

# Update

# Wills and Succession

## Service 75 — March 2021

### Legislative amendments

#### **Trusts Act 2019 (2019 No 38)**

This Act amended the following Acts and legislative instrument, effective 30 January 2021:

- ss 2, 4A, 4B, 9, 28, 49, 68, 78 and 79 of the Administration Act 1969;
- s 378 of the Insolvency Act 2006;
- s 2 of the Law Reform (Testamentary Promises) Act 1949; and
- rr 27.14, 27.37 and 27.38 of the High Court Rules 2016.

#### **Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020 (2020 No 51)**

This Act amended the following Acts, effective 6 February 2021:

- s 3A of the Family Protection Act 1955;
- ss 2 and 5 of the Law Reform (Testamentary Promises) Act 1949; and
- ss 4, 107A, 108, 108A, 109, 109AA, 113, 113A, 114A, 115, 116, 235A, 240 and 241 of the Te Ture Whenua Māori Act 1993 (The Māori Land Act 1993).

### Legislative amendments updated in commentary

#### **Trusts Act 2019**

The Trusts Act 2019 came into force on 30 January 2021. References to the Trusts Act 2019 have been updated throughout the commentary, replacing references to the repealed Trustee Act 1956 at [1.1], [1.3], [7.32], [8.3], [10.37], [11.1], [11.5], [11.10], [11.12], [11.16], [11.18], [11.19], [11.20], [11.21], [11.22], [11.23], [11.26], [11.32], [11.34], [11.40], [11.41], [11.43], [12.8.2], [12.11], [12.14.1], [12.14.2], [12.14.3], [14.5], [14.25], [14.38].

#### **Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020**

The Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020, which came into force on 6 February 2021, made a number of significant changes to the law relating to Māori estates, including:

- allowing the court Registrar to determine simple and uncontested succession applications, related vestings and trust orders;
- providing the Māori Land Court with jurisdiction to determine Family Protection Act 1955 and Law Reform (Testamentary Promises) Act 1949 claims relating to Māori land;

- providing that the tikanga of the relevant hapu or iwi will in certain circumstances determine if a whangai can succeed to interests in Māori land; and
- providing that when a spouse succeeds to a life interest in Māori land interests the final beneficiaries are entitled to succeed to the land interests while the life interest is continuing.

These amendments to the Te Ture Whenua Maori Act 1993 are discussed at [16.2], [16.11.01], [16.12.03], [16.13], [16.13.01], [16.22], [16.23], [16.24.01], [16.25], [16.45A], [16.58], [11.19], [11.20], [11.21], [11.22], [11.23], [11.26], [11.32], [11.34], [11.40], [11.41], [11.43], [12.8.2], [12.11], [12.14.1], [12.14.2], [12.14.3], [14.5], [14.25], [14.38].

## Commentary

### Chapter 2 — Nature of a will — delegation of will-making powers

A fundamental principle of the law of succession is that a will-maker cannot delegate to another the power to make the will-maker’s will: *Turner v Coombe* [2018] NZHC 315, [2018] NZAR 574. See [2.11].

### Chapter 3 — Testamentary capacity — to be determined by Courts

Questions of incapacity are for the Courts to determine. Interested parties cannot consent between themselves in order to “make a will no will”: *Endean v Endean* [2020] NZHC 2575. See [3.1].

### Chapter 3 — Testamentary capacity — impact of physical illness on cognition

In *Marshall v Singleton* [2020] NZCA 450 the Court of Appeal upheld a finding in the High Court that a man with terminal cancer did not have capacity to make a will. The Court of Appeal found that the severity of the will-maker’s physical deterioration had an “undoubted” toll on his mental capacity. See [3.1].

### Chapter 3 — Testamentary capacity — onus of proof

In *Endean v Endean* [2020] NZHC 2575 the notes made by the legal executive taking the instructions were a significant factor in persuading the Court that the will-maker did not have capacity at the time the will was made. See [3.2].

### Chapter 3 — Testamentary capacity — onus of proof

An issue raised about the will-maker’s testamentary capacity is less tenable when medical experts consider the will-maker competent and the lawyers who drafted the will had no concerns about testamentary capacity: *O’Neill v O’Neill* [2020] NZHC 2988. See [3.2].

### Chapter 3 — Testamentary capacity — onus of proof

If there is a tenable issue of capacity, the matter should be heard in full, and cannot be resolved in a summary way: *Saint v Ball* [2020] NZHC 2567. See [3.2].

### Chapter 3 — Testamentary capacity — knowledge and approval of contents of will — suspicious circumstances

In *Re Tang (dec’d)*; *Sun v Sun* [2020] NZHC 2414 the Court held that it could not be satisfied about the deceased’s knowledge of English and, therefore, it could not be satisfied that she knew and approved of the contents of the will. Suspicious circumstances

were alleged in this case. The Court could not dispel its suspicions, and thus did not declare the unattested document to be valid under s 14. See [3.10] and [4.7.3].

### **Chapter 3 — Testamentary capacity — undue influence**

*O'Neill v O'Neill* [2020] NZHC 2988 held that “nagging” or requests for a thing does not amount to undue influence since the person being nagged is capable of resistance and resisting the demand. See [3.12].

### **Chapter 4 — Formal requirements — signed email — s 11, Wills Act 2007**

A signed email in *Re Day (dec'd)* [2020] NZHC 2101 was held valid under s 11. The Court noted that an attestation clause was not required. See [4.6] and [4.7.3].

### **Chapter 4 — Formal requirements — validation of wills by High Court — Epidemic Order — s 14 of the Wills Act 2007**

In *Re Henry (dec'd)* [2020] NZHC 1992 a will was prepared at the time when New Zealand was at Alert Level 4. This will was eventually declared a valid will under s 14. The Court noted that use was not made of the procedures for signing and witnessing a will under the Epidemic Preparedness (Wills Act 2007 — Signing and Witnessing of Wills) Immediate Modification Order 2020. See [4.6.1] and [4.7.3].

### **Chapter 4 — Formal requirements — validation of wills by High Court — s 14, Wills Act 2007**

For a will to be declared valid, it is important that there is testamentary capacity and no evidence of undue influence: *Re Butt* [2020] NZHC 3225. See [4.7.1].

### **Chapter 4 — Formal requirements — validation of wills by High Court — s 14, Wills Act 2007**

Successful recent cases of validation of wills under s 14 include:

- *Re Rudman* [2020] NZHC 1950
- *Public Trust v Oxner* [2020] NZHC 2383
- *Moore and Humble* [2020] NZHC 2977
- *Re Rae* [2020] NZHC 2078
- *Re Fraser* [2020] NZHC 2448
- *Re Ratcliffe* [2021] NZHC 1

See [4.7.3].

### **Chapter 4 — Formal requirements — validation of wills by High Court — disposition of property — s 14, Wills Act 2007**

Section 14 was unsuccessful in *Re Fairburn (dec'd)* [2020] NZHC 2103 as there was no clear disposition of property. See [4.7.3].

### **Chapter 5 — Revocation of wills — revocation by marriage or civil union — s 18, Wills Act 2007**

In *Newton v Newton* [2020] NZHC 3337 the concerned parties made joint wills in 1992 while in a de facto relationship before later marrying in 1998. The Court held that the mirror provisions of their wills showed a contemplation that the relationship between them would endure and would have the status of marriage, which did eventually occur. Therefore, s 18(3) applied and it was in the interest of justice that the will was not revoked. See [5.2.3].

**Chapter 6 — Construction of wills — powers to correct — s 31, Wills Act 2007**

In *Re Hyndman (dec'd)* [2020] NZHC 3147 the Court made an order correcting the will under s 31(2) to meet the will-maker's intentions and instructions. See [6.2].

**Chapter 7 — Gifts of property by will — will speaks from date of death — ademption — s 20, Wills Act 2007**

In *Re Taylor; Platt v Taylor* [2020] NZHC 3186 the will-maker executed a will in 2017 that instructed trustees to repay a half share of a home loan out of the proceeds of a life insurance policy. In 2018, the will-maker received early payment of the policy on the basis she had terminal cancer, which the insurance provider paid into her bank account. In applying s 20, Cull J held that those proceeds remained an identifiable asset at the date of death. See [7.2] and [7.36].

**Chapter 10 — Probate and letters of administration — caveats — s 61, Administration Act 1969**

The threshold for satisfying the Court that there are grounds for a full inquiry is low and if the caveator's evidence is disputed the Court will normally order the application for administration to proceed in solemn form: *Saint v Bail* [2020] NZHC 2567 and *Seth v Chopra* [2020] NZHC 2525. See [10.11].

**Chapter 11 — Personal representatives — duties of personal representatives — dispute over disposal of body**

In *Witehira v Ram* [2020] NZHC 2326 the Court had to resolve a disagreement among next of kin where no grant of administration of the estate had yet been made. See [11.8].

**Chapter 9 — Wills and intestacy in practice — mutual wills**

The making of mirror wills at the same time will be insufficient to establish a contract or mutual understanding to be bound: *McNeish v McArthur* [2019] NZHC 3281, [2020] 2 NZLR 287. See [9.5].

**Chapter 16 — Māori estates — wills — gifts by will — gifts to other persons — s 108, Te Ture Whenua Maori Act 1993**

The Māori Appellate Court rejected an argument that the beneficiary of the gift must show an associational relationship with the hapū associated with the land: *Fleet v Kennedy* [2020] Māori Appellate Court MB 46 (2020 APPEAL 46). See [16.13].

**Chapter 16 — Māori estates — intestate succession — Māori freehold land — occupation orders (ota whakanoho) — s 109A, Te Ture Whenua Maori Act 1993**

In *Appleton v Krissansen* (2019) 194 Waikato Maniapoto MB 291 the Māori Land Court decided that it was not appropriate to grant a s 109A succession order to one of the children who already had another occupation order on the land. See [16.24.01].

**Chapter 16 — Māori estates — intestate succession — Māori freehold land — occupation orders (ota whakanoho) — s 328, Te Ture Whenua Maori Act 1993**

In *Kake — Estate of Aldyth Kake* (2020) 209 Taitokerau MB 134 (209 TTK 134) the Māori Land Court dealt with an unusual situation where an occupation order was granted to the husband who was an owner in the land and the wife who was not. See [16.24.01].

**Chapter 16 — Māori estates — probate and letters of administration — s 118, Te Ture Whenua Maori Act 1993**

In *Kake — Estate of Aldyth Kake* (2020) 209 Taitokerau MB 134 (209 TTK 134) the Māori Land Court ruled that any indicated challenge must raise a genuine issue about the validity of the will. See [16.31].

**Chapter 16 — Māori estates — intestate succession — grant of administration — s 6(2), Administration Act 1969**

Special circumstances have been found to grant administration to a natural child of the deceased who had been legally adopted out upon the basis that in Māori tikanga an adopted child still maintains an important connection with their birth parents: *Re Estate of Berghan* [2020] NZHC 1399, [2020] 2 NZLR 585. See [16.32].

**Chapter 16 — Māori estates — administration of the estate — correction order — s 44, Te Ture Whenua Maori Act 1993**

In *Te Awe Awe v Te Awe Awe — Estate of Pipi Rakene or Pipi Te Awe Awe* [2019] Chief Judge's MB 1414 (2019 CJ 1414) it was noted that even if no mistake or error arose if it was considered that the conduct of the parties resulted in them holding interests on trust for others then the proper course may be to apply to the court for declarations that a resulting trust existed. See [16.47].

**Chapter 16 — Māori estates — administration of the estate — amendment of succession orders — s 86, Te Ture Whenua Maori Act 1993**

The Māori Land Court can also make orders under s 86 to correct succession orders to as to reflect the true intention of the court in making the original orders: *Herewini — Te Tii Mangonui A3* [2020] Māori Appellate Court MB 54 (2020 APPEAL 54). See [16.47].

**Chapter 16 — Māori estates — whānau trusts — establishment of whānau trusts**

In *Papuni — Barbara Lois Rewha* (2020) 208 Taitokerau MB 296 (208 TTK 296) the Māori Land Court clarified that a testator could leave Māori land interests to a private trust provided that the trust had adequate provisions restricting the rights to alienate the interests. See [16.60].

