood or widely accepted by the wide variety of communities and families in New Zealand, claims by adult children succeed in a very high percentage of cases.

Similar comments were made by the Law Commission in its more recent *Issues Paper* on the law of succession.[42]

This uncertainty has very unfortunate consequences. At least in part because of this, FPA disputes are often: (a) disproportionately expensive, and (b) incredibly bitter. As to the former, one New South Wales Judge has observed that based on a random review of 50 proceedings in that jurisdiction, the costs of litigation amounted to, on average, 22.2 per cent of the value of the estate.[43] In this country, cost has long been a concern with FPA proceedings, with Holland J warning in the early 1990s that, "there should, however, be some concern on behalf of all lawyers concerned with litigation under the Family Protection Act to ensure that costs are kept to a minimum".[44] The costs of litigation have risen markedly since then.

As to the latter, this is a seemingly perennial feature of the FPA litigation. As the Court of Appeal summarised in *Auckland City Mission*:[45]

> [15] We should add that it was common ground, at least some time before the hearing in the High Court, that Mr Miller had breached his moral duty to Inge under the Family Protection Act. The only issues were what further provision from the father's estate was required to remedy that breach and the incidence of that further provision. Nevertheless the affidavits and exhibits ran to over 230 pages and appear from the judgment to have led to an inquest into the detail of family life and consideration of a host of incidents, apparently assumed to be relevant, but not ordinarily regarded as appropriate for family protection cases. As Wild CJ observed in *Re Meier (deceased)* [1976] 1 NZLR 257 at p 258:
>
> > "Though conduct and family relationships may in some cases well have relevance I think it appropriate in this case to recall that from the early days of the family protection jurisdiction the Court has disapproved attempts by litigants to blacken each other's character — See, for example, *Hoffman v Hoffman* (1909) 29 NZLR 425, 428, per Sim J. Allegations and counter-allegations about petty incidents which occurred years before the date of death are generally unlikely to advance anyone's case and when, as in this case, it is sought to support them by affidavits from neighbours they may merely deepen rifts in the family and dishonour the memory of the testator. Counsel and solicitors bear a responsibility to their clients as well as the Court in this respect."

That aligns with Blanchard J's comment in *Williams* that it is a:[46]

> … comparatively rare case where denigrating the character and motives of a family member will assist the cause of another in the eyes of a Judge trying a family protection proceeding.

Somewhat unfortunately, allegations are often levelled at the one person that cannot defend themselves — the deceased.

In summary, the FPA's uncertain and haphazard application is both problematic from a rule of law perspective and has negative practical consequences. Together, these factors strongly support the conclusion that the FPA is a bad law that ought to be repealed or have its scope severely reduced.

The application of the FPA is arbitrary

The final critique is that the application of the FPA is arbitrary because it is so easily circumvented. The FPA applies only to a person's estate. Property that no longer forms part of a person's estate falls outside the scope of the FPA. Therefore, settling property on trust prior to death and inter vivos gifting are measures which are commonly used to avoid the application of the FPA.[47] The question then arises: if the FPA cannot consistently serve its (albeit vague) purpose, what is the point?

Some have argued that the solution to the arbitrariness of the FPA is to introduce anti-avoidance measures.[48] However, the argument to solidify the application of the FPA rests on a foundation that the principles underpinning it remain valid. As I have argued above, the FPA is both out of step with the prevailing views of New Zealanders and is unacceptably discretionary. To introduce anti-avoidance measures would be to double-down on a bad law. I caveat that by saying, if the scope of the FPA was significantly reduced, and its policy underpinnings clarified, the introduction of anti-avoidance measures would become more compelling. I return to this shortly.

So, what to do?

But what about the just cases?

For the reasons I have set out, Parliament should take up the call and repeal or significantly reduce the scope of the FPA. In making this call, I am aware that there are a number of cases where awards under the FPA — even large awards — feel just.

A relatively recent example is *Kinney v Pardington* where the applicant, Erin, was the ex-nuptial daughter of the deceased.[49] The deceased initially denied paternity; he turned a blind eye to abuse that Erin suffered; he kept Erin's existence secret from the rest of his family; and he provided little support to Erin during his lifetime. In these circumstances, Cull J awarded Erin 70 per cent of the value of the estate. The fairness of the outcome here is difficult to argue with.

Nevertheless, the existence of these cases does not justify the retention of the Act. The FPA is frankly a blunt and unsuitable instrument to remedy situations like *Kinney*. Issues to do with the inadequate provision of child support should be addressed directly, rather than relying on amending the parent's will many years (possibly decades) later.

It is also necessary to reflect on whether remedying meritorious claims is, in a utilitarian sense, worth the unnecessary cost and emotional stress that come with litigating far less meritorious claims. In my view, that is genuinely open to debate.

Repeal or amend?

As has been referenced earlier, the Law Commission is presently undertaking a review of the law of succession. The Commission has formed the preliminary view that eligibility under the FPA should be limited to partners and children up to a prescribed age. It preferred these options as "the law relating to family provision should be consistent with the legal duties the deceased owed to their family members during their lifetime".[50]

I broadly agree with the Commission's initial view and note that this would bring the Act full circle, back to Edward J's 1901 reasoning that:[51]

> … this duty is properly discharged by providing in the first place for those who were dependent upon the testator, and to *whom the law gave rights against him, in his lifetime*.

I confess that before reading the Law Commission's recent *Issues Paper*, I was in favour of a wholesale repeal. Two points have changed my mind. First, the proposed limited approach

largely addresses the issues I have outlined above — to the extent that this constitutes an erosion into testamentary freedom, it mirrors limitations on property rights that exist while a person is alive.[52] It has much clearer policy underpinnings, which could be applied consistently by different judges. Issues of avoidance would become less common given the more limited scope of the Act and, because of the clearer policy underpinnings, proactively addressing avoidance would be less problematic.

Secondly, it appears that there remains strong community support for being able to challenge wills in more targeted circumstances. Social laws like the FPA ought to reflect social values, as I have argued above. It would be hypocritical now to suggest otherwise.

Conclusion

For reasons that I have outlined above, the FPA is a fundamentally bad law. As the title of this article suggests, it makes for bad cases — that is, inconsistent authority applied to emotive facts which are frankly unsuitable for adversarial litigation. The status quo is wholly unsuitable. I support the Law Commission's call to significantly reduce the scope of the Act.

Footnotes

*. Junior Barrister, Bankside Chambers.
1. Law Commission *Review of Succession Law: Rights to a person's property on death* (NZLC IP46, 2021).
2. Above, at [4.12].
3. For a detailed summary of the history of the FPA, see Nicola Peart "The Direction of the Family Protection Act 1955" [1994] NZRL Rev 193. See also Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [FPIntro.02].
4. Peart *Brookers Family Law — Family Property*, above n 3, at [FPIntro.01].
5. *Re Rush* (1901) 20 NZLR 249 (SC) at 253.
6. At 253–254.
7. *Allardice v Allardice* (1910) 29 NZLR 959 (CA) at 972–973.
8. (29 September 1955) 307 NZPD 2724.
9. *Re Harrison* [1962] NZLR 6 (CA) at 14 per Richardson J.
10. *Re Leonard* [1985] 2 NZLR 88 (CA) at 92 per Richardson J.
11. Peart *Brookers Family Law — Family Property*, above n 3, at [FPIntro.03].
12. Law Commission *Succession Law — Testamentary Claims* (NZLC PP24, 1996).
13. *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [9].
14. At [15].
15. At [3].
16. *Little v Angus* [1981] 1 NZLR 126 (CA) at 127, cited in *Williams*, above n 13, at [35].
17. *Williams*, above n 13, at [52].
18. See for example *Carson v Lane* [2019] NZHC 3259 where Thomas J referred to *Williams*, above n 13, as the "seminal decision" (at [65]).
19. *Williams*, above n 13, at [68] and [70].
20. *Auckland City Mission v Brown* [2002] 2 NZLR 650 (CA) at [33].
21. At [37].
22. *Henry v Henry* [2007] NZCA 42 at [55]. These comments are frequently made. See for example *Ware v Reid* [2019] NZHC 506 at [10].
23. *Re Wilson (deceased)* [1973] 2 NZLR 359 (CA) at 362.
24. Nikki Macdonald "Where there's a will, there's a way to challenge it" *Stuff* (online ed, 3 June 2017).
25. Law Commission *Succession Law — A Succession (Adjustment) Act* (NZLC R39, 1997) at [74].
26. Ian Binnie and others *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values* (University of Otago and Michael & Suzanne Borrin Foundation, Dunedin, April 2021) at [95], cited by the Law Commission, above n 1, at [1.20].
27. Law Commission, above n 1, at [1.20].
28. Law Commission, above n 1, at [1.10]–[1.17].
29. For a general discussion on this topic, see Rhymer Rigby "Disinheriting your children might be for their own good" *Financial Times* (online ed, 15 October 2019).
30. Law Commission, above n 12, at [36].
31. Law Commission, above n 1, at [4.10].
32. *Stott v Cook* (1960) 33 ALJR 447 (HCA) at 453–454. Recently cited with approval in *Page v Hull-Moody* [2020] NSWSC 411 at [164].
33. *Courtney v Pratley* [2017] NZHC 1761 at [55], citing *Wood-Luxford v Wood* [2013] NZSC 153, [2014] 1 NZLR 451.
34. *Re Z (deceased)* [1979] 2 NZLR 495 (CA) at 506, more recently cited with approval by Cull J in *Kinney v Pardington* [2019] NZHC 317 at [46].
35. *Fisher v Kirby* [2012] NZCA 310 at [119]–[120].
36. *Cartwright v Joseph* [2018] NZHC 2383 at [33] (footnotes omitted).
37. *National Heart Foundation of New Zealand v Carroll* (2009) 28 FRNZ 268 (HC) at [9], citing *Henry*, above n 22.
38. Tom Bingham *The Rule of Law* (Penguin Books, London, 2011).
39. Murray Gleeson, former Chief Justice of Australia "Courts and the Rule of Law" (The Rule of Law Series, Melbourne University, 7 November 2001) (footnote omitted).
40. Law Commission, above n 12, at [47].
41. Law Commission, above n 25, at [34].
42. See for example Law Commission, above n 1, at [4.10]–[4.11].
43. Francois Kunc, Judge of the Supreme Court of New South Wales "Family Provision and Artificial Intelligence — Utopia or Dystopia" (annual dinner of Accredited Wills & Estates Specialist, 11 November 2019).
44. *Re Saunders* HC Dunedin CP112/88, 14 December 2014 at 6.
45. *Auckland City Mission*, above n 20.
46. *Williams*, above n 13, at [71].
47. Law Commission, above n 1, at [9.5].
48. See for example Josie Te Rata "Fortifying Family Protection: The Need for Anti-Avoidance Provisions in the Family Protection Act 1955" (LLB (Hons) Dissertation, University of Otago, 2016); Law Commission, above n 1, at ch 9.
49. *Kinney*, above n 34.
50. Law Commission, above n 1, at [4.17].
51. *Re Rush*, above n 5, at 253 (emphasis added).
52. Under the Property (Relationships) Act 1976 and the Child Support Act 1991.

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Te ao Māori, whāngai, and the law of intestacy: a principled proposal

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Introduction

The colonial state has impacted Māori in profound and devastating ways. Foreign law imposed upon Māori to varying degrees of oppression and assimilation has consistently frustrated the promise to Māori in 1840 that Māori would retain autonomy and self-determination. This promise is contained in our most sacred covenant, te Tiriti o Waitangi.[1]

This article is focussed upon the law governing the distribution of property upon death, the law of succession. Every person in Aotearoa New Zealand has an integral stake in this area of law. It is an area of law that is out of date and primarily based upon beliefs of family and proper estate administration birthed out of the 1950s. In particular, this article is concerned with the little opportunity given to Māori to exercise tino rangatiratanga and how space might be carved out for Māori to walk their own path in determining how property should be distributed upon death.

The central concern in this article is the distribution of property when no formal will has been made by a person who has died. In particular, what should be the process for determining who gets what.

The challenge

The need for review is urgent

In 1996–1997, the Law Commission undertook a comprehensive review of succession law. It said of this task:[2]

> The need for review is urgent. The existing law operates in a way that is less just, clear, consistent, and efficient than it can be. The newest statute our draft Act would replace was enacted in 1963 — since then values known and widely accepted in New Zealand communities have changed, but the existing law has not in all cases developed to reflect these changes.

The Commission later continued:[3]

> New Zealand families are different ethnically, socially, and culturally. Particular families will see themselves in different ways. Different members of the same family may have different views on their function and role in the family. These views will be based on family members' different gender, age, or personal characteristics and experiences.

In particular the Law Commission drew attention to the failure of the law to properly consider Māori perspectives on family.[4] A report was commissioned and completed that emphasised the fundamental difference between Pākehā and Māori perceptions of family.[5] This report concluded that New Zealand's succession law needs to adapt to accommodate Māori family structures and that this should be done via comprehensive kanohi te ki kanohi (face-to-face) consultation with Māori in all parts of New Zealand.[6] Unfortunately these recommendations never eventuated and no subsequent law was ever developed that dealt with the issues of particular concern to Māori in relation to succession.

In 2020, the Law Commission picked up the baton as it embarked on another complete review of the law of succession in New Zealand. It identified that the law was:[7]

> … developed in the 18th century largely as a product of the rise of liberal individualism. Croucher and Vines have observed that the "emphasis on the right to do what one liked with one's property reflected the social theory of the time — the importance of the individual, the emphasis on free will, the importance of contract and the rise of capitalism."

Nowhere is this more blatantly obvious than the current state of our intestacy rules. The intestacy rules, contained within the Administration Act 1969, dictate the appropriate distribution of an estate when no will is left by the deceased, or when the will does not effectively dispose of the entire estate (known as partial intestacy). The current rules regulating this process were created in 1944 and have not been substantively changed since then. These rules are based upon the presumed intention of the average will-maker and thus express what Parliament believed to be the "correct" distribution of estate in 1944.[8] Since there has been no substantive upgrade to New Zealand's system of intestacy in almost 80 years, the extreme change in society is not reflected in the law and certain members of the family and whānau remain unrecognised.

This kind of legal exclusion is not merely a concern in material terms. It also has the detrimental effect of refusing to acknowledge a person's connection to the deceased.[9] For example, there is no mention of whāngai in the rules. Whāngai (discussed below) are member of the whānau who have no direct corollary in colonial nuclear families. Therefore, because whāngai are not recognised by the rules they are effectively regarded as having no connection nor legitimate relationship with the deceased. This operates to defeat their sense of self and belonging and denies the importance of their relationships with those around them.

The Treaty of Waitangi

The legal justification for reform lies in the promise made between Māori and the Crown on 6 February 1840, te Tiriti o Waitangi. Within te Tiriti a vision of a partnership in which the Crown is entitled to govern, but Māori retain tino rangatiratanga (sovereignty) over their taonga (treasures, both metaphysical and physical),[10] people, and lands is expressed. This vision is the constitutional foundation of New Zealand.[11]

If the Crown does not comply with the requirements of the Treaty, then it has no jurisdiction to make law at all. The assimilationist policies of the past and present are thus a failure

that threatens the very legitimacy of the state. The Administration Act is just one of many laws that require reworking in order to accommodate all people of New Zealand and be compliant with the obligations contained in the only legitimate source of law in New Zealand, the Treaty of Waitangi.

The constitutional proposition advanced above has some very real consequences for Māori in New Zealand. Denial of the Treaty and the imposition of colonial law have thousands of faces and have caused serious structural and intergenerational trauma across the entire Māori population. This was first officially recognised in the ground-breaking *Puao-te-Ata-Tu* report into the practices of the then Department of Social Welfare in 1988.[12] This report recognised that the monoculturalism and racism inherent in the practices of the Department were damaging to Māori and a reflection of wider society. It concluded:[13]

> The presence of racism in the Department is a reflection of racism which exists generally within the community. Institutional racism exists within the Department as it does generally through our national institutional structures. Its effects in this case are *monocultural laws and administration* in child and family welfare, social security or other departmental responsibilities. Whether or not intended, it gives rise to practices which are discriminatory against Māori people.

Primarily as a result of this report the Children, Young Persons, and Their Families Act 1989 (now known as the Oranga Tamariki Act 1989) was enacted and was internationally lauded as representing a "new paradigm" of dealing with both children in need of care and protection and those who offend.[14]

Central to this praise was the supposed cultural competency represented in the Act. The principal change giving rise to this was a new emphasis upon a child's place in their family, whānau, hapū, iwi, and family group.[15] Additionally the creation of family group conferences (FGCs) was lauded as a revolutionary new tool for addressing the needs of child offenders.[16] Most importantly was the recognition inherent in the Act that a monocultural and oppressive approach can only be detrimental to Māori. It signalled a way forward that is bicultural and reflective of the intention of te Tiriti.

Unfortunately for a long time this Act stood alone among family law legislation as no other legislation referred to the Treaty or the different cultural needs of Māori. Prominent academics reflected that "many of New Zealand's family laws serve a policy that is basically assimilationist, ignoring the social objectives articulated by Māori".[17] Further, the supposed success and cultural competency of the FGC did not stand scrutiny for Paora Moyle and Juan Tauri interviewed Māori participants in the FGC process. They reported that:[18]

> The experiences of Māori participants in the FGC reported in this paper reveal that the process is far from the *whānau inclusive* and *culturally responsive* forum that advocates repeatedly claim. Instead, many of the participants in Moyle's research report experiencing a predominantly Eurocentric, state dominated intervention that marginalizes them and their cultural philosophies and practices.

The law is necessarily moving on from this approach and towards a system of law that takes the two strands of law in Aotearoa and marries them into a "third law of Aotearoa".[19] The third law incorporates both tikanga Māori and colonial law on equal footing,[20] and recognises that the law must step away from its parents and develop into its own system with its own logic and underlying ideals.[21]

This law embraces the obligations contained in te Tiriti and commits to coexistence, cooperation, and the retention of Māori tino rangatiratanga. It steps away from the damaging and oppressive laws of the past and grows into the unique system of partnership envisioned by te Tiriti. The Waitangi Tribunal described this vision, stating:[22]

> [T]he signs are that [the role of Māori] will grow and the partnership framework will endure. It is evolving as New Zealand evolves. There are signs it is changing from the familiar late-twentieth century partnership built on the notion that the perpetrator's successor must pay the victim's successor for the original colonial sin, into a twenty-first century relationship of mutual advantage in which, through joint and agreed action, both sides end up better off than they were before they started.

This is the aspiration upon which the proposal articulated in this article rests. While the roots of the problem go much deeper, the monoculturalism endemic to New Zealand's system of family and succession law sprouts in the intestacy rules as they symbolise the state's view of the proper distribution of property in Aotearoa.

The law of intestacy

The law relating to intestacy is contained in ss 75–80 of the Administration Act 1969. Section 77 of that Act sets out the rules for what should happen to a person's property when they die intestate. Section 77 automatically allocates property according to an order of precedence.[23] This order is heavily weighted towards the rights of spouses with those of children coming in a close second.[24] Note that the meaning of children is restricted to biological and legally adopted children, meaning that whāngai are consequently excluded.[25]

This order of precedence is thought to represent the default position of any reasonable will-maker in New Zealand.[26] In other words it is assumed that every person would favour distribution first to their spouse, then to their children, and so on. These rules were first contained in the Administration Amendment Act 1944 and remained unchanged when they were transplanted into the 1969 Act.[27] The only meaningful change since 1944 are clarifications to the meaning of the spouse, the status of both illegitimate children and those born via new birth technologies.[28]

The result is that a single standard is applied uniformly across all New Zealand families. Such an approach is inherently flawed because it does not appropriately reflect the diverse and dynamic nature of family in New Zealand. No two families can be assumed to be the same and the intestacy rules must reflect this. It cannot be assumed that there is a default or standard distribution of property in New Zealand. This is especially true where the intestacy rules are to be applied to the Māori whānau. If the shape and structure of the Pākehā "nuclear family" can no longer fit within the intestacy rules, then this is doubly so for the whānau. The whānau is a complex unit with entirely different philosophical underpinnings. The particular characteristics of any given family or whānau must be taken into account by and cohesive intestacy structure.

Family protection

If the intestacy regime is to be challenged, the primary way is via the Family Protection Act 1955. If this Act is utilised, then a judge determines how the estate should be distributed according to the flexible principle of "moral duty". The "moral duty"

principle has changed over the years from merely ensuring proper maintenance to ensuring that no successor goes improperly unrecognised.[29] Judges are able to insert their own views upon what is right in the situation. This is based upon their judgement of what a "wise and just testator" would do.[30] Commentators have pointed out that the wise and just testator must be Pākehā because they rarely consider Māori perspectives,[31] and case law has specifically excluded the consideration of whāngai as beneficiaries.[32] This implies that the "wise and just testator" would never consider whāngai as a deserving beneficiary and that the flexibility of a quasi-subjective approach does no more favours for Māori than the mechanistic rules of intestacy.

It is worth noting that there are very few challenges to intestate distribution under this regime. From this it is possible to infer that the rigidity of the intestacy rules is more accepted than the terms of a will. Peart and Vines suggest that this is because the intestacy rules involve equal distribution of the estate while a contested will generally involves unequal distribution.[33] This can be seen in the leading case of *Williams v Aucutt* where the will to be contested involved a 90:10 division between two sisters.[34] It could also be argued that where large estates are involved (which are the most likely to be contested) a will is likely to have been made.

Te Ture Whenua Māori

The second relevant part of New Zealand's intestacy rules are contained in the Te Ture Whenua Māori Act 1993 (TTWMA), which were designed specifically with the distribution of "Māori freehold land" in mind.[35] The TTWMA gives the Māori Land Court the power to administer the estates of "deceased persons (whether or not Māori) comprising in whole or in part any beneficial interest in Māori freehold land".[36]

Section 109 requires the Māori Land Court to determine the distribution of Māori freehold land upon intestacy. The intestacy regime in this Act is completely different to the Administration Act. Of immediate note is that the surviving spouse does not take a place of primacy, the spouse being entitled only to a "life interest"[37] in the land, while the children, followed by the brothers and sisters of the deceased, are primarily entitled to inherit.[38] The scheme is centred upon whakapapa as the primary organising principle of Māori society.[39]

Pursuant to the TTWMA, the Court may determine it appropriate for whāngai to receive a full beneficial entitlement in the land.[40] The rules governing this distribution provide far more latitude for the application of tikanga. Unfortunately, this applies only if the land in question is Māori freehold land. If Māori do not have any such entitlement, then they are required to proceed through the monocultural system in the Administration Act. The challenge is therefore to learn from the TTWMA and implement a system that provides for everyone, paying attention to the obligations of te Tiriti.

Tikanga Māori

This article is not the place for a comprehensive primer on tikanga Māori.[41] For the purposes of this article it is enough to state that tikanga is the general term used to refer to the laws and rules governing Māori society. Tikanga continues to grow and flourish and guide many Māori today. A system of both ethics and precedent, the values that guide the application of tikanga are constant and unwavering but flexible in their expression.[42] This allows tikanga to evolve and adapt, as necessary.

The adaptability of tikanga allows it to continue to be practised by many Māori in Aotearoa. Although in many ways colonial law and tikanga conflict with one another, it is fundamentally wrong to deny tikanga as a legitimate source of law. Such denial is the source of much of the historical grievance and intergenerational trauma that has characterised the monocultural and assimilationist policies of the past and present.

The five key concepts of tikanga relevant to this article are: whanaungatanga, whakapapa, mana, Māori social units, and whāngai.[43]

Whanaungatanga

Whanaungatanga is the "lifeblood" of tikanga Māori as well as the glue that holds the whole system together.[44] In a sentence whanaungatanga has been described as "the fundamental law of the maintenance of properly tended relationships".[45] Whanaungatanga is an ideal that is difficult to achieve and yet central to the proper functioning of the entire system.[46]

Through whanaungatanga individuals can expect to be supported by others within a collective, while the collective may in turn expect the support and help of each individual.[47] Whanaungatanga also guides relationships beyond the interpersonal into both the natural and metaphysical world meaning that the relationship with one's ancestors and the land around you define a person as much as the relationship with one's peers.[48] Succession must place the ideal of whanaungatanga in a central and loadbearing position.

Whakapapa

Whakapapa is the central organising principle of Māori life.[49] Often defined as "genealogy", whakapapa is inextricably linked to your identity and place in the world. Whakapapa has been described as:[50]

> … critical to developing one's cultural identity, health and wellbeing, and connection with one's whenua, whānau and tipuna. I have heard it said that people who do not know their whakapapa are like pieces of driftwood lost at sea … it is about a connection with the land, your extended family, and ancestors.

There must be a nexus between how a person places themselves in the world and succession law. The law must materially recognise the importance of relationships that define a person.[51] For Māori this is highly dependent upon whakapapa.

The TTWMA recognises this by placing children and siblings above spouses in succession to land. The Māori Land Court has also used whakapapa as a reference to determine the rights whāngai have to land. Whakapapa is generally a necessary prerequisite for the inheritance of land.[52]

Mana

Mana is often translated as "authority" and tikanga recognises three kinds of mana defined by reference to their source. All people have mana derived from their whakapapa to the gods, mana atua, and are therefore all entitled to inherent respect. People also have mana derived from their ancestors, mana tupuna, and are therefore accountable to the generations that come both before and after them. Individual mana comes from one's own actions and personal attributes, mana tangata, and is therefore linked with how one conducts oneself in relation to others.[53]

Mana is important as a regulator of relationships in that one is held accountable in upholding their own mana, the mana of others and the mana of their ancestors.[54] A new system of succession law must recognise and safeguard both individual, and collective mana.

Social units: whānau, hapū and iwi

The whānau, hapū, and iwi are the primary social units of Māori life and membership is defined by whakapapa. The whānau is the smallest social unit and difficult to define.[55] Those within the whānau are most likely to have a direct interest in questions of succession. Ruru defines the whānau as: "A group of relatives defined by reference to a recent ancestor, comprising several generations, several nuclear families and several households, and having a degree of ongoing corporate life …"[56]

The hapū is made up of several whānau and is the most important social, political, and economic unit.[57] It is at the hapū level that important differences in tikanga are practised. Succession law should take account of these differences and allow for inter-hapū distinctions.

The iwi is again made up of several hapū and is the largest political unit. Iwi traditionally only come together for important matters that affected the entire iwi. In the modern system of Treaty settlements iwi are, rightly or wrongly, the most important political grouping.

Whāngai

The whāngai relationship is a useful focussing lens for examination of the intestacy rules and Māori. This is because the whāngai relationship is unparalleled in colonial law. Therefore, a system that can provide for whāngai has the potential to provide for other whānau relationships that are currently unrecognised at law. A whāngai is a child who is raised by someone other than the biological parents. Often likened to adoption, there is, in fact, an ocean of difference.[58]

In 2000, the Ministry of Women's Affairs described whāngai as follows:[59]

> At the heart of Māori customary adoption or whāngai is the practice of allowing for the care of a child to be shared across a broad social group. The effect of the variety of whāngai options was that a child had a more complete experience of its place in the world, at the same time as busy parents were assisted and cultural information was transmitted either by grandparents or some other whānau, hapū or iwi member.

Whāngai is the most common term for this relationship. The closest direct translation of whāngai is "to feed" or "to nourish". The northern iwi of Tai Tokerau prefer the term "atawhai" which translates to "show kindness" or "to foster". Finally, the iwi of Taranaki prefer "taurima" which is to "entertain" or "treat with care".[60] Although different iwi and hapū across New Zealand view and practise the whāngai relationship in slightly different ways there exists several common threads. Whāngai adoption is always open, is underpinned by whanaungatanga and whakapapa, and has positive connotations for all involved.[61]

The whāngai has two sets of parents and maintains a special relationship with both. The transfer is often done at birth and usually with the express or implied approval of the whānau or hapū.[62] Whāngai placements are often done for an express purpose such as maintaining whakapapa connections to land or receiving education from kaumātua (elders). Sometimes it was done due to the infertility of the matua whāngai ("adoptive" parents).[63] For whatever reason a whāngai relationship is formed, it is both highly practical and entirely intertwined with Māori culture.

The Adoption Act 1955 specifically prohibits legal recognition of whāngai arrangements and restricts it to the narrow definition within the Act.[64] This narrow definition has no parallel in Te Ao Māori. The arrangement is entirely alien and abhorrent to Māori.[65] This is because "legal" adoption involves a complete legal severance from the biological parents in order to build a new connection with the adoptive parents, who are often strangers.

The Adoption Act is based upon the "clean break" principle which gained favour in the 1940s and 1950s and reflected the narrow and punitive social attitudes of the time towards infertility and unmarried mothers with illegitimate children.[66] The clean break principle involves the severing of any legal connection between the biological parents and the imposition of a new relationship with the adoptive parents. This principle has caused serious harm to all mothers subjected to it, especially Māori.[67] Although some of these issues were mitigated by changes in 1985 facilitating open adoption,[68] much of the underlying philosophy of legal adoption remains counter to Māori views and objectives.

When the Law Commission examined the history of adoption in New Zealand, it realised that the social attitudes towards "legal" adoption were constantly in flux. At different times adoption was encouraged or discouraged according to the operative moral and economic tendencies.[69] In contrast, whāngai arrangements have always been encouraged. Birth parents are not criticised for giving up their children: they are praised for their generosity. The relationship between tamariki whāngai ("adoptive" child) and matua whāngai is characterised by love given freely without expectation of recompense. Tamariki whāngai are, in theory, and generally in practice, children who are wanted.[70] One mother is quoted as saying that whāngai "though not born of my womb is born of my heart".[71]

Whāngai in law

Whāngai, though always practised by Māori, has historically been recognised at differing levels by the colonial state. Although in 1955 legal recognition of whāngai was specifically prohibited, this was not always the case. The changes that mostly occurred around the turn of the century were generally driven by the need for certainty of succession to Māori land.[72] Prior to 1881, adoption of any form was not regulated by colonial law. It has been suggested that the 1881 Act that first legally recognised adoption, which was also the first in the British Commonwealth,[73] was driven by the Pākehā recognition of whāngai as an informal adoption that potentially gave unregulated property rights by succession.[74]

The first Act to govern intestate succession in relation to Māori was the Intestate Native Succession Act 1876. This gave the authority of determining intestate succession to the Native Land Court, the so called "engine of destruction",[75] which was to determine the appropriate distribution "according to Native Custom, or *most nearly* in accordance with Native Custom".[76]

This began the development, through case law, of 10 rules by which the Court was to determine whether or not a person had been adopted according to Māori custom.[77] This Act did not necessarily supplant customary law or the status of whāngai. It merely imposed the authority of the Native Land Court in order to provide for greater certainty of succession (in the eyes of the colonial state).

In 1901, registration of whāngai adoption was required before the Native Land Court could recognise a claim on any estate,[78] but whether or not someone was whāngai was still determined by Māori. The operation of customary law was not supplanted as a mode of succession until 1909. The Native Land Act 1909 made it clear, in similar language to the current Act, that "No Native shall … be capable of adopting a child in accordance

with Native custom, whether adoption is registered in the Native Land Court or not".[79] Additionally entitlements upon intestacy (excluding Native land) "shall … be determined in the same manner as if he was a European."[80] This position is substantively continued as far as the legal position of whāngai is concerned, with the narrow exceptions provided by the TTWMA.

Succession and whāngai

As already mentioned, the TTWMA gives legislative recognition to the right of whāngai to inherit Māori freehold land upon intestacy.[81] The leading case for these purposes is that of *Hohua — Estate of Tangi Biddle*.[82] In this case the Māori Appellate Court set up a two-stage test. The first is to inquire as to whether the relationship in question was whāngai.[83] This requires asking whether the child was "adopted in accordance with tikanga Māori."[84] Evidence on this point is usually given by both general tikanga experts and those who are knowledgeable of the particular tikanga of the hapū in question. In *Hohua* this resulted in a list of factors such as:[85]

- The whāngai child shares whakapapa with the deceased.
- The hapū of the deceased consented to the relationship.
- The relationship began at birth and continued through infancy into at least young adulthood.

Subsequent cases have added to this list, but the general tenor of the factors remain the same.

The second question is whether the particular whāngai is entitled to succeed to the land in question on account of the relevant tikanga.[86] The ability of the whāngai to whakapapa to the land in question was particularly important. Other factors include:[87]

- Whether the hapū had consented to the establishment of such rights of succession.
- There were no other close relatives, and the whāngai had assumed the responsibilities of caring for the adoptive parents until old age.

The case of *Hohua* was concerned with the tikanga of Ngāi Tūhoe but it was noted that the general principles discussed are unlikely to be substantially different.[88] Subsequent cases have confirmed that, although inter-hapū and iwi tikanga may differ on specific (and important) points, the general rules and principles enjoy common acceptance.

The Māori Land Court therefore sets out a number of rules when it comes to the intestate distribution of land. Land is a focal point when it comes to any reform of the law of succession as it relates to Māori.[89] However, similar considerations are likely to arise when addressing succession to land that is not Māori freehold land or in respect of personal property. When it comes to this question in respect of whāngai, the first question and its subsequent interpretations, established by *Re Hohua*, are likely to be important.

Different principles exist when it comes to the distribution of different kinds of property. One relevant example is to the succession of taonga. According to tikanga, a specific taonga is not owned by an individual but be held by a responsible member on behalf of the entire whānau, hapū, or iwi.[90] This taonga will be passed from hand to hand upon death in order to keep it within the whānau.

Another relevant tikanga based process is the "Te takahe whare". This is an essential component of the tangihanga and is a ceremony that is aimed at clearing the tapu of death from the home of the deceased.[91] As part of this ceremony the personal effects of the deceased may be shared amongst the whānau of the deceased, although it is noted that customarily these items would be buried with the deceased.[92] Personal heirlooms of high value such as whānau tiki, greenstone patu, and cloaks are often given to a member of the whānau who are responsible for caring for the heirloom on behalf of the whole whānau.[93] Beyond this the scope of different rules for intestate distribution are unclear and impossible to deal with in this article.

In the 1996 Law Commission report, David Williams noted that it is likely that tikanga Māori would be more flexible and instance specific than the current general and mechanistic rules of intestate succession.[94] In the same report Pat Hohepa briefly and non-exhaustively lists the kinds of personal property that would be of central concern for the development of succession law for Māori. This list includes property that:

- is communally owned in theory or culturally;
- has been inherited from ancestors;
- was or thought to have been acquired through tuku;[95]
- that can be subsumed under the term taonga;
- have some tapu or mana associations; and
- that changes after death (eg body parts).

No attempt should be made to definitively compile and define the relevant tikanga until proper consultation has been attempted with Māori across the country.[96] It is likely that giving a space for customary law, as opposed to imposing a singular colonial perspective, to apply to intestate law would allow it to flourish and take on a life of its own.

Proposal

Aspirations

The key takeaway is that Māori family forms are fundamentally different from those provided for in colonial law. This has been recognised in all areas of the law and has, and continues to cause, significant harm to Māori by denying their way of life and subjecting them to a monocultural system. No law of succession has adequately provided for Māori. This is whether a flexible and quasi-subjective approach is taken under the Family Protection Act, or whether an objective mechanistic approach is taken under the Administration Act. The proposal in this article seeks to place power into the hands of Māori so that they may determine how property should be distributed upon intestacy. This is based upon the idea, as expressed by Quince and Thomas, that:[97]

> The path forward for Māori is one based on affirmation of our culture, language, and institutions. First and foremost, recognition of tino rangatiratanga of Māori as guaranteed by the Treaty of Waitangi places the responsibility for decision-making back into the hands of the community, whether the community is kin-based or otherwise.

When this is applied to the rules of intestacy the first step is the abolition of a set "default" distribution. A default and mechanistic set of rules is no longer appropriate for the diverse and dynamic family forms found in New Zealand generally, and it never was appropriate for Māori. Exactly how property should be distributed can only be a question for the particular family. This may result in the development of general rules, but it may not. It is clear, however, that for Māori the process must be guided by whanaungatanga and based upon whakapapa.

Alongside these aspirations sit the general principles of succession law that must be taken into account when designing an effective system of succession law. According to the Law Commission in 1997 it is essential that a law of succession be clear

and predictable as well as promoting the cohesion of families by aiding in the resolution of disputes, while recognising and respecting their diversity.[98] Not all of these are capable of peaceful cohabitation. Any reform of the law is likely to throw up serious issues, not all of which can be addressed. The primary concern of this particular article is to suggest a system whereby the power devolved to the relevant community rather than the state imposing a universal standard.

Operation

With this in mind, it is suggested that the family group conference serve as a schematic framework for a new intestacy regime.[99] By this it is meant that upon death all interested parties are to be gathered for hui about the appropriate distribution of property when there is neither a will nor ōhākī. Guided by an "intestacy coordinator" skilled in dispute resolution and with expertise of tikanga, the whānau should be given the opportunity, as a group, to determine what the appropriate distribution of property should be. The "whānau" is hesitantly given as a parameter of who may attend, hesitantly given because the whānau resists definition and may include a huge number of people.[100] Possibly the whānau may be comprised of those who can possibly bring a claim and, importantly, includes whāngai.

This suggestion is partly inspired by the conclusion of the Law Commission that the best approach in reforming a culturally accountable system of adoption law is to adopt a general approach that incorporates tikanga Māori values into legislation so that they may guide the application of the law.[101] This was in opposition to the suggestion of codifying and potentially freezing the meaning of whāngai. The concern is that to do so would be to distort the meaning of whāngai and prevent the development of Māori-based processes.[102] The hope is that the approach taken in this article would allow for such development. To this end the legislation should direct that, where appropriate, the intestacy conference be conducted according to tikanga. In aid of this key concepts, may be capable of bearing legislative definition and perhaps the examples in the Oranga Tamariki Act as to the definition of whanaungatanga and whakapapa should be considered.[103]

Application to whāngai

Exactly how this approach would apply to whāngai is uncertain. However, it will at least provide a platform where whāngai can appear and state their case. The cases heard by the Māori Land Court shed some light as to the extent of the entitlement of any individual whāngai. It is intended that the intestacy conference provide a forum upon which any given entitlement can be determined on a fact-specific basis. As suggested by the Māori Land Court this may depend on:

- the blood/whakapapa relationship between the whāngai and the deceased;
- the extent/duration of the relationship between the whāngai and the deceased;
- whether the deceased had any other children with a stronger claim;
- whether the whāngai took responsibility in the care of the deceased;
- whether the whāngai has any other entitlements;
- any other relevant considerations; or
- the consent of the whānau and/or hapū.

These questions will be easier for the whānau to answer than the courts as they will know the extent of the relationship, having had the benefit of seeing it with their own eyes. This is better than forcing a fixed scenario as to when distribution to whāngai is warranted that will not be correct in all situations. It is better that the whāngai be able to participate in the discussion and have their input and suggestions as to the correct distribution of property be valued and potentially acted upon. Once agreement has been reached as to the correct and appropriate distribution of property then the administrator is empowered to distribute and wind up the estate according to the plan determined at the conference.

Some issues

The Family Group Conference

The Family Group Conference (FGC) in many ways serves as an example of what not to do. The most important thing is to avoid a co-option of Māori processes without a true understanding of their importance or meaning. When introduced in 1989 FGCs were considered a golden standard of cultural competency,[104] and while in theory the conference does get closer to Māori processes of dispute resolution, it would be a mistake to describe this as the wholesale adoption and application of an indigenous method of dispute resolution.[105] A key issue is that the power is still held by the state. Participants of FGCs have been reported as saying, "family group conferencing was never a Māori process … (laughing) the Pākehā appropriated the whānau hui, colonized it and then cheekily sold it back to the native".[106] This must be avoided.

Since the inception of FGC, studies have found, and academics have argued, that whānau, hapū and iwi who participate in these processes are sceptical, as the coordinators,[107] in practice, are directive rather than facilitative of open discussion.[108] Ruru argues that this arises out of the failure of the process and those who participate within it to recognise the corporate aspect of whānau and accommodate tikanga within the process.[109] In particular she argues that facilitators fail to appreciate the key role that is played by whanaungatanga and whakapapa and that those who do not have the experience or cultural sensitivity:[110]

> … can easily mistake what is happening, show impatience with what they see as time-wasting formalities, misinterpret silences and other forms of non-verbal communication, and misjudge the relative mana of participants. (Under tikanga Māori, the most influential person present is not necessarily the most forceful or frequent speaker.)

The primary pitfalls therefore are that the FGC is state run and operated and that those who facilitate do not have the required cultural competency to properly conduct the conference. The first issue can be mitigated by considering an obligation contained within the statute of similar form to that of s 7AA of the Oranga Tamariki Act. Such an obligation will require the state to form strategic partnerships with iwi and Māori organisations in order to design outcomes that are designed by Māori, for Māori. Such service providers will be much more suited to deal with the issues that arise upon intestacy as they will be more familiar with the appropriate tikanga as well as potentially having personal experiences with members of the iwi, hapū, and whānau involved. The goal is to accommodate the need identified by many academics that:[111]

> To be effectively responsive to indigenous needs, there probably has to be a different process, a different type of spirit and underlying philosophy and, potentially, different outcomes from those traditionally available …

It is worth noting that such relationships already exist in New Zealand. The establishment of such a partnership was a key part of the Ngāi Tūhoe Treaty settlement. This settlement set up a

"services management plan" which governed relationships with, and the management and delivery of services by, Tūhoe and MSD, MBIE, and DHBs. These plans were established with a view to transforming the social circumstances of the people of Ngāi Tūhoe and ensuring that they retain mana motuhake (the Tūhoe expression of tino rangatiratanga) over caring for their people.

The second issue is dealt with by ensuring that the facilitator has expertise in tikanga-based dispute resolution. This is to ensure that when disputes arise, as they inevitably will, it must be resolved according to tikanga Māori. The central and guiding principle must therefore be whanaungatanga which means that all disputes must be resolved by reference to the maintenance of relationships rather than an objective standard of what constitutes the correct distribution of property.[112] In harmony with this, the focus must be on the needs of the collective as opposed to that of the individual. Exactly what this entails in any specific situation is difficult to determine.[113] However, it must be beyond doubt that the resolution of such disputes is in the interests of the entire community rather than any individual participant.

Resolution by the courts

If disputes cannot be resolved, then it may be necessary for matters to proceed to an adjudicative setting. It is not ideal, but it can be seen from the judgments of the Māori Land Courts on this issue that the courts are capable of resolving such matters. The Māori Land Court is not a perfect forum, but it has demonstrated that it is capable of resolving matters by applying tikanga Māori.

It is suggested that all disagreements arising out a intestacy conference should go to the Family Court, but this is dependent upon the aspirations identified in the *Te Korowai* report being realised.[114] *Te Korowai Ture ā-whānau* envisions a linked up system of family law service providers that is alive to issues of particular importance to Māori and has the cultural competency to deal with it.[115] Importantly, the report recognises that currently many judges of the Family Court have little to no understanding of tikanga Māori and makes several recommendations directed towards remedying this issue.[116] For example, it is recommended that sometimes judges of the Māori Land Court sit in the Family Court.[117] Only if these recommendations are implemented should they be permitted to determine questions of intestacy in the way suggested by this article.

It is important to acknowledge that the adjudicative nature of the Family Court is ill-positioned to determine Māori issues of succession. Adjudication is fundamentally opposite to Māori methods of dispute resolution as it emphasises that there must be a winner and a loser and ultimately drives a rift between families rather than seeking to preserve and mend relationships. However, it is also important to note that this approach is contrary to the original objectives of the Commission that recommended the establishment of the Family Court. In 1978, the Royal Commission said:[118]

> The Family Court concept demands that the Family Court should be essentially a conciliation service with court appearances as a last resort, rather than a court with a conciliation service. The emphasis is thus placed upon mediation rather than adjudication. In this way the disputing parties are encouraged to play a large part in resolving their differences under the guidance of trained staff rather than resorting to the wounding experience of litigation, unless such a course is inevitable.

Bearing this objective in mind, the Family Court has strayed from the path originally envisioned. It is this mischief that the *Te Korowai* report was intended to address.[119] In sum, it is not impossible to imagine that should the aspirations of both the *Te Korowai* report and the Beattie Commission be realised, then the Family Court could be able to deliver culturally competent decisions to the benefit of all family and whānau in New Zealand.

This, however, does not escape the question of how the court must come to its decision. There must be some way in which the Court reaches a conclusion on the correct distribution of property. Answering this question is incredibly difficult and there are a number of factors to be balanced against each other. Setting an order of priority upon which the Court must make its decision would be counterproductive in enabling the very mischief that this entire article has been designed to avoid. Further if, for example, the views of the spouse or children are placed in a position of primacy, then the spouse and children would be discouraged from effectively participating in the intestacy conference because they would know that they would get better results from an application to the Family Court.

The judge should make a balanced judgement upon all of the circumstances of the case in accordance with the principles of the Act. It is important that the legislation provides for disputes to be resolved in a way that gives effect to values that are deemed to be important in our society. Importantly, there should be a clear expectation that evidence of tikanga Māori is to be given weight on par with any other consideration.

Beyond this, the law must reflect the state of society. For example, some people may consider that dependants and children of the deceased get the highest priority, while others may consider that the spouse gets priority as theoretically, they have built up the estate together. The exact balance is difficult to predict, but these general considerations must then also be weighed against the specific context which will be divulged via evidence from all parties. Additionally, it is tentatively suggested that the facilitator be permitted to give evidence and express a view upon the appropriate distribution. While exact recounts of the proceedings within the intestacy conference should be avoided, the valuable position of the facilitator in being an impartial and expert witness to all the different factors of the dispute should not be discounted.

Ultimately, if the Family Court system is able to realign its focus on the conciliation service initially envisioned and be able to exhibit a high level of cultural competency then it may be the best arbiter of the disputes if no other accommodation can be made.

Cross-cultural issues

If enacted the law will have to seek some harmony between the different cultures that occupy New Zealand. It is suggested that, where the family or whānau subject to the intestacy conference is homogenous, there should be no issue in adapting to that particular culture's needs. The focus in this article has been upon Māori because of their particular importance as tangata whenua, partners to the Treaty of Waitangi and the large quantity of historical and contemporary grievances by the state. It is recognised however that issues may arise where the family or whānau of the deceased are of different cultural origin. These different families therefore have different beginnings and different goals. Indeed, issues may arise simply because of the way that different people with different cultural backgrounds express themselves.[120]

This was recognised in the Law Commission report that followed the case of *Takamore v Clarke* which involved a cross-cultural dispute over the burial of the body of Mr Takamore.[121] In essence the Law Commission recommended that, when determining issues of burial, the law must reflect the expectations of society as well as making space for tikanga to operate to the fullest extent possible. The Commission acknowledged that balancing the interests of tikanga alongside Pākehā values was a key challenge of the review. Ultimately, however it said that the question is one to be determined by reference to the individual circumstances of the family. However, it was recommended that a new role of "deceased representative" be statutorily created in order to provide some certainty. This representative would be appointed by the deceased and would perform their role according to the deceased's wishes.[122] The Commission also said that if agreement still cannot be reached then application must be made to the Māori Land Court which is best placed to determine issues involving tikanga against all of the relevant considerations.[123]

The role of the "intestacy coordinator" is incredibly important here. It is integral to the process that no one view is placed above the other. Where two parties are in direct opposition to each other it is for the coordinator, with expertise in dispute resolution and tikanga Māori, to attempt to come to a constructive resolution. While it is inevitable that the intestacy conference will run up against the same cross-cultural issues:[124]

> There are always more people who refuse to become involved in wars than who take up weapons. There are always more connectors than dividers, common traditions and values, shared resources like markets and water supplies that all groups 'fight together' to preserve. All we have to do is find ways to build on what already works and adapt those processes that already exist.

The coordinator and the process must be equipped to deal with this issue. It would undermine the entire objective of the process to set an objective standard or guideline against which the outcome should be measured. It is important that the families and whānau are empowered to come to their own resolution. This will unfortunately not always work out and if, unfortunately, no accommodation can be made, then the case may unfortunately be required to proceed to the Family Court, which will involve costs for all involved and takes the decision out of the hands of the family or whānau.

Efficiency and certainty

One of the key objectives of a good law of succession as identified by the Law Commission in 1997 is that the law provide for the efficient administration of estates in a way that is clear, predictable, and certain.[125] It is not denied that should the proposal advanced in this article be adopted then these principles will certainly take a hit. However, this is not necessarily a bad thing. The first point to note is that under the current law of intestacy the distribution is often delayed and estimated to take between six and 24 months to wind up.[126] Further, figures released by the Ministry of Justice and the Public Trust show that the number of intestacies dealt with per year is relatively low.[127] In the years 2010–2018 there were an average of 30,955 deaths. Of those the Ministry of Justice dealt with an average 1,100 via the "Election to Administer" and "Letters of Administration" process. During this time, the Public Trust administered an average of 84 intestate estates per annum. Many of these estates will be small in size, and the intestacy conference will involve a simple process and simple distribution. Making a will or ōhākī should still be encouraged for the greatest level of certainty.

Certainty is an area where the common law and customary law have been noted to conflict.[128] Because tikanga Māori is based on values as opposed to rules there is arguably a certain degree of uncertainty in the way in which tikanga will apply in any given situation.[129] This has been recognised by the Court of Appeal, which said that, when it comes to tikanga Māori, "the certainty criterion cannot apply with the same rigour as it does in relation to English customs".[130] Coates disagrees with this assessment. She argues that tikanga can be certain, but just in different ways from what colonial law desires. She argues that tikanga is certain when it comes to the values that are to be applied. When it is understood that whanaungatanga underpins all relationships then the values that constrain the exercise of the customary practice are certain.[131]

Additionally, tikanga often has a certainty of process. Both tikanga and the common law will set out a process by which the decision must be made, but the outcome can very rarely be determined or predicted ahead of time.[132] Coates suggests that the limitation therefore is not the certainty of tikanga but the deficiencies of the court system that seeks to apply it. Judges therefore "need to be willing to engage deeply with Māori customary concepts" in order to be capable of applying tikanga in a way that is certain.[133] This means that the issue is not with tikanga, but with the underlying system that has so far been unwilling and incapable of engaging with New Zealand's first law in any meaningful way. The proposal has certainty in both of these degrees. It is certain that the values that underpin the process are whanaungatanga and whakapapa and it is certain that the process will involve hui, discussion, and a mediated quest towards a consensus. In focussing upon the process and relationships instead of the outcome, better family cohesion can be maintained, and the mana of all parties will be upheld.

Conclusion

This discussion has considered the serious deficiencies of the law of succession as it applies to Māori. It is primarily argued that the monocultural view represented by the intestacy rules is no more than a reflection of outdated law that has no place in contemporary New Zealand. The key to reform is ensuring that proper account is taken of the different philosophical perspective underpinning Māori society and giving Māori the ability to determine exactly how that will impact upon the law on the distribution of property after death. This article gives only one principled example of how that might look in a reform of the law — intestacy laws.

The Law Commission, in its recent issues paper on Succession,[134] has proposed a framework of three parts in their chapter "Te ao Māori and succession".[135] This framework is suggested as three different ways in which to consider how succession law might be developed in line with te ao Māori in New Zealand. These are the following:

- Allow tikanga Māori to determine succession matters for Māori, without state law involvement.
- Remove taonga from succession law and apply tikanga.
- Weaving together the values of tikanga Māori and state law to create a better law for all.

It is with the third point that this article most closely aligns and one version of how that might work is described in this article. The important point is that a revision of law is urgently needed

and that it must be done in consultation with Māori across New Zealand in order to empower Māori to make their own decisions. On this point the comments of Paora Moyle and Juan Tauri are apposite, they argue that for forums to be culturally responsive, empowering and whānau inclusive, they must be:[136]

> … delivered by (or at the very least reflect the needs and cultural contexts of) the communities within which it is practiced [sic]. For any intervention to be effective for whānau (i.e., the FGC), Māori need to be involved in its development and delivery — from identification of community needs to designing and directly delivering those programs themselves. They also need to be involved at all stages of program development, change, and local program evaluation.

Footnotes

*. The original version of this paper was authored prior to the release of the Law Commission's issues paper on this subject. It was sent to the Law Commission and was ultimately cited by them in that paper. See Law Commission *Review of Succession Law: Rights to a person's property on death* (NZLC IP45, 2021). Available at www.lawcom.govt.nz.

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1. Law Commission *The taking into account of Te Ao Māori in Relation to reform of the Law of Succession* (NZLC MP6, 1996) at [11].
2. Law Commission *Succession Law: A Succession (Adjustment) Act — Modernising the law on sharing property on death* (NZLC R39, 1997) at 3.
3. Law Commission *What should happen to your property when you die?* (NZLC MP1, 1996), at 7.
4. *What should happen to your property when you die?*, above, at 7.
5. *Te Ao Māori and Succession*, above n 1.
6. *Te Ao Māori and Succession*, above n 1, at [133] to [137].
7. Law Commission *Review of Succession Law: Rights to a person's property on death* (NZLC IP46, 2021). Available at www.lawcom.govt.nz, at 13.
8. 1944 is the time of the first Administration Act which was rewritten without substantive change in 1969. Nicola Peart and Prue Vines "Intestate Succession in Australia and New Zealand" in Kenneth GC Reid, Marius J De Waal and Reinhard Zimmerman (eds) *Comparative Succession Law: Volume II — Intestate Succession* (eBook ed, Oxford University Press, Oxford, 2015) 349 at 357.
9. Nicola Peart "The Direction of the Family Protection Act" [1994] NZ Recent Law Review 193 at 207. Andreas Bauer *The Law Commission's Succession Project: A Critical Analysis and Alternative Model* (LLM Dissertation, Victoria University of Wellington, 2004) at 2–3.
10. See *Te Ao Māori and Succession*, above n 1, at [11] wherein succession law is referred to as a taonga.
11. Carwyn Jones "Tāwhaki and Te Tiriti: A Principled Approach to the Constitutional Future of the Treaty of Waitangi" (2013) 25 NZULR 703.
12. Māori Perspective Advisory Committee *Puao-te-Ata-Tu: the report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare* (Department of Social Welfare, SW 470, September 1988).
13. At [81] (emphasis added).
14. Allison Morris and Gabriel M Maxwell "Juvenile Justice in New Zealand: A New Paradigm" (1993) 26 ANZJ Crim 72.
15. Morris and Maxwell, at 56–57. See reference in Oranga Tamariki Act 1989, s 5(1)(c).
16. Morris and Maxwell, above n 14, at 62–63.
17. Donna Hall and Joan Metge quoted in Jacinta Ruru "Kua tutū te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) at 57.
18. Paora Moyle and Juan Tauri "Māori, Family Group Conferencing and the Mystifications of Restorative Justice" (2016) 11 Victims and Offenders 87 at 101.
19. Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato Law Review 1.
20. Williams, at 11.
21. Williams, above n 19, at 12.
22. Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 17.
23. See FOV Acheson *Adoption among the Maoris of New Zealand* (1922) 4 Journal of Comparative Legislation and International Law 60.
24. Peart and Vines, above n 8, at 357.
25. Peart and Vines, above n 8, at 363.
26. Peart and Vines, above n 8, at 357.
27. See Administration Amendment Act 1944, s 6. Compare with Administration Act 1969, s 77.
28. Peart and Vines, above n 8, at 357. Property Relationships Amendment Act 2001. Civil Union Act 2004. Status of Children Act 1969.
29. Compare *Munt v Findlay* (1905) 25 NZLR 488 (HC) with *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [52]; See also Nicola Peart "Property Rights on Death: Policies in Conflict" (2017) 15 Otago LR 25 at 34–37.
30. *Little v Angus* [1981] 1 NZLR 126 (CA) at 127.
31. *Te Ao Māori and Succession*, above n 1, at [147].
32. *Keelan v Peach* [2003] 1 NZLR 589 (CA); *Rameka v Wikitene* (2008) 27 FRNZ 149 (HC).
33. Peart and Vines, above n 8, at 357.
34. *Williams v Aucutt*, above n 29.
35. Māori freehold land is defined in s 129(b) of the Te Ture Whenua Māori Act 1993 as "land, the beneficial ownership of which has been determined by the Māori Land Court by freehold order".
36. Te Ture Whenua Māori Act 1993, s 100.
37. Te Ture Whenua Māori Act 1993, s 150D.
38. Te Ture Whenua Māori Act 1993, s 109(1) and (2).
39. Peart and Vines, above n 8, at 368. Discussed further below.
40. Te Ture Whenua Māori Act 1993, s 115(2).
41. For an excellent and accessible explanation of tikanga see Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Te Whare Wānanga o Awanuiārangi, Wellington, 2016).
42. At 31.

43. Before moving on to discuss the key concepts that comprise a tikanga worldview, it is important to acknowledge that true understanding of these concepts can come only with knowledge and understanding of Māori cosmogony. Unfortunately, an exploration of Māori cosmology is beyond the scope of this paper. The key point is that Māori cosmogony illustrates an entirely different world view and source of understanding. Excellent summaries related to the related to the topic at hand are given in Di Pitama, Ani Mikaere, and George Ririnui *Guardianship, Custody and Access Māori Perspectives and Experiences* (Ministry of Justice, August 2002) at 20–23 and *Te Ao Māori and Succession*, above n 1, at 13–15.
44. *Ko Aotearoa Tēnei*, above n 22, at 5 and Williams, above n 19, at 4.
45. Williams, above n 19, at 4.
46. Mead, above n 41, at 33.
47. Mead, above n 41, at 32.
48. Mead, above n 41, at 33.
49. David Jones "Whakapapa membership and post settlement governance entities: the erosion of whakapapa as the heart of Māori institutions?" (LLM Dissertation, Victoria University of Wellington, 2013) at 13–14.
50. Law Commission *Adoption and its Alternatives: A different approach and a new framework* (NZLC R65, September 2000) at 81–82.
51. Bauer, above n 9, at 2–3.
52. *Hohua - Estate of Tangi Biddle* (2001) 10 Rotorua Appellate MB 43 (MAC); *Re Pomare* (2015) 103 Tai Tokerau MB 95, (2015) 30 FRNZ 626 (MLC); *Re Thorpe — Waikawa Village Section 10C3* (2017) 374 Aotea MB 291 (MLC).
53. Carwyn Jones "Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes" 4 VUWLRP 24/2014 at 121.
54. At 121.
55. Joan Metge *New Growth from Old: The Whānau in the Modern World* (Victoria University Press, Wellington, 1995).
56. Ruru, above n 17, at 59.
57. Pitama, Mikaere and Ririnui, above n 43, at 20.
58. Metge, above n 55, at 210. Referring to adoption as defined by the Adoption Act 1955.
59. *Adoption and its Alternatives*, above n 50, at 74–75; Metge, above n 55, at 210–227.
60. Definitions provided by Metge, above n 55, at 211.
61. *Adoption and its Alternatives*, above n 50, at 75.
62. *Hohua*, above n 52, at 44.
63. *Adoption and its Alternatives*, above n 50, at 14–16.
64. Adoption Act 1955, s 19.
65. *Adoption and its Alternatives*, above n 50, at 80.
66. *Adoption and its Alternatives*, above n 50, at 14–21; See further *Re Adoption of PAT* [1995] NZFLR 817 (HC) at 819.
67. *Adoption and its Alternatives*, above n 50, at 80–82.
68. Adult Adoption Information Act 1985.
69. Law Commission *Adoption and its Alternatives*, above n 50, at 14–16.
70. Metge, above n 55, at 212–214.
71. At 213.
72. *Adoption and its Alternatives* above n 50, at 13.
73. *Adoption and its Alternatives* above n 50, at 13.
74. *Adoption and its Alternatives* above n 50, at 13.
75. Williams, above n 19, at 11.
76. Intestate Native Succession Act 1876, s 4 (emphasis added).
77. See FOV Acheson, above n 23.
78. Native Lands Claims Adjustment and Laws Amendment Act 1901, s 50.
79. Native Land Act 1909, s 161–170.
80. Native Land Act 1909, s 139(1). The distribution of "native land" was determined according to s 139(2).
81. Te Ture Whenua Māori Act 1993, s 115.
82. *Hohua*, above n 52.
83. *Re Pomare*, above n 52, at [55].
84. As defined by Te Ture Whenua Māori Act, s 4 and contemplated by s 115.
85. *Hohua*, above n 52, at 44.
86. *Hohua*, above n 52, at 44; *Re Pomare*, above n 52.
87. *Hohua*, above n 52, at 44-45.
88. *Hohua*, above n 52, at 45.
89. *Te Ao Māori and Succession*, above n 1, at [78].
90. Mead, above n 41, at 151.
91. Mead, above n 41, at 151–152.
92. Mead, above n 41, at 152.
93. Mead, above n 41, at 151–152.
94. *Te Ao Māori and Succession*, above n 1, at [143].
95. To present/offer.
96. *Te Ao Māori and Succession*, above n 1.
97. Khylee Quince and Nin Tomas "Māori Disputes and their Resolution" in Peter Spiller *Dispute Resolution in New Zealand* (Oxford University Press, Melbourne, 2007) 256 at 292.
98. *What should happen to your property when you die?*, above n 3, at 7–8.
99. Relevant provisions contained in Oranga Tamariki Act 1989, ss 20–38.
100. Joan Metge dedicated an excellent book and years of study to the question of how the whānau should be defined, see Metge, above n 55.
101. *Adoption and its Alternatives*, above n 50, at 86.
102. *Adoption and its Alternatives*, above n 50, at 86.
103. Oranga Tamariki Act 1989, s 2.
104. Morris and Maxwell, above n 14, at 79.
105. Morris and Maxwell, above n 14, at 79.
106. Moyle and Tauri, above n 18, at 97.
107. Ruru, above n 17, at 83
108. Ruru, above n 17, at 84.
109. Ruru, above n 17, at 83–86.
110. Ruru, above n 17, at 85.
111. Morris and Maxwell, above n 14, at 87.
112. Jones, above n 73, at 125
113. An illustration of this point is given by Carwyn Jones, above n 53, at 125–128.
114. Ministry of Justice *Te Korowai Ture ā-Whānau: The final report of the independent Panel examining the 2014 family justice reforms* (May 2019).
115. *Te Korowai Ture ā-Whānau*, above n 114.
116. *Te Korowai Ture ā-Whānau*, above n 114, at 7–8.
117. *Te Korowai Ture ā-Whānau*, above n 114, at 37–44.
118. David Beattie *New Zealand Royal Commission on the Courts* (Wellington, 1978) at 484.
119. *Te Korowai Ture ā-Whānau*, above n 114, at 4–7 and 112.
120. Joan Metge and Patricia Kinloch *Talking Past Each Other: Problems of Cross-Cultural Communication* (Online ed, Victoria University Press, Wellington, 2014).
121. *Takamore v Clark* [2012] NZSC 116, [2013] 2 NZLR 733.
122. Law Commission *Death, Burial and Cremation: A new law for contemporary New Zealand* (NZLC R134, 2015) at 210–214.

123. *Death, Burial and Cremation*, above n 122, at 208.
124. Stephen Hooper "Cross Cultural Dispute Resolution" in Peter Spiller *Dispute Resolution in New Zealand* (Oxford University Press, Melbourne, 2007) 295 at 296.
125. *What should happen to your property when you die?*, above n 3, at 7–8.
126. Public Trust "When there is no will — Intestacy" <www.publictrust.co.nz>.
127. Ministry of Justice "Number of 'Election to Administer' and 'Letters of Administration' applications disposed nationwide each year (2010-2019)" (12 May 2020) (Obtained under Official Information Act 1982 Request to Nicolaas Platje). Public Trust "Number of intestate estates administered by Public Trust" (26 March 2020) (Obtained under Official Information Act 1982 Request to Nicolaas Platje). Stats NZ "Births and Deaths" <www.stats.govt.nz>.
128. Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" [2015] NZ L Rev 1, at 24–26.
129. Coates, above n 128, at 24.
130. *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573, at [132].
131. Coates, above n 128, at 25.
132. Coates, above n 128, at 25–26.
133. Coates, above n 128, at 26.
134. *Review of Succession Law: Rights to a person's property on death*, above n 7.
135. At 23.
136. Moyle and Tauri, above n 18, at 101.

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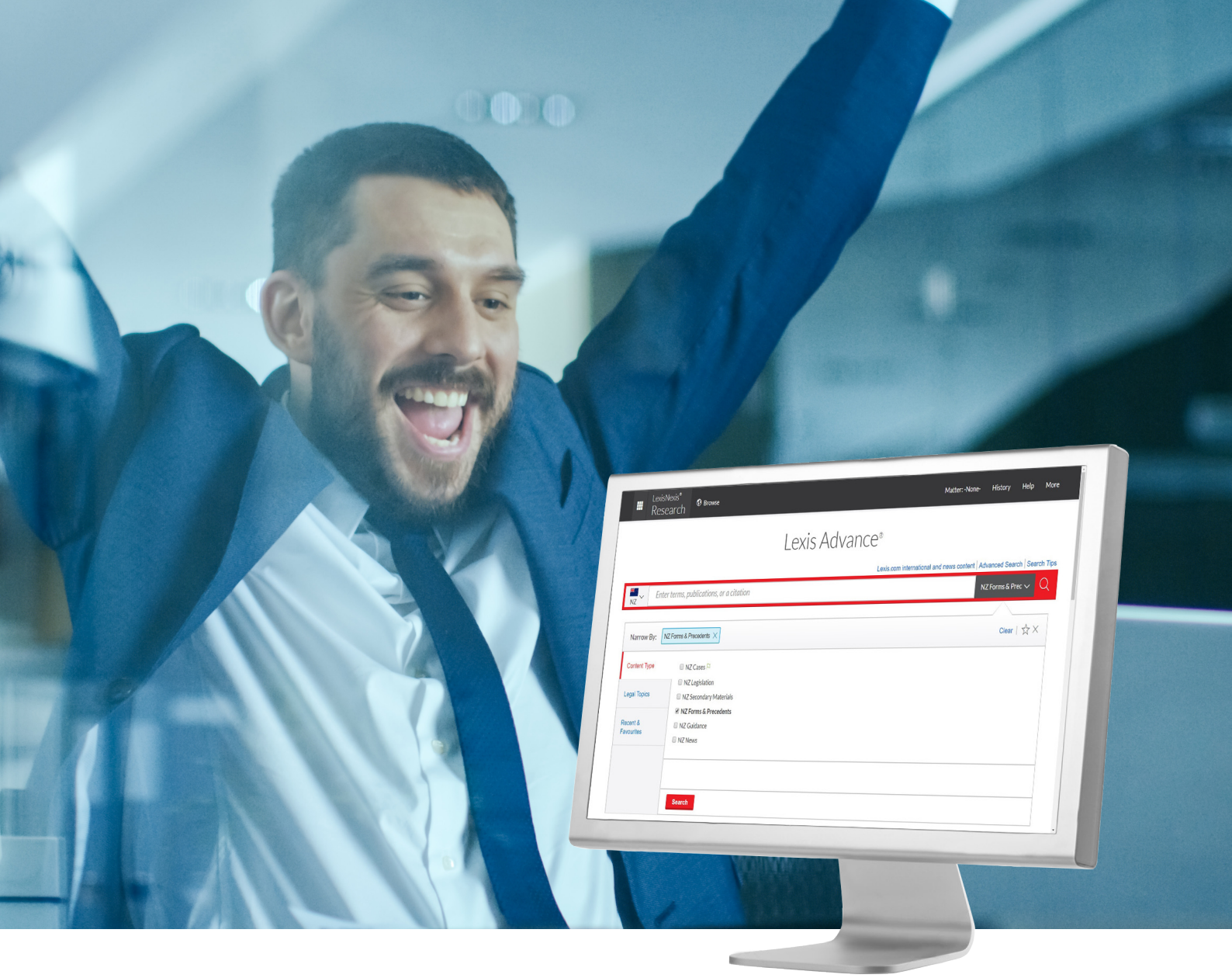

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