

Little-known law changes are pitting family members against each other when a loved one dies. Donna Chisholm reports.

DEATH TRAPS

When we die, heaven or hell awaits, they say. But if we're not careful, so does the High Court.

Middle New Zealand never expects to find itself here. Certainly Nelson brother and sister Suzanne Horne and Edward Webster didn't. But when their father, Ted Webster, died, leaving their 79-year-old stepmother Phyllis with practically everything, all that changed.

What ensued was a lengthy legal battle for a share of his estate. It is one they ultimately lost, but it typifies hundreds of other such cases being played out in the courts, in which step-parents face claims from their dead spouse's children.

The siblings argued they were effectively disenfranchised when their stepmother inherited her late husband's share of the \$245,000 Nelson retirement villa the couple jointly owned, leaving them with only a \$25,000 cash bequest.

They wanted their father's share to revert to their family on Phyllis Webster's death, rather than see it go to her children from a previous marriage – children who they felt were already covered in her estate.

A High Court decision in May declining the siblings' claim may have ended the litigation, but the anguish the case engendered lingers. "It's a bitter pill to swallow – it's unjustified and it's just not fair," Suzanne Horne told *North & South*. "It wasn't about greed. If Mrs [Phyllis] Webster had died first I would have given her family half. There's a principle at stake here – my father's rightful share should go to his family, not to hers.

"It might sound like sour grapes – and she will be rubbing her hands together – but her whole attitude is what's yours is mine and what's mine is my own."

Suzanne Horne says her four children now get nothing from their grandfather's estate, which will end up in the hands of children to whom he was related only by marriage.

Phyllis Webster says the case was a "nightmare" and she feared losing control of – and access to – the money tied up in her husband's share of the home. Suzanne, she says, "didn't like me to be married to her father; she's a controlling person and she doesn't like losing control. My husband and I were working under the old rules – you know, if a man makes a will, that's what goes through."

But where there's a will, it seems there's often a way around it.

In the torrent of publicity that surrounded the 2002 changes to the Property (Relationships) Act, which gave de facto and same-sex partners the same rights as the legally wed, one amendment went barely noticed. It gave widows and widowers the option to choose one of two ways to divvy up their late spouse's estate.

It allows the bereaved to either abide by their partner's will or choose the so-called "option A" and seek a 50 per cent share of all their property as if they were legally separating. Survivors who opt to make a

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Phyllis Webster had been married to Ted for 27 years when he died. His son and daughter from a previous marriage fought her in court because they felt it was unfair that her family, not his, would benefit from his half-share of their joint property when Phyllis eventually died. They lost.

relationship property claim lose any entitlement to gifts or property left to them in the will unless it expressly provides otherwise.

The choice, practically irrevocable, must be made within six months. Until 2002, only the will applied – which proponents of the change argued could leave loving bereaved partners with less than they would have got in a bitter divorce. But family lawyers say most New Zealanders are unaware of this very basic change – and the main group being disenfranchised are children from the deceased's former relationships, most commonly a first marriage.

South Auckland family lawyer David Rice

says many elderly clients are shocked to hear of the option.

“One of the hardest things to do is to try to explain to some poor old lady or man that they have to make a decision to exercise option A or B in relation to the spouse they’ve been married to for 50 years. Some of them get quite upset about it – they find it incomprehensible that there’s anything other than the will that can dictate it. People who’ve been in relationships for a long time tend to go with the will out of a sense of honour to their long-time partner.

“The problem is that because of the law changes, people seem to have lost their ability to administer their affairs in the way they’d like.”

Having to make such a significant choice soon after a loved one’s death can be so traumatic some partners are unable to make any choice at all. If that happens, the survivor is deemed to be covered by the will. And the court sets a high bar for those who want to change their minds later.

The long-term lesbian partner of a West Auckland woman who died in 2007 found that out when she asked the Family Court to set aside the fact she had made no choice in the required time because she was too grief-stricken. The court said no.

Christchurch family law expert Andrew Watkins says all sides can fail to realise the importance of the choice. “A millionaire might say to his new younger partner, ‘You can come and live with me, and you’ll get a nice lifestyle, but most of my wealth was mine before I met you and I want to leave it to my kids.’”

He doesn’t sign a relationship property agreement and in his will leaves most of his estate to his children and only a small amount to his new de facto.

He believes the matter is settled by the will. “He doesn’t realise that leaving it to the kids in the will doesn’t matter – the wife can take the Property (Relationships) Act option and get 50 per cent of the relationship property anyway.”

Auckland lawyer Bill Patterson, one of the country’s foremost authorities on family protection issues, says stepchildren or the “first family” of a deceased person are at a huge disadvantage in any court battle for a share of the estate. This is because, while the widow has the automatic right to bring a claim for half her husband’s property, the children must seek special leave to do so, at a significant cost. They will succeed only if the court rules it would be a serious injustice to deny them.

“It does seem anomalous. The family are not totally powerless but they have an uphill

struggle the way the dice are loaded at the moment. What's fair for one ought to be fair for another," says Patterson.

Examples "pop up all the time" of cases where all the money from the first family transfers to a second on the surviving spouse's remarriage. If the money goes into jointly owned property, the first family can be left with practically nothing, with the "new" partner taking everything by survivorship of her husband's death. In that case, there's no incentive for her to choose the relationship property option.

The "first family" must then seek leave to "claw back" half the step-parent's assets in a Property (Relationships) Act claim, then seek a share of the balance of the estate under the Family Protection Act – the same laws under which Suzanne Horne and Edward Webster took their unsuccessful case.

In that case, the court ruled any family protection claim they made was unlikely to succeed, therefore it wasn't a serious injustice to deny their bid.

The judge said Suzanne Horne and her husband owned a mortgage-free home worth \$770,000, an also unencumbered \$35,000 holiday home and had a \$50,000 investment. Edward Webster was unmarried, earned \$40,000 a year and was building a house on a mortgage-free section he owned worth \$126,000. He had savings of \$150,000, which were going towards the house.

They both wanted to help their recently separated half-sister who had a disabled son.

Phyllis Webster, the court said, had been married to her husband for 27 years, had \$77,000 in savings, was owed \$147,000 by a family trust of which she was a beneficiary and owned the retirement villa outright by survivorship.

She was concerned she might have to shift from her retirement home or need rest-home care because of her deteriorating health.

The judge ruled it would be unfair to dictate Phyllis Webster's living circumstances for the rest of her life by "shackling her" to only a life interest in a half-share of the house. The children had already received \$25,000, and giving them a greater share meant they would be getting part of the money their stepmother had put into the property. Ted Webster had given all he could to his children and discharged his moral duty to them.

While the surviving spouse or step-parent has priority in relationship property claims, that position can be upended when all assets are held in a family trust.

Then, says Otago law professor Nicola Peart, the issue is not so much "can I get



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the property out?" but "who is going to be managing the trust?"

When a property is in a trust, it does not form part of the deceased's estate and the will has no effect. The terms of the trust continue to operate, so if the assets are intended to benefit the surviving spouse, they will continue to do so.

"The question is, who will take over the administration if the deceased was one of the trustees?" Peart says. If, in his will, the deceased appoints children from his former marriage to succeed him as trustees, "imagine what they're going to do to their stepmother. They're not going to be giving her as much as she might like, possibly, unless they love her to bits, because they'll want more of the pie themselves."

Of course, matters can get even messier when more than one spouse – say if there has been a series of long-term de facto relationships – makes a property relationship



Love, Death and Money

Kiri Stirling faced a court battle with her in-laws over her husband's estate when he died of cancer less than six weeks after the wedding.

Kiri Stirling became a bride on November 17 and a widow two days after Christmas. Her 40-day marriage to sales rep Andy Stirling ended with his death from bowel cancer in a Tauranga hospice. He was only 41.

They'd known he had less than two months to live when they wed. He'd told her he didn't want to make her a widow. She told him she wanted to be Mrs Stirling.

The problem was, when he made his will in May, despite becoming engaged two months earlier, Andy Stirling apparently told the Public Trust he wasn't making it in contemplation of marriage.

Whether he realised the importance of the question we will never know. But that single answer – and the crucial timing of a change to the Wills Act in November 2007 – sparked an 18-month legal battle over his estate.

Andy Stirling was by all accounts a careful and methodical man. In his will, he left half his estate to his fiancée, Kiri Brown, and half to his parents for the education of his niece and three nephews.

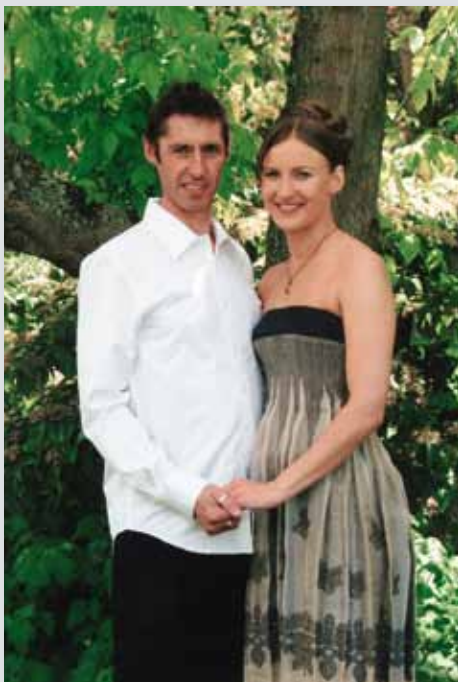
What he may not have known is that his November marriage automatically cancelled his will and he was deemed to have died intestate. That meant his estate was divided under intestacy rules that favour his widow, who gets a statutory sum (then \$121,000, since raised to

\$155,000) and two-thirds of all his assets. His parents were to receive one-third.

George and Alison Stirling didn't believe that's what their son would have wanted and took legal action, citing the change to the Wills Act, which allows the will to stand if circumstances showed it was clearly made in contemplation of a marriage – even if it didn't expressly say so.

In July last year, the High Court ruled it couldn't safely say that Andy Stirling made his will in contemplation of marriage. He therefore died intestate.

It is a controversial decision which legal experts say has set a "high bar" for the future. Says Otago University's Professor Nicola Peart: "If the will in those circumstances isn't saved, God, what is?"



Left: Andy and Kiri Stirling on their wedding day.

Far left: Kiri Stirling.

He knew he was dying and he was an organised man trying to put his affairs in order. What the hell else was he doing? He knew he was going to get married – did he expect to draw up another one after he got married? I don't think so."

While it represented a "win" for his widow, the fallout over the case has left Kiri Stirling estranged from her in-laws and emotionally devastated.

"My life has been on hold for two years. I haven't been able to grieve properly," she says

Kiri, who turned 40 in March, says she felt as if "I was on a train going on a journey that was out of control and I had no say in it."

She and Andy met in January 2003 when she answered his ad for a flatmate. She moved into the house he owned in Tauranga and they became lovers a year later.

They worked on his property and talked of having children – they were trying to conceive just before he died.

"People say to me if it was them they'd end up in loony tunes," she says.

"It's been hard because I've lost my mate, my best friend, my husband, my future, a chance to have a child. I lost the family, my in-laws. I lost them. It was only my love for Andy that got me through all of it."

She believes that, despite their engagement, Andy didn't make the will in contemplation of marriage.

At the time he made it, he was in denial of his disease, despite knowing he was terminally ill. Kiri wanted to get married in May, but he'd refused to do so.

She says it was only in August that he began to accept his condition, and that's when the wedding date and place were set.

The wedding, in Masterton, was a small but happy occasion attended by both sets of parents.

Kiri says Andy seemed to have been holding out for the marriage – his condition deteriorated sharply in the following weeks, and despite palliative surgery in Wellington, he was admitted to a hospice the following month. He died on December 27 with his wife and family at his side.

Both she and her in-laws say they were shocked when the Public Trust advised them the will wouldn't stand.

George and Alison Stirling say that despite the trauma of the case, they'd do it all again. "It's been terribly hard for all of us, but we were upholding Andrew's wishes – that was paramount," says George Stirling.

He says the Public Trust "didn't do a very good job. I said they should be looking at the way they do their wills. We're not very happy with the way they did it."

The Public Trust said it gave Andy Stirling a brochure when he finally signed the will on July 10. The brochure was significant in that under the headline "Marriage changes everything" it said – "Did you know that if you marry your will is usually cancelled automatically, but if you separate it isn't? It's very important to review your will any time there's a major change in your life."

Kiri Stirling doesn't know if her husband even read it. She found it tossed in the back of his work car when she cleaned it out after he died.

claim after a death.

Says Auckland family lawyer Stuart Cummings: "That's one of the weird things about the act that came in in 2002 – you can have multiple claims and more than one qualifying relationship [more than three years' cohabitation]." This occurs when, for example, a husband has left his wife but has not formally separated or divorced, and has moved in with a long-term lover.

That means the estate of a man who was married for 20 years and did not divorce but had two later de facto partners could potentially face three relationship property claims.

There are, says Andrew Watkins, rules around the time limits for bringing claims. The former wife would have to make a claim within a year of the dissolution of the marriage – but that wouldn't apply if the couple hadn't divorced. A de facto has to make a claim within three years of the relationship ending. Outside those timeframes, both women would have to seek leave to make a claim. A de facto partnership of less than three years can be a qualifying relationship if, for example, a child is involved and there would be serious injustice if a property order was not made.

Couples often fail to formalise their separation, so it's not unheard of for the former wife (now widow) and new partner to have competing claims.

Wellington family law specialist Greg Kelly says current legislation is based largely on laws passed in the 1950s and 1960s when family structures were far simpler than they are today. The Law Commission called for fundamental reform in the late 1990s but, "apart from piecemeal changes, this hasn't happened".

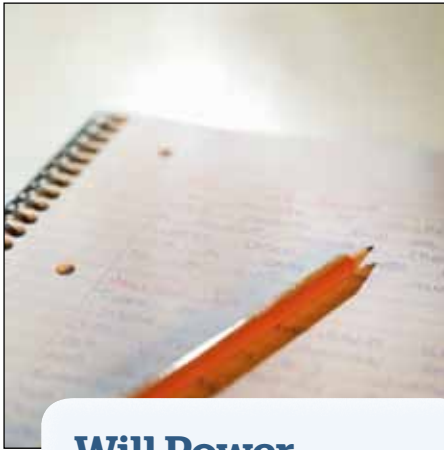
He says advising will-makers and claimants is very difficult because awards are at the discretion of individual judges and opinions can vary widely.

Chief Family Court Judge Peter Boshier says family protection cases represent the vast bulk of applications surrounding deceased estates.

While the court sees only about 550 such cases a year (a tiny fraction of the 87,000 applications it hears annually), the numbers are rising – up 20 per cent over five years.

"Family protection cases are some of the most emotional and fraught cases you're ever likely to see," says Boshier. "The taking-up of positions, and the things that are said, can be so cruel."

Despite the fact the court is at the heart of some of the worst cases of family disintegration involving children, Boshier says



Will Power

Changes to the Wills Act in 2007 not only had profound ramifications for the Stirling family (see panel, page 70) but also relaxed some of the most stringent rules about what constitutes a will in the first place.

In the past, wills could be ruled out if they weren't signed and witnessed in the same place at the same time, for instance.

The new law clears the way for informal wills to be more easily validated if courts are satisfied they express the deceased's intentions.

One of the first cases to test the new formula was heard in the High Court at Timaru last year, when Therese MacNeil's de facto husband successfully claimed that her suicide note constituted a will.

MacNeil died in Adelaide in January 2008. Her note, written a day earlier, ran to 10 pages. The first was headed, "This is my will and testament". Though the note included unrelated song lyrics, and was not witnessed, the court ruled it was a valid will and her partner could inherit according to her wishes.

Auckland family lawyer Stuart Cummings has concerns about the trend to render informal wills valid.

"A huge number of people do cheap or stupid wills or get a do-it-yourself will pack. My assessment would be that a third of people don't do it right. It's really easy for Parliament to create legislation that gives people more freedom around writing wills but what people need to know is the cost of getting that will validated is significant, when you could have avoided it just by doing the damned thing right."

estate claims are "right up there in terms of the hurt-generating, emotion-producing cases".

"You're having to look in a mirror which you may never have had to look in before. I don't think any of us particularly likes looking at a reflection of ourselves and the way we may have acted. Family Protection Act cases bare all, so putting up the mirror of a family in front of a judge is a pretty traumatic business."

Often the cases aren't about large pots of money as much as sibling and step-sibling dynamics. "In families where siblings perceive that either one sibling has taken advantage of a parent or has manoeuvred the situation so the will seems unfair, the siblings can fall out terribly."

Boshier says such cases are open to early intervention and mediation rather than litigation and he wants that course to become more common.

The foundations for family scraps after a death are usually laid in life, says Patterson.

It could be the parents have "re-partnered" and mentally and physically abandoned the children or even blamed them for wrecking the marriage.

But, he says, often the first thing that takes potential beneficiaries by surprise is the will itself. "Parents can be terribly deceptive. Some parents love to attract attention and to keep the kids dancing on the end of a string as to what they're going to do in their will; that's a favourite trick with a lot of older people. Some actually make a game of it, and you get to the point where they're changing their wills frequently depending on who's in favour."

The landmark Williams and Aucutt case that Patterson himself was involved in 10 years ago provided a new, more restrictive benchmark for the courts when deciding how assets should be redistributed in family protection claims. Until then, family lawyers say, the courts were stepping in more readily to appease wealthy adult children who'd been cut out.

The Family Protection Act, which had its origins in legislation introduced more than 100 years ago, allows the courts to change wills to ensure they uphold the parents' moral duty to properly maintain and support adult children.

"But remedying unfairness," says Patterson, "is not really what the FPA is about and people tend to forget that."

Not everyone agrees with him. In *NZ*

Lawyer magazine in 2008, Canterbury associate professor of law John Caldwell wrote: "It might be helpful if the judges felt able to concede that this rewriting [of wills] is undertaken solely in the interests of making the will 'fair'. The oft-stated protestation that the courts will refuse to modify the will in the interests of fairness but rather will only interfere... to the extent necessary to remedy the perceived breach of moral duty has always audaciously begged the fundamental question of exactly what constitutes a 'moral' (or, to put it another way, 'fair') testamentary provision."

So how are the courts deciding how much is enough to meet a parent's moral duty to support the kids? And shouldn't we all be able to choose who to leave our assets to – and how much?

In the Nelson case of Williams and Aucutt, Susan Aucutt, an independently wealthy elder daughter, claimed against her mother Beatrice Henderson's \$1 million estate, which had been unequally divided. Her mother had left about 95 per cent of the estate to younger sister Christine Williams, not because she loved her any more than she loved Susan, but because Susan and her husband were independently wealthy.

The High Court ruled Susan Aucutt's share be increased to 25 per cent – but the Court of Appeal disagreed, awarding her only an extra five per cent to take account of her position in the family.

The effect of the Williams and Aucutt ruling, say the experts, is to make courts far less likely to make big changes to a will.

But Stuart Cummings says it's becoming more common for parents to choose to disinherit a child or children "because families are more fractured and people have far more opportunity to do things that are beyond the pale – what lawyers would call 'disentitling conduct'."

An obvious case, he says, is where a child has had a raging drug habit or gambling problem and been propped up by the parents during their lifetime. "In the end they say, 'Enough's enough, you've had your share,' or alternatively, 'What's the point?' and yes, they don't want it to go in the arm or up the nose. So either you've had your cut of the pie or what's the point of giving you any pie?"

A man's liability to his offspring is correspondingly increased if he had been "a lousy father". Likewise, "being a good child increases your entitlement".

"It's the extent to which those differences – if you think of them as high- and low-pressure zones – have been equalised by the

will or provision in the course of the relationship that the court would take into account," says Cummings.

The problem still is the lack of certainty as to what the courts might do. "It's fine for lawyers to say we're in a conservative mode for family protection cases," he says. "It's fine and dandy for me because I've got my head around that and I'm getting better at predicting an outcome for my clients. But the essence of the law is certainty, so when these shifts pick up steam [from more liberal to conservative rulings], it's very unfair."

Nicola Peart says it's difficult to know how to make matters more predictable "short of saying you must leave a share of your property to your children come hell or high water and that's all they're ever going to be allowed to get unless you give them more. In that case you'd cut out a lot of litigation, but there's no suggestion anywhere that that's going to happen."

But she says if New Zealand has reached the stage where the law says children should not be disinherited, "I'd much rather we went the whole hog and said, 'OK, let's fix a percentage that a child is entitled to and forget all this litigation.'"

As it is, says Peart, the courts must be a backstop to prevent the serious injustices that can occur when an acrimonious divorce disadvantages the children, as in the case of John Russell and Lynda Whyman, decided in the Appeal Court in December 2004.

Russell and his wife, who had two children, split in 1996, and when he died in May 2003, he was in a de facto relationship with Whyman. When he and his wife separated, he had a life insurance policy that he intended should benefit his children when he died. But, irritated by difficulties over access to them, he cancelled the policy just before his death. He and Whyman owned three properties together – all of which passed to Whyman by survivorship after his death, leaving his estate "largely devoid of assets" for his children.

The effect of the decision was to allow the relationship property to be brought back into the estate so the children could claim a share.

Frequently, though, the warring parties are the siblings and charities their parents may have favoured in the will.

The most famous of these in recent years has been the claim of Inge Brown on her father Eric Miller's \$4.6 million estate. Miller left almost \$3 million to the Auckland City Mission, Salvation Army and Cancer Society, but gave his only daughter just personal effects and the forgiveness of a \$10,000 loan.



GUY FREDERICK

Andrew Watkins acted for a client who was sued for half her house by the children of her late, longtime boarder, with whom she had had a brief sexual relationship. They backed down when Watkins demanded they put up security for legal costs.

The High Court awarded Brown an extra \$1.6 million, but the Appeal Court – in line with the Williams and Aucutt judgment – pared that back to \$850,000, or 20 per cent of her father's estate.

Occasionally, family protection claims can come from completely unexpected quarters, as in the case of a Christchurch woman who spent nearly 15 months fighting off attempts by the children of her late boarder for a share in her house.

She and the man had had a sexual relationship lasting only a few months but, when that ended, they lived together for many years as landlady and lodger, with separate finances – although they attended some functions together. The boarder had spent all his money by the time he died.

When the lodger's children made a claim for half the woman's house, lawyer Andrew Watkins says he ultimately fended them off by demanding security for costs – which they couldn't pay.

Family lawyers say most of these cases can be avoided with a little judicious planning. Watkins says that when he puts together relationship property agreements for people with substantial assets who are re-partnering, he'll include a separate clause covering division of assets on death. It will often say

that the survivor will agree not to bring a relationship property claim, in return for which the deceased will gift them a minimum, agreed amount. That amount should be reviewed regularly – by agreement – to ensure it increases as the relationship lasts longer and becomes more successful.

If one side won't sign, he says, assets are best protected in a trust – but this should be set up before the relationship begins.

Also vital is maintaining a paper trail to prove the origin of separate property not included in the relationship split.

Cummings says those pondering a family protection claim should always consider "the value you put on the relationships your litigation will harm" and the stress a case is likely to involve.

Sometimes clients fail to realise they are inextricably involved in the process. "People want to treat family lawyers like they're taking in their car or motor mower to be fixed. They take it to the shop, dump it on the counter, give them their card and say ring me when it's finished. They want us to take it and sort it out and I say, 'I can't do that, because you have decisions to make all along the way. I shine the bullets and might even put 'em in the gun for you but I never have and never will pull the trigger – that's your job.'" +