

Law Commission succession project: Communal family property?

R J Sutton*

The author presents a personal view of a possible future law of family property. At the heart of that law is the concept of "communal property". Communal property is maintained or built up by some members of the family in the expectation that all members of their family will benefit from it. Because of that expectation the legal owner of communal property may not be able to claim the unfettered power of disposing of it by way of gift, family settlement or will. If called upon to evaluate such arrangements, the courts should have regard to the broader interests of the family as a whole and not just the wishes of the legal owner. This notion is found in the present law governing disputes over the division of matrimonial property and the property of de facto partners. Admittedly, the idea that the whole family (and not just the partners) should benefit has limited application in those disputes. It becomes much more important when a surviving spouse or partner dies, disinheriting members of the family. The concept of communal family property can help to explain the judges' current practice in making awards under the Family Protection Act 1955. It may help resolve a much wider range of issues arising in the reform of the law of inheritance.

I INTRODUCTION

This paper is about the concept of "communal family property". It arises from work the Law Commission has been doing on claims against deceased estates.¹ It is here (more so even than in matrimonial property disputes) that the full reach of the concept of communal family property can be realised. My argument will be that communal property does not mean simply property which the wife and husband can split up between them. In International Year of the Family, it is time to recognise that children too may be part of that communality.

Everyone knows that in disputes between married and de facto couples, traditional concepts of property have not served the community well. The courts now acknowledge this. The lot of the partner who does not (in the strictly legal sense) "own" property

* Professor of Law, University of Otago, and Commissioner, New Zealand Law Commission. Thanks are due to Penelope Stevenson and Hamish Dempster of the Law Commission for their help in preparing this paper. But the views expressed in it, (and the responsibility for its defects) are those of the author and not of the Commission.

¹ The general purpose of the project is set out in an unpublished paper by Paul McKnight "Succession Law: Policy and Issues", Law Commission files. For the purpose of this paper I have drawn selectively on this and other work done within or for the Commission. The material we have collected covers a much wider range of issues than are dealt with in the paper.

acquired during the relationship has been much improved. Helped, in some jurisdictions at least, by notions of "unjust enrichment",² legal thinking is moving slowly towards a concept of "community" property, in a very full sense of that term.

What is "communal family property"? I take as my starting point a quotation from an article written by Simon Gardner, published in the *Law Quarterly Review* in 1993.³ He made the point that even the idea of "unjust enrichment" does not come to terms with the reality of a family's communal relationship.⁴

The thrust of communality. . . is that the parties do not regard their affairs in terms of a gain to the one being matched by a loss to the other, which might or might not need to be reallocated. They do not keep separate accounts in this way, but trust and collaborate with one another for the good of both. In a nutshell, restitution is about "mine or yours"; communality is about "ours".

This comment was made in the context of the division of property when a couple splits up.

Communality in this sense, of course, lies at the heart of New Zealand's *Matrimonial Property Act 1976*.⁵

There is, however, a wider perspective. Very similar issues are going to arise in whatever way a couple's relationship ends - including cases where it is brought to an end by the death of one or both partners.⁶ In that wider context, is it right to speak of

2 For an extensive comparison of the law in New Zealand with that of other countries, see N Peart "A Comparative View of Property Rights in De facto Relationships" (1989) 7 *Otago LR* 100. The Court of Appeal has recently returned to the issue in *Nash v Nash* [1994] NZFLR 921 but without extensive discussion of the principles involved.

3 S Gardner "Rethinking Family Property" (1993) 109 *LQR* 263. He identifies the "contribution" approach with principles of unjust enrichment, whereas the "common expectation" approach is linked with principles of "communality" (289-290). Of particular interest is his reliance on "fiduciary" principles (288) because a person can be a "fiduciary" for a wider range of interests than those of the contributing parties, if that is the intention of the arrangement. Gardner's underlying argument is that the choice between an enrichment and a communality approach depends upon the nature of the particular relationship. The latter applies more clearly to married couples (291).

4 Above n 3, 287.

5 Though, the general principle is considerably curtailed in that Act:

- (1) it applies only to married couples;
- (2) communality is "deferred" until the couple separate; and
- (3) the statute has no application to claims made after one of the spouses has died.

6 See the author's discussion in "Families for Life - and Death", unpublished paper for International Society of Family Law, 8th World Conference, Cardiff, June-July 1994. The argument is made there that the law of succession has become artificially separated from the mainstream of family law, with consequent disadvantages for both. The separation has not been helped, in New Zealand, by the fact that for a long period

communality solely as between the two partners? Or does "ours" refer also to the family that both have worked to bring up, and for which both (in varying degrees, perhaps) will feel affection until they die? The argument of my paper is that "ours" should include everyone in the family relationship.

The work the Law Commission has been doing on the law of succession may in due course lead us to this wider perspective of family property - I cannot say. Our consultation process is far from complete. We have already had most valuable help from both theoreticians⁷ and legal professional commentators,⁸ and the basic options for improving the law are beginning to emerge. But there is other consultation to be done,⁹ and I am not yet in a position to offer you even a tentative Law Commission

the laws governing these two subjects have been dealt with by separate courts, and even now there are significant parts of the law of succession which are not dealt with in the Family Court.

7 The Law Commission has held two seminars. The first seminar at the Law Commission in February 1994 involved a round table discussion by a variety of academic, public policy experts and practitioners of four papers on the Family Protection Act prepared for the Law Commission by a number of legal academics. The authors and topics were Nicola Peart of Otago University Law School, "The Directions of the Family Protection Act 1955" [1994] NZRLR 193; Rosemary Tobin of Auckland University Law School on extending the categories of claimants see below, n 20; Virginia Grainer of Victoria University of Wellington Law School, below, n 15 and Paul McKnight of the Law Commission of "The Direction of the Family Protection Act 1955", above n 1.

The second seminar held in May 1994 involved a discussion of papers prepared by social policy experts. The authors and topics were David Thorns of Canterbury University "The Impact of Changing Family and Household Structures upon Property Inheritance", Susan St John of Auckland University Department of Economics "Social Welfare Policy and the Laws of Succession", Kaye Saville-Smith "The Law of Succession: Contract or Social Obligation" and Dame Joan Metge "Succession Law: Background Issues Relating to tikanga maori". The panellists who responded to the papers were Mark Prebble, Head of Social Policy at the Treasury, Professor Pru Hyman from Victoria University of Wellington Department of Economics, Robin McKinley Researcher and Professor Pat Hohepa of the Department of Maori Studies Auckland University.

8 A number of papers have been prepared within the Law Commission for the purposes of consultation with members of the legal profession. These have covered areas such as the Law Reform (Testamentary Promises) Act, the mediation of succession disputes, time limits on claims under the Family Protection Act and time limits on tracing claims, the duty to account for the estate, grants of administration where the person entitled is incapacitated, non-probate transfers of property at death, the relationship between the Family Protection Act and the Matrimonial Property Act 1963, murdering beneficiaries, the revocation of wills by marriage and divorce and the formalities requirements of wills. Abstracts of many of these papers or the papers themselves have been sent to groups of legal practitioners who work in the area of succession and Family Protection Act law and who have undertaken to discuss the ideas and options outlined and to forward their thoughts to the Law Commission.

9 Consideration still has to be given to the form that public consultation, and any further research into public views and attitudes, will take. An important aspect of

view on what new law should be proposed. What follows are my own personal suggestions about the things which have provoked this thought strongly in my mind.

Of the various options the Commission has under consideration, one is of particular relevance to my chosen topic. This is the proposal that the present law under the Family Protection Act¹⁰ 1955 be consolidated and extended.¹¹ Present practice allows

consultation is consultation with Maori. Succession law impacts heavily on tikanga maori (Maori values, customs, principles) and through consultation the Law Commission hopes to better understand those values, as it is obliged to do by the Law Commission Act. An outcome will be sought which will better foster and protect those values as the Crown is bound to do by the Treaty of Waitangi. Currently the Law Commission is being assisted by Professor Pat Hohepa and Dr David Williams of the University of Auckland. In the future, with guidance from the Law Commission's Maori Advisory Committee, wider consultation with Maori will be undertaken.

10 There is a gap between the literal words of the Family Protection Act and the application of the Act by the courts. This reflects a view of social policy held by the judges. The Act states that where:

adequate provision is not available from his estate for the proper maintenance and support thereafter of the persons by whom or on whose behalf application may be made under this Act

the court may order such provision as it thinks fit to be made out of the estate. The original Act was passed at the turn of the century when there was little if any social welfare legislation. The legislation got the support it did largely because it would relieve the state of any obligation to support destitute widows and children. It was viewed as a minor derogation from the principle of testamentary freedom. Within twenty years of its enactment, however, the courts were interpreting the Act to mean that where ever there had been breach of a moral duty the court would make provision for the applicant. This line of thinking has developed to the point at which any provision which looks unfair as between the survivors of the testator will quite likely be varied or overturned by the courts. Very few applicants are refused relief even if the amounts awarded are sometimes small.

11 The Commission has identified two basic directions for reform of New Zealand's family provision legislation. The first is to build on the existing law but widen the categories of claimant. The second is to limit the reach of the legislation and refocus it on protecting dependants.

1 An extended family protection law

Under this option the legislation would need a more flexible approach to the classes of eligible claimants since society itself constructs itself into a bewildering array of family groups. Obvious candidates for inclusion would be spouses and partners whether same or different sex; children, including adopted and children born through assisted reproductive technologies; step children and informally adopted children; grandchildren, parents siblings.

2(a) A dependency scheme

Under this option challenges to the will would be somewhat constrained: cf *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, Wellington, 1988). The original purpose of the Act was to prevent dependent family members of the deceased person becoming destitute and therefore a charge on the estate after the death of the testator. It is possible to return to such a principle. Eligibility would turn on being economically dependent on the deceased at the time of

adult children to make family protection claims, even though they themselves are settled in life and have long since ceased to be dependent upon their parents.¹² The balance of professional view seems to be that this is a useful practice, which considerably allays hurts felt by children who have been disinherited. It is thought that there is a need to strengthen the courts' jurisdiction in such matters, and to include other claimants (eg, stepchildren) who are not currently protected in the same way.

If that option is chosen,¹³ then my question would be whether it can be done without radically revising our conceptions of family property. Such a development would, it seems to me, have considerable implications both for the succession to property upon death, and for the law of gift and trust dispositions amongst the living.

In particular, we need to consider whether a fuller conception of communal property is necessary and desirable:

the death of the deceased or being legally dependent whether or not in fact dependent on the deceased. Those no longer dependent would not have a claim. Our consultation with practitioners lead us to believe that such a result would be viewed as unfair to these children.

2(b) A cohabitation scheme

Legislation based on dependency could be accompanied by reform and extension of the present matrimonial property legislation. This is needed because it is often difficult for partners to an interdependent reciprocal relationship to show dependency. Such relationships imply that parties have voluntarily undertaken to support each other on an ongoing basis. There are a wide range of interdependent relationships such as marriage, homosexual and heterosexual de facto relationships and other domestic relationships which do not involve a sexual relationships but do involve intermingling of resources.

12 An analysis of children's claims has been prepared for the Commission in a draft paper by N Peart "Fixed Shares under The Family Protection Act" (1994).

13 This is a matter which has been considered by a number of law reform bodies in the last two decades. Law Reform Committee of Western Australia *Project 2 - The Protection to be Give under the Family and Dependants Act 1916* (1970); Law Commission Report No 61, *Family Law: Second Report on Family Property. Family Provision on Death* (UK) (1974); Ontario Law Reform Commission *Report on Family Law "Part IV, Family Property Law"* (1974) 107-110; Law Reform Committee of Victoria *Report on the Testator's Family Maintenance and Guardianship of Infants Act 1916* (1977); New South Wales Law Reform Commission *Report on the Testator's Family Maintenance and Guardianship of Infants Act 1916* (LRC 28, 1977); Queensland Law Reform Commission *Report on the Law Relating to Succession* (QLRC 22, 1978); Alberta Institute of Law Research and Reform *Family Relief* (1978); Law Reform Commission of British Columbia *Report on Statutory Succession Rights* (LRC 70, 1983); Manitoba Law Reform Commission *Report on the Testator's Family Maintenance Act* (1985); Law Reform Commission of Hong Kong *Report on the Law of Wills, Intestate Succession, and Provision for Deceased Persons' Families and Dependants* (Topic 15, 1984). The results were varied. While in some cases there was a call for the general reach of existing legislation to be extended, in others it was recommended that relief be limited to a small group of close family, or limited in the purpose for which it was given.

- to give effect to current policies applicable to estate claims
- to help determine what property owned by a dead person is part of that person's "estate", and is available to meet family claims
- to help determine what restraints should be imposed against gifting property before death, so as to defeat family claimants.

II COMMUNAL PROPERTY AND ESTATE CLAIMS

A *Property Acquisition in New Zealand*

It is a matter of common observation that in New Zealand, property is normally acquired by the personal efforts of its owners during the course of their lifetime.

Most frequently, the life-histories described by the courts in family protection cases are of couples who have saved together to acquire a house, or built up family businesses from virtually nothing, or who have acquired and developed farming properties.¹⁴ Even where one partner has acquired a family farm or business, the tale is often one of hard work to maintain and build it up. Or there may appear a story of adversity bravely borne, of family pressures and dissensions withstood or avoided, and of family property used (wisely or unwisely) to further the interests of children and other family members.

The point I am making is that in New Zealand inherited property is not a bulwark, it is merely an opportunity. We do not have a "dynastic" approach to property. Property does not stand still - it is acquired, built up and maintained at a cost which will be felt by all members of the owner's immediate family. It is used well, or poorly, to meet family members' needs as they arise. Looked at as a "communality", the property which is "owned" by one or both parents carries with it the marks of a lifetime of endeavour, whether it be well or ill-directed.

The costs a family may have to pay for the acquisition and retention of family property appear in the various claims which are often made against deceased estates. Typical amongst these are

- testamentary promises claims for services rendered at by family members on the farm, for low wages or no wages at all

14 This is reflected in the size of estates in which children have made claims. Peart, above n 13, reports that (of approximately 200 claims studied in the 1985-1994 period) well over half the estates involved were small, ie, less than \$150,000 in size. About three quarters of the estates involved were less than \$300,000. Only in a little over 10% of the cases did the estate exceed \$500,000, and the highest value was \$1.6 million. To acquire an estate of say \$1 million is not out of reach of an income earner or the owner of successful small businesses, without the aid of inherited capital, particularly having regard to the inflation in house property values in certain parts of the country.

- claims made by wives and husbands under the Matrimonial Property Act 1963 for contributions made to their spouse's estate; and similar claims made by de facto spouses (including those of the same sex) based on the general law
- claims made by children on the basis of past neglect by their parent, while the parent was building up another family, and other family assets, elsewhere
- claims made by children on the basis that their siblings are preferred in the will, or have been preferred by gifts made during the parent's lifetime
- claims by children who have taken a direction in life which has not been approved or supported by their parents.

Of course, in the great majority of cases these matters do not arise, or pass unnoticed when the parent dies. The parents leave their property in a way which is accepted by the family as fair. No claim is made. There are few perfect parents, but there are many happy families, and in any event life goes on.

In the pathological cases, however, we are confronted by a challenge. The concept of legal ownership, and our inherited traditions about the "supremacy" of the legal owner's power during life and upon death, can sometimes discourage courts from giving as full a relief to claimants as notions of family justice would suggest. And legislative proposals to consolidate and extend the existing law are likely to be confronted by the contention that neither legislature nor court should interfere with a legal owner's untrammelled will.

B Should the Power to Make a Will Mirror the Power to Transfer Property During One's Lifetime?

A powerful argument against judicial intervention in deceased estates is this. There should be a "mirror image" between the power one has to dispose of one's property during one's lifetime, and the power to will property to whomsoever one wishes on one's death. Why, is it asked, should someone be able to give all their property to a cat's home while they are alive, yet be obliged to leave it to their children when they die?¹⁵

There does indeed seem to be something wrong if this can happen. I am not sure, though, whether the right conclusion is that we should abandon attempts to control will-making powers. We might, instead, propose rules which give greater effect to the policies lying behind the Family Protection Act, so that they cannot readily be evaded by ante mortem dispositions. I shall say more about that later.

¹⁵ See V Grainer "Is Family Protection a Question of Moral Duty" (1994) 24 VUWLR 141, 151-155. She analyses the various duties owed by a person to their family during their lifetime, arguing that they are nowhere near as extensive as the rights claimed by the family of the person after they are dead.

So which should we choose? I believe that this question is best answered by having regard to the quality of the family life we wish to promote. If we see the family as a communal entity, which takes its decisions together, and meets its burdens and its good fortune together, we will prefer some form of "communal" property ownership.

That is not to say that, in dealings with the outside world, the legal owner will not be seen as the person who is entitled to make the decisions. We are already familiar with that distinction from the concept of trusteeship, and the division between "legal" and "equitable" ownership. The trustee can deal with bona fide purchasers as would an absolute owner. But the beneficiaries have rights against the trustee. If the trustee neglects them, there will be a claim for compensation, or perhaps an order preventing future breach, or even for the removal of the trustee from the administration of the trust.

Do not get me wrong about this - I am not suggesting that "communal" family property rights should be enforced by such drastic methods. I would envisage that, during the legal owner's lifetime, any legal consequences would be much more subtle than that. They would be exercised in clear cases only. I instance the court's power, under the Matrimonial Property Act 1976, section 26, to set aside property for children; and the power under the following provision of the Act to make orders in relation to the occupation of the family home. If we had stronger conception of communal family property, these sections might be more extensively used. As it is, it appears that orders under these sections are unusual.¹⁶

But that is to digress from my main theme, which is that our views on the character of a family relationship may well have a bearing on whether we recognise a concept of communal family property. Further, what happens on death is closely linked with the way things are during the owner's lifetime. Nowhere is this made more clearly explicit than in the writings of Thomas Hobbes, who likened the powers of the head of the family to the powers of the sovereign. Hobbes, though he wrote nearly two centuries before, was a very influential figure for the "positivist" legal philosophers who flourished in England in the last century. Both he and they emphasised the comprehensive nature of sovereign power.

In Book 2 of his *Leviathan*, under the attractive heading, "Of Dominion Paternal and Despotical", Hobbes argued that ". . . he that has dominion over the person of a man has dominion over all that is his, without which dominion were but a title without effect. The right of succession to paternal dominion proceeds in the same manner as

16 See R Fisher *Fisher on Matrimonial Property* (2 ed Butterworths, Wellington, 1984) 572-573, 590-595; *Butterworths Family Law in New Zealand* (6 ed Butterworths, Wellington, 1993) para 7.84. The writer has considerable sympathy with the view (expressed during discussion of this paper) that the wider notion of "family property" ought not to be used to the disadvantage of women who make matrimonial property claims. But that is not an argument for ignoring children's claims; in fact, taking a wider view may well enhance the position of the woman, particularly if she becomes principal care-giver after the couple separate.

does the right of succession of monarchy . . .".¹⁷ Hobbes had earlier explained¹⁸ that in a monarchy, the monarch had power to confer all the rights and powers his subject possessed; and that therefore it made little sense for anyone to assert a right of succession unless the monarch agreed with it. So the monarch is to have complete power to decide who will succeed him. Only in the event of failure to do so will his next-of-kin take the succession. This is because the monarch will be presumed to wish to retain the style of government he himself adopted in his lifetime, and also that he would prefer his own children (and his male children at that) to be advanced over strangers.¹⁹

It has to be said that for centuries after Hobbes wrote, the law of testate and intestate succession was preserved in a form which readily complied with these criteria. But his views are not a helpful description of the modern family relationship. Perhaps they can be watered down, and preserved in the form of a presumption in favour of the wise parent. That parent is likely to know better than the court what is the fair and just way of disposing of family property. But, as with the organs of the modern parliamentary and bureaucratic state, some powers of review are desirable to deal with parents whose testamentary dispositions are arbitrary or manifestly unfair.

Obviously, where you draw the line between testamentary freedom and judicial review is an important question. But no matter how you answer it, a clear concept of a communal family property would help the process of review. This concept would become all the more important if the Commission were persuaded to recommend that the jurisdiction under the Family Protection Act 1955 be extended.

C *An Illustration - Step-children*

Many of those we have consulted express concern about the current law dealing with claims of stepchildren and others who live in composite families. These families comprise the children of two nuclear families, who are brought together when their parents divorce and remarry.²⁰

Under the present Act, stepchildren have no claim against the estate of their step-parent if they are not being maintained, or are not entitled to be maintained, by the step-parent at the date of death.²¹ The following example is typical of the problem identified by our consultants.

17 Thomas Hobbes *Leviathan (Parts I and II)* (Bobbs Merrill, Indianapolis 1958) 165.

18 Above n 17, 160.

19 Above n 17, 161.

20 See generally R Tobin "The Family Protection Act 1955: Expanding the Categories of Eligible Claimant" (1994) 16 NZULR 1. Tobin compares the wider definitions of family in the Inheritance (Provision for Family and Dependents) Act 1975 (UK) and the Family Provision Act 1982 (NSW).

21 Family Protection Act 1955, s 3(1)(d).

The family of H and W comprise five children; two are H's from his earlier marriage, one is W's from an earlier marriage, and two are H and W's children. H and W make wills leaving all their property to each other. The children have all lived in this family from a very young age, but are now grown up. If H dies first, W can leave all her property (including what formerly belonged to H) to her own children, to the exclusion of H's by the other marriage.

Clearly this is unsatisfactory. Of course, on H's death his children could apply for a share of H's estate. But it is quite likely that all of H's estate will be needed to maintain W, who has a prior claim. In any event, it is not particularly desirable that, in an otherwise happy family, H's children should have to make a hostile application to the court to protect their future interests.

Now the obvious way to fix this is to include stepchildren as if they were children, assuming that at some stage they have been part of H and W's family. One does not need a concept of "communal family property" to do that. But suppose one varies the facts, for example:

- (1) H's first marriage was to a wealthy woman, W1, who died leaving him all of her property. The children of H and W1 claim a greater share of H's estate on that account.

In this variation, these children are claiming in different rights: as children of the first marriage, and second, as children/stepchildren of the second. It is difficult to see any easy solution to the problem, since much may depend on what happened in the second marriage, and whether H and W treated everyone alike.

But (if one accepts the notion of family communal property) there may be value in allowing the communal property of the first marriage to persist notwithstanding the second. In equitable terms, what is apparently H and W's property is in fact a "mixed fund" comprising the communal property of each marriage. This would allow the court to draw upon considerations based on the source of the family wealth, and not just the relationship between parent and child.²²

The second variation poses the problem more acutely, since here the children's only claim is based on the communality of the first marriage:

- (2) The children of H and W1 were grown up when H and W married, and were never members of that family. They therefore cannot claim in W's estate under the extended definition. They nevertheless wish to follow W1's property through H's estate and into W's estate when W dies.

22 Note that this approach has some affinity with the situations in which courts have taken into account the origin of money disposed of in a parent's will, in particular "grandfather money".

Here again, some notion of communality of property would be helpful, assuming that as a matter of policy the children's claim is thought to be desirable.

It is by no means clear that the Commission will want to recommend that the law of family protection be carried this far. It has been suggested to us that so much depends upon the circumstances of the individual relationship that judicial intervention will inevitably be heavy handed.²³ On the other hand, many of those who are close to these problems consider that they can be dealt with fairly according to current practice as long as the jurisdictional provisions in the Act are widened.

D Wider Still and Wider

If we do accept a wider definition of the "family member" who has communal interest in property, who will be included as family? Might the family include so many people that having "family property" is meaningless?

The criteria in the present Family Protection Act are expressed primarily in terms of legal marriage and biological (or adoptive) relationship. But social conditions in New Zealand in the 1990s take us well beyond that:

- De facto relationships are increasingly common
- There is a growing acceptance that partners in same-sex relationships should be accorded legal rights. (See Human Rights Act 1993; New Zealand Bill of Rights Act 1990, section 19, as amended in 1993)
- Adoption is more open than it once was, and increasingly adoptive children will have social relationships with both adoptive and biological parents
- Assisted reproductive technologies (ART) are becoming increasingly common, and here too the child may have social relationships with both genetic and legal parents. The genetic and legal parents are distinct in law (see Status of Children Amendment Act 1987).
- More people are living alone, not forming relationships in the nature of marriage, and not having children. For these people extended family ties and other relationships may be important.

Overall, the concept of "family" is very fluid. Further, while all "family" relationships are necessarily of a lasting character, their nature may change considerably over a period of time. However, this is not necessarily an argument against a concept of

²³ See K Saville-Smith "The Law of Succession: Contract or Social Obligation", above n 7, who queries whether intervention based on judicial notions of "social obligation" may be too heavy handed for the multifarious types of family now found in New Zealand society. She also accepts, however, that a purely "contractual" approach to the division of family property is not a sufficient response either.

"family property". Courts of equity have long recognised that there may be enforceable property rights even though the beneficiaries of those rights change over time, and the precise amount they can claim is not readily ascertainable.²⁴

The definitions of who should be capable of being "family" is therefore flexible, according to the particular type of claim which is being made. For the purpose of the Family Protection Act, potential claimants might include spouses and de facto partners (including same-sex partners); children (including adopted and ART children); stepchildren, informally adopted children and others who at any time have been members of the deceased's household; grandchildren; parents; siblings and other relations (though perhaps not in the ordinary course of events).

I have now sketched out the concept of "communal family property" and, I hope, shown how it could be useful to implement reforms of the Family Protection Act 1955, if they are considered desirable. Indeed, I have suggested that without it reform may well result in the Act being redrawn in a much more limited way. But I stress that we are very open to contrary views, and restrictions on the operation of the Act may be no bad thing. It has been suggested to us, for example, that claims should be limited to people who are dependant upon, or who are legally entitled to claim maintenance from, the deceased at the date of death. This would certainly be a much simpler way of handling estate matters, and it may in the end prove no more divisive for family members than does the present law.

III WHAT IS THE "ESTATE" OF A DEAD PERSON?

Traditionally, the central focus of succession to family property is on the "estate" of the deceased. This is the property which is collected by the administrator of the estate and is made available to various claimants:

- creditors and contractual claimants
- statutory claimants (Family Protection Act 1955, Law Reform (Testamentary Promises) Act 1949, Matrimonial Property Act 1963)
- claimants under the general law, ie, constructive trusts, restitutionary claims

24 Thus, the concept of a "trust power" of appointment is a well established equitable concept: see eg *McPhail v Doulton* [1971] AC 425. Such a trust provides potential benefits for a very large, fluctuating group of beneficiaries, from whom the trustee must select in accordance with the terms and objectives of the trust. Another recognised equitable interest is the "floating charge", which does not attach to property immediately, but "hovers" above it until some crystallising event, such as a breach of contract, takes place. The exact status of the latter equitable interest is still a matter for debate. While the potential beneficiary of a trust power, and (possibly) the owner of a floating charge, may not enforce a direct property right, the property itself is continuously affected by the equitable obligation owed by the trustee or the charger company.

- people having rights under the deceased's will or intestacy.

Assuming that there will continue to be some form of redress for these claimants, it is important to ensure that everything the deceased can resort to, or dispose of, during his or her lifetime should be available. Moreover, as the time of death approaches, there is a need to look closely to see whether particular claims will be able, in fact, to be met upon death. It is one thing for a testator to make (for example) a testamentary promise in mid-life, not knowing where the assets are going to come from to meet it; it is another for a testator to act irresponsibly, in the last few years of life, so that property which should be reserved to meet the promise goes out of the estate.

This too should be reflected in the notion of "communal family property" and how it should be recognised by the law. I will have more to say about transactions designed to defeat estate claimants' rights in the next section of my paper. In this section, I shall concentrate on the property which should be included, and the significance before death of the claims which will be made against the estate.

A *What is in the Estate?*

Under the present law, the administrator controls only that part of the estate which is going to pass under the testator's will or intestacy. This puts matters rather roughly, and there are other instances where the administrator will play a role in getting property to those who take in other ways. But the point is that the administrator may have no control over the assets comprised in the following arrangements, to the extent that they are valid in law:²⁵

- property jointly owned by the deceased, which passes by survivorship to the other owner
- life insurance policies and other similar arrangements, where the beneficiary is nominated by the deceased as part of the contract with the insurance company²⁶
- superannuation rights which automatically devolve to a spouse or other family member

25 See generally a paper written for the Commission by R Tobin "Will Substitutes: The Non-Probate System" (1994), where the consequences of these arrangements in New Zealand law are dealt with.

26 "Credits in any account" are covered by ss 68A to 68E of the Administration Act 1969 (inserted by the Administration Amendment Act 1982, s 2). These provisions

- (1) limit the size of the nomination of any one account to \$6000; and
- (2) give the nomination the effect of a specific legacy (so that it is available to those making a claim against the nominator's estate).

It is unclear whether these provisions extend much beyond bank accounts and similar credits.

- property which is the subject of a deathbed gift
- property held by trustees on a trust set up by the deceased, expressed to be revocable by the deceased before death
- property over which the deceased had a beneficial power of appointment during his or her lifetime.

These assets (which I shall refer to as "non-probate" assets²⁷) appear not to be available to the administrator, unless it can be established in any particular case that the transactions was in reality a form of will disposition which fails because the formalities provided for in the Wills Act 1837, section 9 (UK) have not been complied with.

If the estate is insolvent, some at least of these arrangements may be open to attack by creditors once the estate is formally declared insolvent under Part XVII of the Insolvency Act 1967. So they have a degree of protection. So too will estate claimants who can establish their claim as some form of non-statutory legal right (eg constructive trust or contract).²⁸ And a claimant under the Matrimonial Property Act 1963, section 5, may perhaps have access to the whole of the deceased's estate. But all of this is messy. It would be much more convenient if there was a responsible administrator who simply took these assets and applied them in the way the deceased should have done.

For other claimants, the position is less promising. Deathbed gifts are included in the estate for the purposes of the Family Protection Act.²⁹ Apart from that, claimants may find that although their claim is meritorious, there are insufficient funds in the estate to meet it.³⁰ Further, if the claim is met, this will displace will-beneficiaries who have no access to the non-probate assets themselves.

27 See generally Langbein "The Non-Probate Revolution and the Future of the Law of Succession" (1984) 97 Harv LR 1108. Langbein notes an increasing use of these "will-substitutes" in the USA, due in part to the cost and formalities imposed by the probate system in that country. While the same costly formalities are not a feature of the New Zealand probate system, property which automatically devolves on a wife or other family member without the need to take out probate still has its attractions.

28 Contractual promisees are treated as creditors in the estate and not beneficiaries: *Schaefer v Schuhman* [1972] AC 572.

29 Section 2(5).

30 Typical is the position under the Law Reform (Testamentary Promises) Act. The claimant is able to claim against the **gross estate** of the deceased: *Patterson Family Protection and Testamentary Promises in New Zealand* (Butterworths, Wellington, 1985) para 17.4. This follows from the interpretation of the operative sections of the Act which provide, inter alia:

- (1) The court is directed, in determining whether to grant relief and to what extent, to take account a number of circumstances including claims of creditors.
- (2) Subsection 3(3) of the Act states: Where the promise relates to any **real or personal property which forms part of the estate of the deceased on his death**, the court may in its discretion, instead of awarding

There appears to be a great deal to be said for including all non-probate assets in the estate.³¹ At least they could be made available to the administrator upon request, to meet debts, and statutory and other claims. It would not follow that the dispositions would themselves become invalid, since they might rank in the same order as if they were specific legacies made in the deceased's will. The law might then take a fairly relaxed view about what formalities are required to make such dispositions valid.

B What is the Standing Of Estate Claims before Death?

I merely touch on this question, which may well prove to be of acute difficulty as our enquiries proceed.

1 In general

The basic problem is this. It sometimes becomes relevant to determine whether a particular claimant had standing before the death of the deceased, to object to conduct which might prejudice the claimant's rights. For example, a person may have been promised that a specific thing will be left to them under the deceased's will. Suppose the testator then determines to give that thing away. If that is accomplished, the promised gift in the will must "adeem" and the promisee gets nothing, apart perhaps for a compensatory claim for breach of the testamentary promise.

Should the testator be able to be restrained from making the gift or the donee required to give back the property? If the promise is one which can be enforced only

to the claimant a reasonable sum as aforesaid make an order vesting the property in the claimant.

(3) Subsection 3(5) of the Act states:

The incidence of any payment or payments so ordered shall, unless the Court otherwise determines, fall rateably upon the **whole estate of the deceased ...**

The gross estate means all the property owned by the testator immediately upon death. Estate is defined in s 2 of the Administration Act to mean "real and personal property of every kind including things in action". Property held in common by the testator prior to death as joint tenant ceases to be property of the deceased immediately upon death: *Wright v Gibbons* (1949) 78 CLR 313; see Hinde, *McMorland and Sim Introduction to Land Law* (2ed, Butterworths, Wellington, 1986) para 9.035.12.

³¹ This is a controversial matter in the United States. The Uniform Probate Code, para 6-201, validates non-probate transfers by declaring them non-testamentary. An alternative approach advocated by some writers is to treat them as valid, but testamentary in character so that the property involved is available to the executor to meet debts and other claims. See Tobin, above n 24, 8 citing Browder "Giving or leaving - what is a will" (1977) 75 Mich LR 845; Langbein, above n 26, 1109; Gulliver and Tilson "Classification of Gratuitous Transfers" (1941) 51 Yale LJ1. The provisions of ss 68A-68E of the Administration Act 1969, above n 26, foreshadow the second approach.

under the testamentary promises legislation, then it appears nothing can be done since s 3 of the Act is limited to claims made "in the administration of the estate". If, on the other hand, there is in addition a contractual right, the promisee might be able to get an order restraining the making of the gift.³²

Looking at this from a "communal property" point of view, the present law does not make a great deal of sense. Whether a breach of duty can be restrained or its effect nullified should depend upon the imminence of the threat, the general character of the relationship between the owner and the claimant, and the nature of the restrained transaction. It may be that the testator has an urgent personal need to make the arrangement, or is doing so in satisfaction of some other obligation which will mature into a claim upon death.

2 *Priorities and ante-mortem standing*

We might probe more deeply into this, and ask the question, who would take priority if instead the claims were litigated after death? More anomalies emerge. It appears that, under the testamentary promises legislation, some non-contractual promises may in the court's discretion be given priority over contractual claims.³³ So a disposition made to a contractual claimant shortly before death might be evaluated after death as one which should yield priority to the testamentary promise claim. Yet it could not, under present law, have been restrained. Conversely, if the contractual claimant had successfully restrained a pre-death transfer to a third party, the testamentary promise claimant would still take priority.

I have not yet mentioned family protection claimants and their priorities. At first sight it appears that they have a claim only against the "net" estate of the deceased, after all debts and testamentary promise claims have been satisfied.³⁴ So they will be the last on the priority list. But then it appears from section 3 of the Law Reform (Testamentary Promises) Act that, in making an award under that Act, the court must have regard to claims of beneficiaries and next of kin. Presumably this means that the latter will in some instances take priority. The complex scenario which could arise from this curious collection of priority rules has fortunately not been encountered in practice, though a case on "contracting out" of the family protection legislation has brought us close to it.³⁵

32 On the remedies available, see W Patterson *The Law of Family Protection and of Testamentary Promises in New Zealand* (Butterworths, Wellington, 1985) para 5.6; Sheppard "Contracts to make Wills" (1985) 15 VUWLR 157,159.

33 Sections 3(1), 3(3). See generally on this topic Patterson, para 17.6.

34 Family Protection Act 1955, s 4; Patterson, above n 32, paras 5.7, 17.4.

35 *Re Webster* [1976] 2 NZLR 304 (competition between children who had been promised ownership of the deceased's house, and other children who received money portions calculated only on 1956 values, and who sought a further award under the Family Protection Act).

One useful thing which could be done, as part of the development of a concept of communal family property, is to establish a list of priorities amongst these various claims. These priorities should apply whether a claim is brought before or after death.

3 *A current illustration*

The problem to which I have referred is particularly acute in the administration of the long stay residential care benefit for the elderly. It can happen that an elderly person is cared for by a relative for a considerable period of time before entering residential care. The caregiver may be put under great stress, and may well have a claim against the estate when the elderly person dies. There may, for example, have been a promise that the home in which both live will be made over to the caregiver. Or the caregiver may be a child of the elderly person who (without anything being said) has high hopes of gift in the will which recognises the value of the care that has been given.

When the time comes for the elderly person to go into care, the Department of Social Welfare is called upon to assess that person's assets and liabilities.³⁶ Ought the caregiver's claim to be recognised as a "liability" for these purposes, ie, it reduces the amount of the elderly person's "realisable assets"? Should it make a difference whether, after death, the caregiver's rights will be founded upon contract, a testamentary promise, or the family protection legislation?

As a matter of policy, one might venture the answer "yes" to the first question, and "no" to the second. In practice, this may well be the answer anyway because if the caregiver goes to see a lawyer, she will be helped to state the facts so that they establish a contract. But in theory it may not be possible to achieve this result without re-thinking the whole basis on which "estate" claims are made.

Again, I suggest that a concept of "communal family property" would be helpful here. As we approach the final stages of our life, obligations which hitherto have been vague and uncertain assume a new prominence. This transition may take place slowly, and for many of us it will not be marked out precisely by a particular event, such as our death. The range of options for meeting our obligations we had when we are in the prime of life gradually diminishes, and it will become very clear to a court whether we are acting responsibly or not in what we do. If there are significant estate claims of the kind I have mentioned we should not be compelled to act irresponsibly by the exigences of the welfare system.

IV DISPOSITIONS OF PROPERTY BEFORE DEATH

This brings me to the final question which I wish to consider. If I am right in what I have said so far, it must follow that the courts should have some power to scrutinise transactions which have taken place before death.

³⁶ Social Welfare Act 1964, s 60E, as inserted by Social Security Amendment Act 1993, s 15.

I approached it in the previous section, on the basis that transactions might be restrained in the lifetime of the testator. I appreciate that, except in unusual situations where sanity, competence or influence is in issue, this will rarely be a realistic procedure. Certainly it will not do much for the claimants' chances of future testamentary largesse! But there is a much more realistic way of dealing with irresponsible lifetime transactions. This is by application, after the death of the testator, to bring back property into the estate.

As I already indicated, we have not made extensive use of this technique for estate claims in New Zealand, though it became well established as a means of ensuring that people did not avoid death duty.³⁷ Basically there are two approaches, either or both of which might be adopted:

- By fixing a period prior to death; all gifts and trusts made during the period are automatically brought in to the estate (they would continue to have standing as if they were specific legacies, and would take precedence over legacies otherwise deemed by the gift)³⁸
- By testing any prior gift by reference to the testator's intent; for example, a gift may be invalid if entered into for the purpose of
 - putting assets beyond the reach of a person who is making, or may at some time make, a claim against the estate; or
 - otherwise prejudicing the interests of such a person in relation to such a claim.³⁹

Such a provision, if adopted, would again draw force from a concept of communal family property. It would meet the objection that we cannot be taking the family protection legislation seriously if we allow it to be readily avoided. And it would stress communal property is a concept designed to speak to the relationships of the living, as well as to those dealing with a deceased's property after they have died.⁴⁰

37 Estate and Gift Duties Act 1968, ss 8-16 (covering also most of the non-probate transfers referred to in the previous section of the paper). The provisions of the Act do not apply to the estates of people dying after 17 December 1992. Cf *Proceedings of 49th Conference of Commissioners on Uniformity of Legislation in Canada* (1967) 219-221, s 21, for a discussion in the context of family claims.

38 Cf Estate and Gift Duties Act 1968, s 10 (3 year period).

39 The wording is adapted from the Insolvency Act 1986 (UK), s 423(3). For overseas illustrations, in the context of family provision, see Inheritance (Provision for Family and Dependants) Act 1975, ss 10-13 (UK); Family Provision Act 1982, Division 2 (NSW). A further possibility, found in the Estate and Gift Duties Act 1968 ss 11 and 12, is to claw back gifts and trusts set up by the donor or settlor, in which a benefit is reserved which can operate during the donor's or settlor's lifetime.

40 For a general discussion of anti-avoidance provisions, see Law Commission *Report No 61, Second Report of Family Property: Family Provision on Death* (UK 1974), paras 189-192; Law Reform Commission of British Columbia *Report on Statutory*

V CONCLUSION

I have argued for a concept of "communal family property" which looks beyond the immediate wishes of the two people who found a family, and expresses more effectively the long-term basis on which they come together. This concept seems to me to express more accurately what all of us desire from a family relationship, than do current notions of legal or equitable ownership. It speaks of family as a community, and not as a unit presided over by a despot. Its recognition would not, however, result in any great unsettling of precedent; the hand of judicial intervention would still be light. Yet the concept might be found helpful in resolving conflicting expectations we sometimes have of the present law of succession, and awkwardness which currently exists in its implementation.

Succession Rights (LRC 70, 1983) 95-97; Queensland Law Reform Commission *Report on the Law Relating to Succession* (QLRC 22 1978) 29; New South Wales Law Reform Commission *Report on the Testator's Family Maintenance and Guardianship of Infants Act 1916* (LRC 28, 1977) 68-69; Law Reform Commission of Hong Kong *Report on the Law of Wills, Intestate Succession and Provision for Deceased Persons' Families and Dependents* (Topic 15, 1984) 75.

