Book Review

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Commentary On Preliminary Paper 24: *Succession Law Testamentary Claims – A Discussion Paper* R. Sutton, Law Commission Te Aka Matua O Te Ture, Wellington, New Zealand, August 1996, .. pp

The New Zealand Law Commission's discussion paper (PP 24) on Succession Law Testamentary Claims could be described as a proposal for radical surgery on the *Family Protection Act* 1955. Whether there is a need for such radical surgery is debatable. Judicial discretion which has served so well for 96 years is said to be found wanting. In the case of adult children it is said that the legislation is not being applied with consistent principles and defined objectives in mind. Results depend upon judicial views of what is fair in the context of the particular case (ch. 7 para. 222). The solution is to limit that discretion and spell out certain claimants' rights in some detail.

I have identified nine major changes and propose to comment briefly on each one.

1. Claims by Widows and Widowers

It is proposed to import matrimonial property law into such claims. This means the claim has a property division component and a support component. In the property division component there is a presumption that the claimant's contribution to the marriage is equal to that of the deceased. There are some exceptions to this presumption and it may be rebutted but the starting point is equal division. The support component is designed to allow, if possible, the claimant to enjoy a reasonable independent standard of living.

The fact that the Family Court and High Court in New Zealand have concurrent jurisdiction in such claims probably has a bearing on this proposal. In Australia such claims are dealt with by State Supreme and District Courts, not the Family Court.

Given that the issues are different and in the case of testamentary claims that the best person to give evidence is dead there seems no reason why matrimonial property law should apply to testamentary claims. The result is likely to be very different but whether it is better is both debatable and unknown.

2. Claims by de facto spouses

This proposal (viz., to allow such claims) merely follows a trend in many other common law jurisdictions. What is new is the extension to same sex couples. The only Australian State to allow such claims is New South Wales. In the 14 years since such claims were allowed in New South Wales only the ACT has chosen to follow this path and then only quite recently.

The Law Commission admits this proposal is controversial. I can only agree.

3. Limit or Abolish Claims by Adult Children

The Law Commission does not have a firm view on whether such claims should be abolished or not but it does advocate limiting such claims by giving them lower priority to other claims, by limiting the time to apply for such applicants to 6 months from the date of death as opposed to 3 years for spouses and dependant children, and by excluding notional estate (eg gifts prior to death) from such claims.

What effect these limitations would have on the volume of litigation is not stated but I suspect that it would be substantially reduced. Having noted the difficulty of developing satisfactory tighter legal tests designed to limit such applications, the Commission states at para. 267 that: "it may be that the existing law, with all its difficulties, is seen as less unsatisfactory than any of the other options and prevails by default".

If the choice is between detailed legislative prescription and judicial discretion the writer prefers the latter.

4. Contributors

Contributors (defined as anyone who contributes a benefit to a will maker in his lifetime) may claim if the testator has made an express promise to leave them a benefit in the will. An order may also be made where the testator has retained the benefit of the services of the contributor and it is just that provision be made for that contributor. These changes are to some extent a development of testamentary promises legislation which New Zealand has had since 1949. There is no equivalent legislation in Australia. Such claims are dealt with here by other means (eg breach of contract, equitable estoppel, constructive trust etc). There seems little need for further remedy. However, given New Zealand's long experience with testamentary

promises legislation its introduction in a new Succession Act is understandable.

5. Abolition of Claims by Parents and Grandchildren

This is tied in with the desire to limit claims generally to spouses and dependant children. Such claims are, in the writer's experience, extremely rare so abolition would affect very few people.

6. Estate assets

Allowing the court to include as an estate asset contracts to transfer property to a co-owner, gifts made in contemplation of death, property subject to a power of appointment, property subject to a trust set up by the deceased person expressed to be revocable by the deceased person before death and joint property does nothing for certainty of property rights and may create more problems than it solves. Secret trusts and inter vivos gifts will no doubt gain in popularity.

7. Anti-avoidance Measures

One cannot quibble with this proposal. In Australia only New South Wales has such legislation (see *Family Provision Act* 1982, s.23). It is a pity it does not exist elsewhere in Australia.

8. Time Limits

The three year limit proposed for spouses and dependant children is only viable where tracing is allowed and where the beneficiary is still in possession of the property received under a proper distribution from the executor. Three years would seem ample time for a beneficiary to change his or her position and so render any bequest unavailable for the purposes of any claim. The present New Zealand limit of 12 months after grant seems generous enough to the writer and is a reasonable compromise of competing interests.

9. Allowing Parties to Compromise Actions

This proposal should be adopted universally.

This completes my comments on specific changes. On a more general note it is said (ch. 2 para. 28) that the law should promote family cohesion by advancing a vision of the family which is widely shared in society. One cannot argue with that. However, at ch. 1 para. 9 and ch. 2 paras. 29, 30, families are said to be different and should not be treated in the same way. If this is so the question must be asked: is a law of succession even possible?

An attempt to articulate a vision of the family has been made by the Commission (see ch. 2 para. 28) (viz., one where women and men partners share equally in

the wealth they have created and growing children are properly cared for and have their needs fulfilled). It is a vision which is consistent with the legislative changes proposed but it is not necessarily the only valid one. A vision which includes a duty to adult children in need or which places less emphasis on money may also be widely held.

The Commission suggests that the term "moral duty" should no longer be used. Although some Australian judges have warned against erecting what has been described as a useful yardstick (*Coates v. NTE&A* (1956) 95 CLR 494 at 512) into a test of jurisdiction (see *Hughes v. NTE&A* (1979) 143 CLR 134 at 158; *Singer v. Berghouse* (1994) 181 CLR 201 at 209; 18 Fam LR 94 at 100; *Permanent Trustee Co v. Fraser* (1995) 36 NSWLR 24 at 29), it is doubtful whether it has been so applied in Australia. The writer is unaware of any appellate decision based on such a flaw. Perhaps the position is different in New Zealand (see *Permanent Trustee Co v. Fraser*, supra at 30,31). If it is, the comments in the discussion paper may be justified. If it is not, a lot of time and effort has been expended on a fruitless linguistic exercise.

If the New Zealand parliament accepts the proposed changes the probability is that New Zealand decisions will in future have little relevance in Australia and vice versa. Unless the Australian parliaments follow New Zealand's lead each country will lose the great advantage, which has been enjoyed for the last 90 years, of learning from each other's family provision decisions because of the similarity of the legislation. It is a loss I would not welcome.

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