

Commentary on Professor Sutton's paper

Richard Perry*

Firstly, I would like to thank the Law Commission for the opportunity provided to Wellington District Law Society members to participate in a consultation committee, responding to Law Commission papers on succession issues. Over the last 5 months, a group of six practitioners, drawn both from family law litigators and property lawyers interested in family property matters, have met to discuss these papers. The range of viewpoint has extended, on the one hand, from those who advocate complete testamentary freedom subject only to court intervention where there is obvious injustice, to, on the other hand, a suggestion that upon death all major assets could revert to the State for distribution to the most needy. This latter position could be described as communal property in extremis. I hope that some of the group viewpoints are interweaved into this commentary, apart from my own individual viewpoint.

I HOW CAN THE CONCEPT OF COMMUNAL FAMILY PROPERTY EARN LEGITIMACY?

A One basis is the assertion of contribution to the growth of the testator's wealth during his or her lifetime. This may be contribution through joint work efforts and contribution to material wealth, or provision of services. Matrimonial property law already recognises to a substantial degree the communality of property between marriage partners, and a substantial justification for the introduction of the equal sharing regime was the need to recognise the material and non-material contributions of a spouse to the marriage.

I have reservations whether the same justification can be so readily applied to the children of a testator. Most of us find that our children are consumers of material family wealth, rather than contributors to it. The only choice of parents is either to accept their continual financial claims with the philosophical resignation of an Al Bundy, or to enjoy the benefit that we see children derive from the provision made for them.

B Validity for a concept of communal family property may more generally be seen to derive from a mutually implied expectation between parents and children. While the use and allocation of property between family members is determined by one or both of the parents, there is an expectation that all participate. I would consider that 90% of will instructions passing over the property lawyer's desk from couples with children follow the standard formula (subject to minor bequests) of passing all property to the surviving spouse, with a provision that if the marriage partner predeceases, the property will be divided equally among the children of the marriage. There is some recent

* Barrister and Solicitor of the High Court of New Zealand.

recession from that theme. More frequently now, the surviving marriage partner is being left only a life interest in much of the property. There has also been a tendency to the creation of family trusts so that property which formerly would have belonged to a testator for varying periods before death may not be seen to be the property of the testator, or upon death to be the absolute property of the surviving marriage partner.

That mutual expectation is not universal. Some clients advise us they have told their children not to expect anything, and believe that it is bad to cultivate an attitude of dependency or expectation in their children rather than self-reliance.

Some of our minority cultures still believe that the eldest child has a right of inheritance, with a culturally imposed obligation to care for the rest of the family as their needs arise.

The new succession regime will presumably be making special provision for Maori custom. If so, should it expressly also allow for cultural factors in ethnic cases, even if they do not readily fit a family communal property concept?

- C There is also a feeling of social obligation to provide for the next generation. As State support for tertiary education and health needs recedes, testators will feel the need to make supporting provision for children and grandchildren wherever practical.

II FREEDOM OF DISPOSITION

I concur with Richard Sutton, that we do not have a dynastic approach to property. Actually, a dynastic approach would probably help a sense of communal family property - if wealth received from the superior generation was regarded dynastically, it might be regarded as held in trust for use by the current generation and handing on to the next generation.

III WIDER DEFINITIONS OF FAMILY

All members of the consultation committee with which I have been involved, believe that the definition of "family" in the context of any review of the family protection legislation must encompass both step-children and de facto marriage partners. Step-children may step back from the thought of claim upon the death of their parent, out of grief or respect for the needs of their step-parent, only to find they are totally without claim if the step-parent makes no provision for them. I have experienced a situation where a de facto wife has supported her partner dying of cancer, when his own estranged children gave no support but immediately after the death walked into their home and stripped the furniture around her. Having endeavoured to cope with the distressed telephone pleas of the surviving partner for help, I very much sympathise with the position that a de facto partner can sometimes be placed in.

Notwithstanding the anti-discriminatory provisions of the Human Rights Act and the New Zealand Bill of Rights Act, I believe the public support for rights of same sex partnerships is less strong.

Indeed, one can argue that the existence of a sexual relationship is not a particularly distinguishing criterion which should justify a claim. Some members of my committee considered that, while orthodox family relationships ought to give rise to a presumption of priority in claim, jurisdiction for claims should extend to any type of dependency or communal relationship where a just expectation might exist. For example, two elderly ladies or bachelors living together in the same home over an extended period of time might develop a mutual dependency relationship, even though their relationship categorised as entirely non-sexual.

IV WHAT SHOULD BE IN THE ESTATE?

A substantial part of the wealth of smaller estates does not fall within the probated estate. Commonly in the small estate, the principal asset is a jointly owned house, which passes to the survivor.

Increasingly, I believe there will be a trend that the larger part of the wealth of more substantial testators will not find its way into the probated estate of that testator. Family trusts are becoming more frequent vehicles for holding family wealth, bridging the period of death of the de facto settlor. Recent motivations have included a desire to escape the Social Welfare asset testing net. More families are likely to be driven to the family trust concept by the promises of political parties (currently in opposition) to introduce more penal marginal tax rates and to re-introduce death duty.

Bringing pre-death dispositions back into the estate could have the advantage of giving a court greater flexibility to re-distribute the "family" wealth. A majority of the members of my committee had serious reservations as to whether this was necessary or appropriate:

- (a) It runs counter to the theme of freedom of disposition by a person of assets accumulated by that person during their lifetime.
- (b) Co-owners ought to be entitled to the absolute security of survivorship rights arising from joint tenure, if a joint tenancy has been established by mutual agreement in the lifetime of the marriage partners. It gives the surviving spouse the assurance that he or she will not be subjected to an action for severance of a tenancy attaching rights to the home, from other family members, strangers or charities who might be designated (perhaps secretly) as testamentary beneficiaries by the predeceasing spouse.
- (c) The element of uncertainty, introduced by the possibility of recall, might destroy the effectiveness of inter vivos gifts by older persons. For example, a family donee might have reservations in accepting a gift designed to encourage them to undertake tertiary study, if they knew it was going to count against them at a later estate distribution. Limiting the period of clawback is not

much assistance. Except in the case of gifts by the terminally ill, it will not be known whether at the point of gifting the disposition is liable to clawback.

- (d) Most dispositions by inter vivos trusts do have as their ultimate beneficiaries either immediate children or grandchildren - and there is some, albeit limited, restraint on trustees from exercising discretionary allocation powers in an unfair manner.
- (e) Attempts to subject the property of living persons to control regimes inevitably leads to devices to avoid them. The controls and avoidance techniques create distortions in normal and more useful or desirable human expenditure patterns, and are counterproductive; and work unfairly in that the avoidance techniques tend to be more available to the more wealthy.

In conclusion, I would concur that the concept of communal family property is a useful analytical technique in consideration of new succession law regimes; but would caution against a reform structure which is driven by desire for pure application of this philosophy, rather than the remedying of recognised shortcomings and its acceptability within the current mores of the New Zealand public.