Relationship property and death
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explained the concepts applying to property transfer on death to the LexisNexis Professional Development Seminar

When one of a couple dies, their assets are likely to consist of:
- relationship property owned by one or both of them;
- separate property; and
- jointly owned property.

A first inquiry by or on behalf of the survivor will be – did the deceased leave a will or die intestate? Who are the beneficiaries? How will I manage financially?

Another initial inquiry will relate to the need to obtain a grant of administration, either probate of the will or letters of administration on intestacy. Traditionally this task used to be carried out relatively quickly, often within a month of the death of the deceased. This step then triggered time limits that might affect the survivor or others if they were unhappy about the provisions made in the will or on intestacy. These time limits affected potential claims under the Family Protection Act 1955, the Law Reform (Testamentary Promises) Act 1949 and the Matrimonial Property Act 1963.

There has always been a tension between the desire of executors and administrators to distribute estates quickly and the need for adequate time for potential claimants to have their claims investigated, advised on, and, where necessary, documented filed. The usual rule was that the executor/administrator was not able to distribute any part of the estate within six months of the date of the grant (although there were some minor exceptions to this general principle). (Administration Act 1969, s 47) After that date the executor could safely distribute if no claim had been made and no notice of claim had been given (in the latter case the notice itself expiring three months after having been given and not being capable of renewal). (s 48(1))

Even in this case, if a distribution were made, a claimant could still bring a claim provided that claim was brought within 12 months of the date of death. There were also provisions for extensions of time so long as the estate had not been finally distributed. (ss 48-51)

Jointly owned assets which passed by survivorship and assets previously owned by the deceased which had been disposed of, for example, to a family trust, were outside the scope of the Family Protection Act and the Testamentary Promises Act although not always outside the scope of the Matrimonial Property Act 1963. (See, eg Irvine v Public Trustee [1989] 1 NZLR 67.) Under the new legislation both jointly owned assets and assets disposed of to trusts may be amenable to some recourse.

In the case of spouses, the usual redress for a disappointed spouse was an application under the Family Protection Act and/or the Matrimonial Property Act 1963. Relief under the former Act was always subject to the Court’s discretion, while under the latter Act the Courts never fully adopted the principle of equal sharing because of the requirement to establish “contribution”. It was therefore very common for claims by spouses to be brought under both Acts. For reasons set out later in this paper, this situation is likely to continue under the new Act.

ELECTIONS UNDER THE PROPERTY (RELATIONSHIPS) ACT
The most fundamental change made by the Property (Relationships) Act 1976 is to extend the principle of equal sharing beyond the lifetime of the spouses to cover the position on the death of one or both of them. The Act is also, of course, extended to cover de facto relationships.

The bulk of the death provisions are found in Part 8. One of the consequences of the changes is to place considerable responsibility on legal advisers:

- to advise surviving spouses/partners;
- to advise executors/administrators;
- to advise living clients about the structure of wills and the advantage of section 21 agreements.

Preliminary points
Part 8 will usually apply when a relationship ends on the death of one of the parties. (s 55(1)(a) and (b)) But Part 8 also applies if a relationship has ended during the lifetime of the parties and subsequently one of the parties dies before proceedings had been commenced under Part VII of the Act. (s 55(2)(a) and (b))

Some limitations need to be noted. Under section 24 the right of a married person to claim will expire 12 months after the dissolution of the marriage or at the date of an order declaring the marriage to be void ab initio. A de facto partner’s right will cease three years after the de facto relationship ended (subject in each case to the Court’s power under s 24(2) to extend the time for making an application). These limitations also apply if one of the parties dies within these periods. (s 89)

It does not matter if a will of a deceased person had been made before 1 February 2002. (s 56)

The remedies under the Family Protection and Testamentary Promises Acts still remain available. (s 57) This provision in particular may mean that combined applications under the Family Protection Act and the Property (Relationships) Act will become as common as those under the Family Protection Act and the Matrimonial Property Act 1963. The recent decision of Priesley J in Re
Flathaug HC Auckland, 9 October 2002, M88-SD01 is the first example. It shows that the surviving widow is still entitled to paramount consideration under the Family Protection Act, even when she has received her entitlement under the Property (Relationships) Act.

The rights of creditors are preserved by s 58. Where proceedings were commenced before the date of death and an order is made against the personal representatives of the deceased, the Court can decide where the incidence of such order falls. (s 60) This particular provision mirrors s 7 of the Family Protection Act and the commentary on cases in that section are likely to be relevant to the present Act.

The choice of options
The relevant provisions are contained in ss 61 to 70. Option A is the election to apply under the Act for a division of relationship property. Option B is the option not to make that application and rather to take what is left to the survivor under the will or intestacy of the deceased. (s 61)

While s 61(1) states that it is compulsory to elect, really only the Option A election is one which must be made. This is because s 68 says that if no choice is made then Option B is deemed to have been chosen. Section 67 states that the choice is irrevocable, unless the Court exercises its power to set aside a choice of option under s 69.

Section 65 sets out the procedure for making a choice. It requires the survivor to complete and sign a written notice which must be in the prescribed form and which must include or be accompanied by a certificate signed by a lawyer which certifies that the lawyer has explained to the surviving spouse or de facto partner the effect and implications of the choice. The certification requirement is worded in substantially the same way as for s 21 agreements and so the description of the solicitor’s obligation by Hardie Boys J in Cookhead v Cookhead [1993] 2 NZLR 397 (CA) should be kept in mind.

The notice must be lodged with the administrator of the estate of the deceased, but if administration has not yet been granted in New Zealand then s 65(2)(c) requires the notice to be lodged in the High Court registry where an application for grant of administration of that estate would, under the High Court Rules, be required to be filed. The form of notice is prescribed by the Property (Relationships) Forms Regulations 2001, Schedule 2.

Under s 66 the choice of option must also be notified to certain persons or entities:

- Where government stock or local authority stock is involved, a copy of the notice must go to the registrar of that stock;
- Where shares or debentures are involved the notice must go to the directors of the company that issued the shares or debentures (in the case of listed companies, presumptively to the Share Registry); and
- Where moneys may be paid under s 65 of the Administration Act 1969 the notice must be sent to the person authorised to make the payment.

As an alternative to issuing the notice to the registrar, directors or person authorised to make payment, the notice may be given to any person who is registered as the holder of the stock, shares or debentures or who has received the payment in the case of money.

A problem with the notice procedure
A practical problem arises in respect of the notice procedure. The first and most immediate problem is what has to be done if no grant of administration has been made? Under s 65(2)(c)(ii) the notice has to be lodged in the High Court. The normal rule about filing for grants of administration is found in HCR 643(1) but this does not apply to the Public Trust or to the Maori Trustee. They may file in any Registry.

Another problem is that the High Court Rules themselves contain some special provisions which affect the ability of a surviving spouse to obtain a grant of administration on intestacy. Rule 634(1)(a) provides that a surviving spouse may apply for a grant of letters of administration on intestacy only if he or she has elected Option B. The affidavit which must be sworn provides at para 7(b) for the notice of choice to be annexed to the affidavit. (First Schedule, Form 53) An adviser to the surviving spouse will need to consider whether it is appropriate for the spouse to seek a grant or not. If there is some doubt as to the extent of the estate or whether assets were relationship property or separate property, it may be necessary to consider whether the grant should be taken by someone else. In such a case the choice of the Public Trust or a trustee company may be preferable if this will keep the survivor’s options open. If the survivor has made the election and something later occurs which proves that decision to have been the wrong one, then the spouse will need to retire from the administration of the estate and seek the Court’s indulgence to set aside the option under s 69.

Time limits
Just as in the case of potential applications under the Family Protection Act etc, strict time limits apply to options. These are set out in s 62 and provide that where a grant of administration has been made, the choice must be made no later than six months after the grant of administration is made in New Zealand. If the estate is a “small estate”, then the period runs from the date of death unless administration of the estate is granted in New Zealand within that six month period. In this case the period becomes six months after the grant of administration. A “small estate” is defined by s 2 as an estate that can lawfully be distributed without a grant being required.

One of the potential problems here is that it may not be clear whether administration is required and, in some cases, executors and administrators are quite dilatory in applying for administration. In the case of the “small estate” the position can, possibly, be cured by a belated application for administration although that alternative will only work if the administration is granted within six months of the date of death because of the wording of the section.

Two important points need to be noted about time limits. The first is that the Court has power to extend the time under s 62(2) even where the time to make the choice has already expired. (s 62(3)) Second, the Court cannot extend the time if “final distribution” of the estate has occurred.

Extension of time
The most likely situation where an extension of time may be required is where Option A has not been elected on an assumption that the provisions of the will or intestacy are
sufficient, but something subsequently happens, such as a
claim under the Family Protection or Testamentary
promises Act, as happened in Re Bathang. A Family
protection claim by a prenuptial child of the deceased
precipitated an application by his widow for an extension
of time to make a claim and elect Option A under the
Property (Relationships) Act, which was granted by consent.

Alternatively, a later will with different provisions may
have been discovered, or there may be an application
challenging the validity of the will perhaps relying on lack
of testamentary capacity. In all of these situations it may
be safer to choose Option A. The reason for this is that
section 78 of the Act provides that the survivor’s rights
under the Act take priority over anyone with a beneficial
interest under the will or intestacy. The survivor’s rights
under the Property (Relationships) Act also take priority
over orders under the Family Protection or Testamentary
Promises Act and, though not presently relevant, over duties
and fees charged against the estate. Priority does not extend over debts
properly incurred by the personal representative in the ordinary
course of administration or over funeral expenses. (s 78(2))

Final distribution

The second point involves the question of what is meant by
“final distribution”. As stated, if final distribution has taken
place then time cannot be extended under s 62.
(s 62(4)) Nor can the Courts set aside an election under s 69.
(s 70) The general rules on when distributions can be made
safely are set out in the next section but final distribution
needs careful attention.

The Family Protection Act deals with the matter quite
explicitly. Section 2(4) provides that a distribution is not
deposited to have occurred simply by reason of the fact “that
it is held by the administrator after he has ceased to be
administrator in respect of that property and has become
trustee thereof, or by reason of the fact that it is held by
any other trustee”. The historic background to this provision
is set out in WM Patterson Family Protection and
Testamentary Promises in New Zealand (Butterworths,
Wellington, 1994) at para 9.3. What the provision does is
to make it clear that simply because the “executorship
duties” have been completed by an administrator so that
the assets are henceforth held on trust for the beneficiaries
do not amount to a final distribution.

There is no equivalent to s 2(4) in the Testamentary
Promises Act, nor is there such a provision in the
Matrimonial Property Act 1963. The leading authorities
in relation to these Acts, Lilley v Public Trustee [1978] 2
592, state that the law as to distribution under these Acts is
the same as that which applied to the Family Protection
Act prior to the amendment referred to. Since there is also
no equivalent provision to s 2(4) in the Property
(Relationships) Act, it is submitted that the position is the
same as under the Testamentary Promises and Matrimonial
Property Acts. The effect is that when an administrator
has completed the executorship duties, the estate will be
deemed to have been finally distributed even though the
assets may still remain in the hands of the administrator.

Determining when these duties have been completed is not
easy in New Zealand. (See Sullivan v Brett [1981] 2 NZLR
202 and Jarkovich v Fortune [1988] 2 NZLR 442.)

Even if a claim under the Property (Relationships) Act
is barred because a “final distribution” has technically
occurred, so long as the assets have not been physically
distributed, a claim under the Family Protection Act will
still be available so long as it is made within the time
limits applicable to that Act. It should however be noted
that to the extent that some distributions have been made
to the beneficiaries, not even an application under the
Family Protection Act will be available in respect of those
distributions. It will only be the undistributed assets that
will be amenable to an order under the Family Protection
Act, unless the Court grants a following order under s 49
Administration Act.

Distributions

For the reasons set out in the
introduction, the policy of the
law has been that executors
should be in a position to
\[\text{Distribution text continues} \]

so long as the assets have not
been physically distributed, a
claim under the Family Protection
Act will still be available

into the Act by ss 71 to 73 with a consequential provision
found in s 74 that prevents a distribution being disturbed
in certain circumstances.

As a preliminary point it can be reiterated that the
distribution provisions discussed in this part of the paper
do not prevent an application for a division of relationship
property being made so long as it is made in time, but it
may prevent the application being fully successful in so
far as it might otherwise have impacted on assets now
distributed. By contrast a “final distribution” acts as a
total bar to the grant of an extension of time to make a
choice under s 62(4) or to setting aside a choice, according
to s 70. Final distribution also prevents the making of a
following order under s 49 of the Administration Act 1969,
because s 74 of the Property (Relationships) Act prevents
a distribution being disturbed.

Section 71 prevents a valid distribution before six
months after the grant of administration or the election of
Option A, whichever happens first. This general exclusion
is subject to three exceptions. First the provisions of s 47(2)
of the Administration Act 1969, which permit the executor
to make a distribution for the purpose of providing for
the maintenance, support or education of any person who was
totally or partially dependent on the deceased immediately
before the death of the deceased, whether or not any
application has been made or notice of application
given apply. The second exception is where the surviving
spouse or de facto partner gives written consent to the
distribution. The third is where the Court approves the
distribution.

Section 72 cuts in where a choice has been made but
before the proceedings have been commenced. In this case
again, the executor is precluded from making a distribution
other than in those exceptions referred to above.

In a similar vein, s 73 operates where proceedings have
been commenced but have not yet been determined and
the same provisions apply.
Distributions made not to be disturbed

Obviously if the above restrictions on distribution are not applicable to any particular case, a distribution may have been made. Subsequently an election may be made or proceedings may be commenced. Section 74 applies to prevent the distribution of any assets from being disturbed and no action lies against the personal representative for having made the distribution. Unlike the provisions which apply to the Family Protection and Testamentary Promises Acts, s 49 of the Administration Act, which deals with the following of assets into the hands of the recipient, does not apply.

Effect of election on will or intestacy

Section 76(1) states that unless the will of the deceased expresses a contrary intention, every gift to the surviving spouse or de facto partner is to be treated for all purposes as having been revoked and the will is to be interpreted as if the survivor had died before the deceased and the estate of the deceased must be distributed accordingly.

The reference to “gift” is a little obscure, but s 76(2) makes it clear that this reference extends to the whole of the interest of the survivor as a beneficiary in any real or personal property to which the survivor would otherwise be entitled under the will.

Section 76 also applies to intestacy. Section 76(3) states that the survivor has no entitlement under Part III of the Administration Act 1969. Presumably this means that the survivor will be treated as having predeceased the deceased for purposes of the intestacy provisions.

Contrary intention in will

The automatic revocation of gifts in the will does not operate if the will expresses a contrary intention. It is therefore possible for people to provide in their wills that all the provisions of the will or specific parts of it are to apply for the benefit of the survivor whether or not they elect Option A. It seems unlikely that such a provision would be appropriate if the will made major provision for the survivor in relation to relationship property. But there are certainly circumstances which might occur relatively commonly where inserting a contrary intention clause should be considered. For example:

- The will may leave separate property to the survivor. It is unfortunate that s 76 does not distinguish between relationship and separate property, even though the effect of Option A is only to bring an application in respect of relationship property. This may be particularly important in the case of spouses contracting out under s 21 agreements where significant assets are declared to be separate rather than relationship property.
- Even in the case of relationship property, there may be specific items of sentimental value, family history, or other items of significance which should be excluded from the general effect of s 76. Obviously this question will not pose a problem if the whole of the estate is left to the spouse or partner, but for the reasons set out earlier, if some other claim were made which made it advisable to elect Option A, the effect of s 76 on separate property or specific items of significance should not be underestimated.

The interest left to the survivor may be a limited interest such as a life interest or an interest until remarriage or entry into another relationship or limited in some other way. It may be appropriate to provide in the will that these interests not be affected by a successful application under the Act (except to the extent that the successful application has the effect of merging the particular interest, e.g. where a limited interest is given in property but the property is vested in the applicant under the Act).

Court approval under s 77

There is another possible way around s 76. Section 77 gives the Court power, despite s 76, if it is satisfied that it is necessary to avoid injustice, on an application by the survivor who has chosen Option A, to make an order that the survivor receive all or any of the gifts to the survivor in the will or to receive all or any part of the beneficial interest to which the survivor is entitled on the intestacy or partial intestacy of the deceased, as the Court thinks fit.

Consistently with the general approach of the Act, an order under s 77 cannot be made unless the application has been made before the final distribution of the estate of the deceased. Here the great “trap” in the Act may prove insuperable. Because “final distribution”, for the reasons set out earlier in this paper, means the point when the executor ceases to be executor and becomes trustee, that situation may have arisen before the issues which give rise to the need to apply are known. This may not in the end be a serious problem in a case where a will has left the bulk of the assets, if not all of the assets, to the survivor and some other application is made under the Family Protection or Testamentary Promises Act or by a competing spouse or partner under the Property (Relationships) Act. In those circumstances the executorship duties will not have been completed since one of the things an executor has to do is to dispose of all claims against the estate before the trusts under the will or on intestacy can take effect. For this reason it could not generally be appropriate for a survivor to whom the whole estate or significantly the whole of the estate, has been left to make an election under Option A until one of these “left field” events occurred.

Other factors affecting choice of option

A more difficult issue arises where the will is part of an estate planning exercise. If assets have been left to a family trust, an issue for the survivor may well be whether he or she feels comfortable with the trustee and the trustees. Clearly the best advice that can be given to clients in these situations is to use the twin trust/parallel trust approach coupled with an agreement under s 21. This estate planning technique assumes the creation of trusts by each of the partners in respect of their separate assets for the benefit of both and their respective children, grandchildren etc. However, this technique may need to be reviewed if there is a concern about economic disparity where a 50/50 division on separation may no longer be appropriate in some cases.

Another situation which will give rise to issues is where there is a significant amount of separate property owned by the deceased. As separate property is not normally likely to be accessible in a claim based on an election under Option A, it will be far better for the survivor to consider bringing an application under the Family Protection Act.