Succession Laws

CONSULTATION PAPER | **FAMILY PROVISION**

Victorian Law Reform Commission

Victorian Law Reform Commission

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Call for submissions

Call for submissions

The Victorian Law Reform Commission invites your comments on this consultation paper.

What is a submission?

Submissions are your ideas or opinions about the law under review and how to improve it. This consultation paper contains a number of questions on page 41 that seek to guide submissions.

Submissions can be anything from a personal story about how the law has affected you to a research paper complete with footnotes and bibliography. We want to hear from anyone who has experience with the law under review. It does not matter if you only have one or two points to make—we still want to hear from you. Please note, however, that the Commission does not provide legal advice.

What is my submission used for?

Submissions help us understand different views and experiences about the law we are researching. We use the information we receive in submissions, and from consultations, along with other research, to write our reports and develop recommendations.

How do I make a submission?

You can make a submission in writing, or in the case of those requiring assistance, verbally, to one of the Commission staff. There is no required format. However, we encourage you to consider the questions listed on page 41.

Submissions can be made by:
Online form: www.lawreform.vic.gov.au
Email: law.reform@lawreform.vic.gov.au
Mail: GPO Box 4637, Melbourne Vic 3001
Fax: (03) 8608 7888
Phone: (03) 8608 7800, 1300 666 557 (TTY) or 1300 666 555 (cost of a local call)

Assistance

Please contact the Commission:

- if you require an interpreter
- if you need assistance to have your views heard
- if you would like a copy of this paper in an accessible format.

Publication of submissions

The Commission is committed to providing open access to information. We publish submissions on our website to encourage discussion and to keep the community informed about our projects.

We will not place on our website, or make available to the public, submissions that contain offensive or defamatory comments or which are outside the scope of the reference. Before publication, we may remove personally identifying information from submissions that discuss specific cases or the personal circumstances and experiences of people other than the author. Personal addresses and contact details are removed from all submissions before they are published.

The views expressed in the submissions are those of the individuals or organisations who submit them and their publication does not imply any acceptance of, or agreement with, these views by the Commission.

We keep submissions on the website for 12 months following the completion of a reference. A reference is complete on the date the final report is tabled in Parliament or, in the case of a community law reform project, when the report is presented to the Attorney-General. Hard copies of submissions will be archived and sent to the Public Records Office Victoria.

The Commission also accepts submissions made in confidence. These submissions will not be published on the website or elsewhere. Submissions may be confidential because they include personal experiences or other sensitive information. The Commission does not allow external access to confidential submissions. If, however, the Commission receives a request under the *Freedom of Information Act 1982* (Vic), the request will be determined in accordance with the Act. The Act has provisions designed to protect personal information and information given in confidence. Further information can be found at www.foi.vic.gov.au.

Please note that submissions that do not have an author or organisation's name attached will not be published on the Commission's website or made publicly available and will be treated as confidential submissions.

Confidentiality

When you make a submission, you must decide how you want your submission to be treated. Submissions are either public or confidential.

- **Public submissions** can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of submitters will be listed in the final report. Private addresses and contact details will be removed from submissions before they are made public.
- **Confidential submissions** are not made available to the public. Confidential submissions are considered by the Commission but they are not referred to in our final reports as a source of information or opinion other than in exceptional circumstances.

Please let us know your preference when you make your submission. If you do not tell us that you want your submission treated as confidential, we will treat it as public.

Anonymous submissions

If you do not put your name or an organisation's name on your submission, it will be difficult for us to make use of the information you have provided. If you have concerns about your identity being made public, please consider making your submission confidential rather than submitting it anonymously.

More information about the submission process and this reference is available on our website: www.lawreform.vic.gov.au.

Submission deadline 28 March 2013

Terms of reference

The Victorian Law Reform Commission is asked to review and report on the desirability of legislative or other reform in relation to the succession law matters set out in these terms of reference. The purpose of this reference is to:

(a) ensure that Victorian law operates justly, fairly and in accordance with community expectations in relation to the way property is dealt with after a person dies

(b) ensure that the processes to resolve disputes about the distribution of such property are efficient, effective and accessible

(c) identify practical solutions to problems that may still be outstanding in Victorian law and practice following the recommendations of the National Committee for Uniform Succession Laws established by the Standing Committee of Attorneys-General (SCAG).

In particular, the Commission is asked to review and report on the following matters:

Wills

1. whether the current requirements for witnessing wills should be revised to better protect older and vulnerable will-makers from undue influence by potential beneficiaries or others
2. whether the current provisions that allow the Supreme Court to authorise wills for persons who do not have testamentary capacity should be revised
3. the need to clarify when testamentary property disposed of during the will-maker's lifetime will be adeemed and when it will be protected from ademption

Family provision

4. whether Part IV of the *Administration and Probate Act 1958* concerning family provision applications is operating justly and effectively, having regard to its objective of providing for the proper maintenance and support of persons for whom a deceased had a responsibility to make provision

Intestacy

5. whether Division 6 of Part I of the *Administration and Probate Act 1958* concerning the distribution of an estate on an intestacy is operating effectively to achieve just and equitable outcomes

Legal practitioner executors

6. whether there should be special rules for legal practitioners who act as executors and also carry out legal work on behalf of the estate, including rules for the charging of costs and commission

Administration of estates

7. how assets are designated to pay the debts of an estate and the effect that this has on the estate available for distribution to beneficiaries or to meet a successful family provision claim
8. whether a court should have the power to review and vary costs and commission charged by executors

Operation of the jurisdiction

9. whether there are more efficient ways of dealing with small estates
10. the costs rules and principles applied in succession proceedings, taking into account any developments in rules or practice notes made or proposed by the Supreme Court
11. any other means of improving efficiency and reducing costs in succession law matters.

In undertaking this reference, the Commission should have regard to, and conduct specific consultation on, any relevant recommendations made by the National Committee for Uniform Succession Laws established by SCAG. The National Committee has released reports and model legislation on wills (1997 and 2006), family provision (1997 and 2004), intestacy (2007) and the administration of deceased estates (2009). State and Territory Ministers have agreed to adopt the National Committee's recommendations as the basis for reforming succession laws in their respective jurisdictions with the aim of maximising national consistency.

The reference does not include consideration of the remaining recommendations of the National Committee, unless relevant to the above referred matters.

The Commission should also consider any legislative developments in both Victoria and other Australian jurisdictions since the National Committee released its reports.

The Commission is to report by 1 September 2013.

Glossary

Ademption	The rule of ademption specifies that, when the subject matter of a specific gift to someone is no longer in the will-maker's estate at the date of death (because it has been sold or given away, for example), the beneficiary will receive nothing. In this case, the gift is said to have been adeemed.
Administrator	A person appointed by the court under letters of administration to administer a deceased estate which has no **executor**. This may be because there is no will, the will does not appoint an executor, or a named executor is unwilling or unable to act.
Bona vacantia	Property that has no owner. If a person dies intestate (leaving property that is not disposed of by a will) and is not survived by any next of kin, the intestate estate belongs to the Crown as *bona vacantia.* See also **intestacy**.
Collateral relatives	Blood relatives who are related by common ancestry but not through a direct line of descent. For example, the relationship between siblings is collateral. See also **lineal relatives**.
Disbursement	An expense paid by a solicitor on behalf of a client, for which reimbursement will be sought. Disbursements are distinct from solicitors' professional fees and court costs, and might include, for example, the cost of medical reports or a barrister's fees.
Executor	The person appointed by the will to administer the estate.
Grant of letters of administration	A grant of letters of administration is made where there is no will, or where there is a will but no **executor** is available for some reason. It confers upon a court-appointed **administrator** the authority to administer the estate.
Grant of probate	A grant of probate certifies that the will is the last and valid will of the deceased person and confirms the authority of the **executor** named in the will to administer the estate.

Grant of representation	A grant, by the Supreme Court, of probate or of letters of administration.
Hotchpot	The requirement for certain benefits received by a deceased person's child during the deceased person's lifetime to be taken into account when determining that child's share on **intestacy**.
Informal administration	Administration of estate assets without a **grant of representation**.
Inter vivos	Refers to something that occurs during life. In the succession law context, it is most often used to distinguish between gifts or transactions during a person's life and those that occur in accordance with their will.
Intestacy	Occurs when a person dies without having made a valid will, or where their will fails to effectively dispose of all of their property. Intestacy can be partial, where only some of the deceased person's property is effectively disposed of by will, or total, where none of the deceased person's property is effectively disposed of by will.
Issue	A person's children, grandchildren, great-grandchildren and other direct descendants down this line.
Joint tenancy	Common ownership of property when all co-owners (or co-tenants) together own the whole piece of property, each having an undivided share. Property that is owned jointly passes to the surviving co-owner or co-owners on the death of one of the co-owners and does not become part of the deceased person's estate. See also **survivorship** and **tenancy in common.**
Lineal relatives	Blood relatives who are related by a direct line of ancestry, either ancestors or descendants. For example, the parent to child relationship is lineal. See also **collateral relatives**.
Marshalling	The process of adjusting beneficiaries' benefits, after the payment of the estate's debts, to ensure the distribution accords with the order established under the will or by statute.
Next of kin	A person's closest blood relatives. A deceased person's estate is distributed to their surviving next of kin on **intestacy.**
Party and party costs	All costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party. The amount includes the necessary legal costs of prosecuting or defending a case, as calculated by using a standard scale of fees (rather than the fees that were actually charged). A party awarded party and party costs recovers less from the other side than they would if awarded **solicitor and client costs.**

Real property	Land and interests in land, otherwise known as real estate.
Registrar of Probates	An officer of the Supreme Court with both judicial and administrative functions. The Registrar of Probates is appointed under the *Supreme Court Act 1986* (Vic) and may exercise the power of the Court in making grants of representation.
Residuary estate	The remainder of the estate after debts and liabilities are paid, and specific gifts and legacies are distributed.
Solicitor and client costs	All costs reasonably incurred and of reasonable amount. They are likely to cover almost all the legal fees that the party was actually charged. A party awarded solicitor and client costs recovers more from the other side than they would if awarded **party and party costs.**
Statutory will	A will authorised by the court for a person who is alive but lacks the **testamentary capacity** required to make a valid will for themselves.
Survivorship	A right in relation to property held by two or more people as joint tenants. Where a co-owner (or co-tenant) dies, their share in the property passes to the surviving co-owner(s). It cannot be given by will. See also **joint tenancy.**
Tenancy in common	A type of co-ownership where multiple parties own distinct interests in the same piece of property. The share owned by a tenant in common forms part of their estate. See also **joint tenancy.**
Testamentary capacity	The mental capacity required to make a valid will. To have testamentary capacity, a person must be of sound mind, memory and understanding, and must understand the nature and effect of making a will.

1. Background

Background to the review

Terms of reference

1.1 On 1 March 2012, the Attorney-General asked the Victorian Law Reform Commission to report by 1 September 2013 on a number of succession law matters. The terms of reference are on page 6.

1.2 The purpose of the review, as set out in the terms of reference, is to:

(a) ensure that Victorian law operates justly, fairly and in accordance with community expectations in relation to the way property is dealt with after a person dies

(b) ensure that the processes to resolve disputes about the distribution of such property are efficient, effective and accessible

(c) identify practical solutions to problems that may still be outstanding in Victorian law and practice following the recommendations of the National Committee for Uniform Succession Laws established by the Standing Committee of Attorneys-General.

1.3 The terms of reference then specify 11 topics that the Commission should examine in particular.

The Uniform Succession Laws project

1.4 In conducting the review, the Commission is to take account of recommendations made by the National Committee for Uniform Succession Laws. The National Committee guided the National Uniform Succession Laws project, which was an initiative of the former Standing Committee of Attorneys-General (SCAG).[1]

1.5 In 1991, SCAG agreed to develop uniform succession law and practice across Australia. The following year, it asked the Queensland Law Reform Commission to coordinate the project. The project was guided by the National Committee, comprising representatives from all jurisdictions.

1.6 The National Committee conducted extensive research in conjunction with a number of law reform bodies over a period of 14 years and published reports on the law of wills (1997), family provision (1997 and 2004), intestacy (2007) and the administration of deceased estates (2009).

1 Now known, since September 2011, as the Standing Council on Law and Justice. It comprises Commonwealth, state and territory attorneys-general and the New Zealand Minister for Justice.

Succession laws in Victoria

1.7 Succession laws regulate how property is administered and distributed on the owner's death. In 2011, 36,733 deaths were registered in Victoria.[2] Many of those who died left a valid will setting out how they wanted their property to be distributed. Property that is not disposed of by a valid will can be distributed under a statutory intestacy scheme.

1.8 Victoria's succession laws are found in:

- the *Wills Act 1997* (Vic) and associated case law on the construction and validity of wills, and
- the *Administration and Probate Act 1958* (Vic) and associated case law dealing with the administration and distribution of assets.

1.9 Other legislation specifies the powers of executors, administrators and others involved in finalising the deceased person's financial affairs and the procedures they should follow.[3] Succession laws also interact with property and taxation laws and laws that determine the legal status of relationships.

1.10 Nevertheless, not all of a deceased person's assets are necessarily managed and administered under succession laws. Succession laws concern the administration and distribution of the deceased person's estate. The estate includes property that the person held or was entitled to at the time of their death. It may be real property (ownership or interest in land, a house or another type of building or immovable object attached to the land) or personal property (other assets such as money, shares, vehicles and other movable personal possessions).[4]

1.11 The following property interests are not normally included in the estate, and therefore are not dealt with by succession laws:

- Death benefits payable by a superannuation fund, as they may be disposed of only by a trustee of the fund. However, fund members often make a binding death benefit nomination asking the trustee to pay their superannuation death benefit to the person they appoint as executor under their will. When this happens, the executor can then distribute the money as directed by the fund member's will.[5]
- Payment under a life insurance policy to someone nominated by the insured person. The payment is made in accordance with the agreement between the insurance firm and the insured person.
- Jointly owned property, such as a house or a bank account, because this passes directly to the other owners.

1.12 As the Commission's terms of reference concern succession laws, they extend only to reviewing the rules that regulate the administration and distribution of property interests that comprise a deceased person's estate.[6]

2 Victorian Registry of Births Deaths and Marriages, *Fast Facts* (3 January 2012) <http://www.bdm.vic.gov.au/utility/about+us/fast+facts/>.
3 For example, trustee companies that act as administrators or executors of estates are regulated by the *State Trustees (State Owned Company) Act 1994* (Vic) and the *Corporations Act 2001* (Cth); and the Supreme Court's procedures for administration and probate are set out in the *Supreme Court (Administration and Probate) Rules 2004* (Vic).
4 For a full description of the types of property that may be disposed of by will, see the *Wills Act 1997* (Vic) s 4.
5 *Superannuation Industry Supervision Act 1993* (Cth) s 59(1A).
6 For a full discussion of the boundaries of succession law, see Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death: Text and Cases* (LexisNexis Butterworths, 3rd ed, 2009) 91–137.

The Wills Act

1.13 When Victoria separated from New South Wales and became an independent colony in 1850, the laws then in force in New South Wales continued to apply here. They included the *Wills Act 1837* (UK).[7]

1.14 An organising principle of the 1837 Act was the doctrine of 'testamentary freedom'. According to this doctrine, a person (the 'testator') should be free to determine how their property is distributed on their death by making a will (or 'testament') that sets out their intentions. The Act regulated who could make a will, the type of property that a will could dispose of, procedural formalities that must be followed in order for the will to be valid, and how to interpret it.

1.15 As a colony, and later as a state, Victoria's wills legislation developed and changed slowly, but sometimes significantly.[8] Although consolidated a number of times,[9] the legislation was not comprehensively reviewed until 1984. In that year the Attorney-General established a working party to review the *Wills Act 1958* (Vic).[10]

1.16 Two years later, in 1986, the working party presented the Attorney-General with a report recommending changes that would bring Victoria's legislation into line with legislation in the other Australian jurisdictions.[11] Work began on drafting a new Wills Act, reflecting the Working Party's recommendations. The eighth draft was referred to the Victorian Parliamentary Law Reform Committee in 1991.

1.17 By that time, moves were being made nationally to establish the Uniform Succession Laws project. The Parliamentary Law Reform Committee sought to assist the national project by 'avoiding unnecessary departures from formulations most likely to be generally adopted'.[12] For its part, the Queensland Law Reform Commission focused the national project on the law of wills in order to accommodate the work of the Parliamentary Law Reform Committee.[13] The Parliamentary Law Reform Committee presented its report in 1994, and its recommendations included a proposed Wills Act.[14]

1.18 The National Committee presented its report on wills in 1996, which took account of the proposed Victorian Wills Act and recommended national model legislation.[15]

1.19 The outcome in Victoria was the passage of the *Wills Act 1997* (Vic). It is a 'reasonably faithful' replica of the model national legislation.[16] The Commission is examining only three specific issues in relation to the law of wills.

7 7 Wm 4 & 1 Vict, c 26.
8 For example, the lowering of the age of majority from 21 to 18 by the *Wills (Minors) Act 1965* (Vic); and the amendment of the witness-beneficiary rule by the *Wills (Interested Witnesses) Act 1977* (Vic).
9 *Wills Statute 1864* (Vic); *Wills Act 1890* (Vic); *Wills Act 1915* (Vic); *Wills Act 1928* (Vic); *Wills Act 1958* (Vic).
10 The Attorney-General's Working Party in 1984 comprised representatives of the Law Department, the Probate Office, the Law Faculty of the University of Melbourne, the Law Institute of Victoria and the Victorian Bar.
11 The report was not published.
12 Law Reform Committee, Parliament of Victoria, *Reforming the Law of Wills* (1994) xiii.
13 National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills,* Queensland Law Reform Commission Miscellaneous Paper 29 (1997) i.
14 Law Reform Committee, above n 12.
15 National Committee for Uniform Succession Laws, above n 13.
16 Rosalind Croucher, 'Towards Uniform Succession in Australia' (2009) 83 *Australian Law Journal* 728, 730.

The Administration and Probate Act

1.20 Like the Wills Act, the origins of the Administration and Probate Act can be traced back to colonial times. It sets out the procedures for administering the estate until the assets are distributed to family, friends and other beneficiaries under a will or in accordance with the rules of intestacy.

1.21 Early versions of this legislation established: the jurisdiction of the Supreme Court in this area; the powers and responsibilities of executors and administrators; rules for distributing the property of people who die intestate; and court procedures, including special arrangements for small estates. Later, it incorporated 'family provision' legislation, empowering the Court to alter the distribution of property under a will or the intestacy scheme to provide for the maintenance and support of someone for whom the deceased person had responsibility to provide.

1.22 Family provision legislation provides a counterpoint to the doctrine of testamentary freedom. It places limits on the freedom of a will-maker to dispose of their property as they wish. Although testamentary freedom was favoured during Victoria's colonial period, it had previously been restricted in a variety of ways, to greater and lesser degrees, under English law.[17]

1.23 With the passage of the *Widows and Young Children Maintenance Act 1906* (Vic), the new State of Victoria was the first jurisdiction to introduce family provision legislation in Australia. It was based on the *Testator's Family Maintenance Act 1900* (NZ), the first law of its kind in a common law country.[18] Between 1912 and 1929, all Australian states and territories enacted family provision laws,[19] followed by England and Wales in 1938.[20]

1.24 Unlike the Wills Act, the Administration and Probate Act has never been comprehensively reviewed. While not requiring the whole Act to be examined, the Commission's terms of reference extend to many of the key provisions, including those that address the following issues:

- executors' commission for their time and trouble
- applying assets to the payment of debts
- the intestacy scheme for distributing the assets of someone who has died without making a will
- special procedures for administering small estates, and
- family provision.

17 See John K de Groot and Bruce W Nickel, *Family Provision in Australia* (LexisNexis Butterworths, 4th ed, 2012) 2–3.

18 Myles McGregor-Lowndes and Frances Hannah, 'Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs?'(2009) 17 *Australian Property Law Journal* 62, 64; National Committee for Uniform Succession Laws, *Uniform Succession Laws: Family Provision,* Queensland Law Reform Commission Working Paper 47 (1995) 1. Dainow notes that the successful New Zealand bill followed several unsuccessful attempts at passing family provision legislation: Joseph Dainow, 'Restricted Testation in New Zealand, Australia and Canada' (1937) 37 *Michigan Law Review* 1107, 1108.

19 National Committee for Uniform Succession Laws, *Uniform Succession Laws: Family Provision,* Queensland Law Reform Commission Working Paper 47 (1995) 1; *Testator's Family Maintenance Act 1912* (Tas); *Testator's Family Maintenance Act 1914* (Qld); *Testator's Maintenance and Guardianship of Infants Act 1916* (NSW); *Testator's Family Maintenance Act 1918* (SA); *Guardianship of Infants Act 1920* (WA) s 11; *Administration and Probate Ordinance* (ACT) pt VII; *Testator's Family Maintenance Order 1929* (NT).

20 *Inheritance (Family Provision) Act 1938* (UK).

The Commission's process

1.25 Dr Ian Hardingham QC has been appointed to the Commission to lead the review. Dr Hardingham has extensive experience in teaching, advising and writing about the law, as well as practising in the area as a barrister.

1.26 Since receiving the terms of reference, the Commission has been studying the legislation, cases and academic materials and holding preliminary discussions with the courts and legal practitioners. To help it identify issues and possible areas in need of reform, the Commission formed an advisory committee of experts who have been able to provide insights into how the law works in practice.

1.27 These preliminary discussions were only the beginning of the Commission's consultations. The release of a series of consultation papers, including this one, is an opportunity for people who would like to comment on the topics covered by the terms of reference to contribute to the review.

1.28 It is the Commission's usual practice to publish a single consultation paper addressing all of the terms of reference of a review. In this case, because it is examining a range of disparate subjects, it is releasing six short consultation papers, each focusing on different topics:

- wills
- family provision
- intestacy
- executors
- small estates
- payment of debts.

1.29 The papers describe the law, identify issues, and suggest options for reform.

1.30 Submissions in response to the papers are invited by 28 March 2013. They will guide the Commission's deliberations and further consultations, in accordance with the Commission's community engagement principles.

This consultation paper

1.31 The Commission has been asked to review and report on:

> **Family provision**
>
> 4. whether Part IV of the *Administration and Probate Act 1958* concerning family provision applications is operating justly and effectively, having regard to its objective of providing for the proper maintenance and support of persons for whom a deceased had a responsibility to make provision.

1.32 This consultation paper discusses problems that have arisen in the family provision jurisdiction, in particular:

- the extent to which the current law enables people to make opportunistic or non-genuine claims on estates
- the problem of high legal costs that are often paid out of the estate
- the suggestion that people are dealing with their assets towards the end of their lives to frustrate the operation of family provision laws.

1.33 The consultation paper then addresses the following possible areas for reform of family provision law in Victoria:

- limiting eligibility to make a family provision application
- amending costs rules and principles.

1.34 In 1997, the National Committee for Uniform Succession Laws provided a report on family provision law to the Standing Committee of Attorneys-General,[21] which was supplemented by another report in 2004.[22] The report made a number of recommendations for reform which, if adopted, would result in substantial changes to family provision law in Victoria. The National Committee's recommendations have been partially implemented in New South Wales and Western Australia (although the Western Australian legislation has not yet been proclaimed).[23] This consultation paper is informed by the work of the National Committee.

21 National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision*, Miscellaneous Paper 28 (1997).

22 National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General*, Queensland Law Reform Commission Report 58 (2004).

23 *Succession Amendment (Family Provision) Act 2008* (NSW); *Inheritance (Family and Dependants Provision) Amendment Act 2011* (WA).

2. Family provision

Introduction

2.1 In Victoria, a person for whom a deceased person had a responsibility to make provision can apply for a court order redistributing the deceased person's estate in their favour. This can occur whether or not the deceased person made a will. This area of law is referred to as 'family provision' and exists in all Australian states and territories.

2.2 Family provision law developed in recognition that, although people are free to give away their property by will after they die, they also have a responsibility to provide for certain people.

2.3 Approximately 500 to 600 family provision applications are made in Victoria each year. For example, in 2010–11 there were 493 family provision claims initiated in the Supreme Court and 108 initiated in the County Court—a total of 601—compared to 17,979 grants of probate and letters of administration. These figures show that a family provision application was made following 3.3 per cent of grants (although it should be noted that family provision applications may be made within six months of the grant, so some family provision matters may have been initiated in the 2011–12 financial year for grants from the 2010–11 financial year).

2.4 Legal practitioners have told the Commission that a very high proportion of family provision matters settle; one legal practitioner estimated that as many as 95 per cent of all family provision matters settle. It is not possible to obtain specific data about how many family provision applications settle, but it is clear that it is the vast majority. In all family provision applications, legal costs are incurred and often borne by the estate.

Current law in Victoria

Introduction

2.5 In Victoria, family provision is governed by part IV of the *Administration and Probate Act 1958* (Vic). This Act allows people to make an application to the County Court or the Supreme Court for a share, or a larger share, of a deceased person's estate, if the deceased person had responsibility to provide for them.[1]

2.6 When hearing a family provision application, the court must determine whether:

- the deceased person had responsibility to provide for the applicant, and
- distribution of the deceased person's estate by their will, intestacy laws,[2] or both, makes adequate provision for the proper maintenance and support of the applicant.[3]

This is the first stage of the court's decision-making process.

2.7 If the court finds that the deceased person did have such responsibility, and did not meet it, it then decides whether the applicant should receive an increased share of the estate, and the amount of any increased share they should receive.[4] This is the second stage of the court's decision-making process.

2.8 The High Court has described the two stages of the court's decision-making process as 'twin tasks', but noted that it would be artificial to say that the exercise of discretion begins only when the judge has completed the first of their tasks and decided that the appellant was left without adequate provision for proper maintenance.[5]

2.9 At both stages of the decision-making process, the court must take into account a range of statutory factors.[6]

1 *Administration and Probate Act 1958* (Vic) s 91(1). The County Court has had jurisdiction to hear and determine family provision applications 'where the value of the estate does not exceed its jurisdictional limit' since 1986: *Courts Amendment Act 1986* (Vic) s 17(a); *Administration and Probate Act 1958* (Vic) s 90 (definition of 'Court'). However, the County Court now has unlimited civil jurisdiction, so the proviso about its jurisdictional limit is now obsolete: *County Court Act 1958* (Vic) s 37, as amended by the *Courts Legislation (Jurisdiction) Act 2006* (Vic) s 3.

2 The operation of family provision was extended to distribution on intestacy in 1962: *Administration and Probate (Family Provision) Act 1962* (Vic) ss 6–11.

3 *Administration and Probate Act 1958* (Vic) ss 91(4)(a)–(b). The High Court characterised this first stage of the process as 'jurisdictional' in *Singer v Berghouse* (1994) 181 CLR 201, 208–9 (Mason CJ, Deane and McHugh JJ). The Supreme Court of Victoria has held that this characterisation of the court's task still applies to the Victorian provisions following their amendment in 1997: *Schmidt v Watkins* [2002] VSC 273 (24 July 2002) [6] (Harper J).

4 *Administration and Probate Act 1958* (Vic) s 91(4)(c). The High Court characterised this second stage of the process as 'discretionary' in *Singer v Berghouse* (1994) 181 CLR 201, 211 (Mason CJ, Deane and McHugh JJ). The Supreme Court of Victoria has held that this characterisation of the court's task still applies to the Victorian provisions following their amendment in 1997: *Schmidt v Watkins* [2002] VSC 273 (24 July 2002) [6] (Harper J).

5 *Goodman v Windeyer* (1980) 144 CLR 490, 502 (Gibbs J).

6 *Administration and Probate Act 1958* (Vic) s 91(4).

Factors considered by the court

2.10 The statutory factors that the court must consider at all stages of its decision-making process in family provision proceedings are:[7]

- any family or other relationship between the deceased person and the applicant, including the nature and length of the relationship
- obligations or responsibilities of the deceased person to the applicant, any other applicant and the beneficiaries of the estate
- the size and nature of the estate, and the charges to which the estate is subject
- the financial resources and needs of the applicant, of any other applicant and any beneficiary of the deceased person's estate
- any physical, mental or intellectual disability of the applicant or any beneficiary of the estate
- the age of the applicant
- any contribution of the applicant to building up the estate[8] or to the welfare of the deceased person or the family of the deceased person
- any benefits previously given by the deceased person to any applicant or beneficiary
- whether the applicant was being maintained, wholly or partly, by the deceased person before their death and, if the court considers it relevant, the extent to which and the basis upon which the deceased person had assumed that responsibility
- the liability of any other person to maintain the applicant
- the character and conduct of the applicant or any other person
- any other matter the court considers relevant.

2.11 In addition to this list of factors that the court *must* consider, there is also scope for the court to hear evidence on the reasons for the dispositions in the deceased's will, if they made a will, when hearing and determining a family provision application. When hearing a family provision application, the court is required to 'inquire fully into the estate of the deceased', and in doing so may accept any evidence of the deceased person's reasons for making the dispositions in his or her will (if any) and for not making proper provision for the applicant, whether or not the evidence is in writing.[9]

2.12 The statutory factors are given different weight depending on the facts of the case, and some may not be relevant at all.

7 Ibid ss 91(4)(e)–(p).
8 Not for adequate consideration: ibid s 91(4)(k).
9 *Administration and Probate Act 1958* (Vic) s 94(c).

Eligibility to make an application: persons for whom the deceased had responsibility to provide

2.13 In Victoria until 1998, only the widow, widower and children of a deceased person could make a family provision application.[10] However, limiting applicants in this way was too restrictive and was resulting in the exclusion of legitimate claims, so case-by-case court determination was substituted by the *Wills Act 1997* (Vic).[11]

2.14 Now anyone for whom the deceased person had responsibility to make provision is entitled to apply to the court within six months of the grant of probate or administration.[12] Victoria's approach to eligibility to make a family provision application is described as 'criteria-based', because statutory criteria must be considered when determining whether the deceased person had a responsibility to the applicant, whether that responsibility was fulfilled and whether the applicant should receive a larger share of the estate.[13] This approach contrasts with the 'status-based' or 'list-based' approach, originally taken in Victoria and still taken in other states and territories,[14] which relies on the relationship between the deceased person and the applicant.[15]

2.15 Although the Victorian legislation does not limit applicants' eligibility by a legislative list of relationship types, the courts still consider the type of relationship, and special characteristics of the relationship, between the deceased person and the applicant when determining whether the deceased person had a responsibility to provide for the applicant.[16]

2.16 The case law provides guidance as to the types of relationship and the 'particular quality' that is likely to give rise to responsibility on the part of the deceased person in Victoria:

> a duty to provide in one's will for the proper maintenance and support of a person does not arise unless the relationship between the deceased and the claimant has within it a particular quality. A mere business relationship would not of itself be enough. Nor would one which did not go beyond that of debtor and creditor. Even one founded upon, or which resulted in, acts of kindness or consideration that went well beyond the ordinary, might not do so.[17]

10 Ibid s 91. 'Widow' was defined as including former wife entitled to payments of alimony or maintenance: *Administration and Probate (Family Provision) Act 1962* (Vic) s 5, which amended *Administration and Probate Act 1958* (Vic) s 91.

11 *Wills Act 1997* (Vic) s 55, which amended *Administration and Probate Act 1958* (Vic) s 91(1); Victoria, *Parliamentary Debates*, Legislative Assembly, 9 October 1997, 433 (Jan Wade, Attorney-General). In *Whitehead v State Trustees Ltd*, Justice Bell provides a comprehensive discussion of the history of family provision laws in Victoria, and notes that prior to publication of the National Committee's 1997 final report on family provision, the Victorian government had already decided to adopt the discretionary, responsibility-based approach to eligibility that was recommended by the National Committee: [2011] VSC 424 (2 September 2011) [24]. His Honour notes that this decision followed consideration of the issue by the Attorney-General's Law Reform Advisory Council and an expert report, commissioned by the Council, by Rosalind Atherton (Croucher): *Whitehead v State Trustees Ltd* [2011] VSC 424 (2 September 2011) [24]; Rosalind Atherton (Croucher), *Victorian Attorney-General's Law Reform Advisory Council Expert Report 1: Family Provision* (1997).

12 *Administration and Probate Act 1958* (Vic) ss 91(1), 99.

13 National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General*, Queensland Law Reform Commission Report 58 (2004) 3–4; Rosalind Croucher, 'Towards Uniform Succession in Australia' (2009) 83 *Australian Law Journal* 728, 738. Croucher uses the terminology 'criteria-based' or 'circumstances' approach interchangeably: at 739.

14 *Testator's Family Maintenance Act 1912* (Tas) ss 2, 3A; *Family Provision Act 1969* (ACT) s 7; *Family Provision Act 1970* (NT) s 7; *Inheritance (Family Provision) Act 1972* (SA) s 6; *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 7; *Succession Act 1981* (Qld) ss 40–1, 5AA; *Succession Act 2006* (NSW) ss 57, 59.

15 Rosalind Croucher, 'Towards Uniform Succession in Australia' (2009) 83 *Australian Law Journal* 728, 738–9.

16 As noted at [2.10], above, 'any family or other relationship between the deceased person and the applicant, including the nature of the relationship and, where relevant, the length of the relationship' is one of the factors to which the court must have regard: *Administration and Probate Act 1958* (Vic) s 91(4)e).

17 *Schmidt v Watkins* [2002] VSC 273 (24 July 2002) [22] (Harper J).

2.17 The courts have held that the deceased person had responsibility to provide for an applicant, and that an applicant should receive a larger share of the estate, in cases involving a range of different relationships, including: adult children of the deceased person,[18] adult children with disabilities,[19] adult step-children,[20] domestic partners,[21] spouses,[22] former spouses,[23] a 'close personal companion' and her child,[24] a foster child,[25] an adult step-grandchild,[26] an adult sibling,[27] a widowed daughter-in-law and children,[28] a friend/carer of the deceased person.[29]

2.18 Applicants in a range of different relationships with the deceased person have also been unsuccessful in their claims for provision, or further provision, on the basis that the deceased person:

- did not have responsibility to make provision for the applicant, or
- had already made adequate provision for the applicant's proper maintenance and support.

2.19 Unsuccessful applicants have included the deceased person's: adult children,[30] adult biological child who had been adopted out at an early age,[31] domestic partner,[32] former spouse,[33] adult siblings,[34] infant grandchildren,[35] adult grandchildren,[36] nephew,[37] paid carer,[38] friend/carer,[39] friend/business partner,[40] friend/sexual partner who claimed that he had been sexually abused by the deceased as a child.[41]

18 *Johansons v ANZ Executors & Trustee Company Ltd* [1999] VSC 219 (15 June 1999); *Collicoat v McMillan* [1999] 3 VR 803; *Richard v AXA Trustees Ltd* [2000] VSC 341(1 September 2000); *Allan v Allan* [2001] VSC 242 (25 July 2001); *Blair v Blair* [2002] VSC 95 (4 April 2002); *Penn v Richards* [2002] VSC 378 (6 September 2002); *Couch v Couch* [2002] VSC 502 (21 November 2002); *Ross v Ross* [2002] VSC 544 (3 December 2002); *Re Monshing; Woods v Stevenson (No 1)* [2003] VSC 498 (19 December 2003); *Herszlikowicz v Czarny* [2005] VSC 354 (8 September 2005); *Brinkkotter v Pelling* [2006] VSC 101 (24 March 2006); *Horsburgh v White* [2006] VSC 300 (10 August 2006); *Vincent v Rae* [2006] VSC 346 (22 September 2006); *Boyd v State Trustees Ltd* [2008] VSC 18 (11 February 2008); *Cangia v Cangia* [2008] VSC 455 (31 October 2008); *Leyden v McVeigh* [2009] VSC 164 (30 April 2009); *Torney v Shalders* [2009] VSC 268 (3 July 2009); *Berkelmans v Bulach* [2009] VSC 472 (29 October 2009); *Yee v State Trustees Ltd* [2009] VSC 15 (10 February 2010); *Litchfield v Smith* [2010] VSC 466 (20 October 2010); *Klemke v Lustig* [2010] VSC 502 (11 November 2010); *Re Carn; Moerth v Moerth (No 1)* [2011] VSC 176 (4 March 2011)—one applicant was successful; *Hyatt v Covalea* [2011] VSC 334 (8 August 2011); *Greely v Greely* [2011] VSC 416 (31 August 2011); *Amicucci v Di Tullio (No 1)* [2011] VSC 539 (24 October 2011); *Youn v Frank* [2011] VSC 649 (16 December 2011).

19 *Costigan v Norton* [2005] VSC 208 (11 November 2005); *White v Muldoon* [2006] VSC 204 (8 June 2006); *Tavra v Petelin* [2011] VSC 359 (8 August 2011).

20 *McKenzie v Topp* [2004] VSC 90 (30 March 2004); *James v Day* [2004] VSC 290 (17 August 2004); *Keets v Marks* [2005] VSC 172 (20 May 2005); *Quinn v Robertson* [2009] VSC 245 (10 June 2009); *Robertson v Koska* [2010] VSC 134 (16 April 2010); *McCann v Ward* [2012] VSC 63 (1 March 2012); *Paola v State Trustees Ltd* [2012] VSC 158 (26 April 2012).

21 *Eins v Kammerhofer* [2004] VSC 417 (14 October 2004); *Re Sitch* [2005] VSC 308 (11 August 2005); *Carter v O'Brien* [2007] VSC 21 (20 February 2007); *Sinclair v Forsyth* [2008] VSC 250 (3 October 2008), upheld by the Court of Appeal in *Forsyth v Sinclair (No 1)* [2010] VSCA 147 (22 June 2010); *Anslow v Journeaux* [2009] VSC 250 (23 June 2009); *Sellers v Scrivenger* [2010] VSC 320 (26 July 2010); *White v Hanover* [2010] VSC 577 (10 December 2010); *Allen v Huntley* [2011] VSC 175 (15 April 2011); *Estrella v McDonald* [2012] VSC 62 (29 February 2012).

22 *Hizak v Henjak* [1999] VSC 73 (25 March 1999); *Gigliotti v Gigliotti* [2002] VSC 279 (19 July 2002); *Singvongsa v Madden* [2002] VSC 316 (9 August 2002); *Ross v Ross* [2002] VSC 544 (3 December 2002); *Downing v Downing* [2003] VSC 28 (24 February 2003); *Moore v Moore* [2005] VSC 95 (8 April 2005); *Costigan v Norton* [2005] VSC 208 (11 November 2005); *Panozzo v Worland* [2009] VSC 206 (25 June 2009); *Youn v Frank* [2011] VSC 649 (16 December 2011).

23 *Coller v Coller* [1999] VSCA 11 (15 February 1999*); Draskovic v Bogicevic* [2007] VSC 36 (1 March 2007).

24 *Whitehead v State Trustees Ltd* [2011] VSC 424 (2 September 2011). This decision was upheld on appeal: *State Trustees Ltd v Bedford* [2012] VSCA 274 (16 November 2012).

25 *Sellers v Hyde* [2005] VSC 382 (27 September 2005).

26 *Subsasa v State Trustees Ltd* [2007] VSC 399 (12 October 2007).

27 *Marshall v Spillane* [2001] VSC 371 (28 September 2011).

28 *Petrucci v Fields* [2004] VSC 425 (29 October 2004).

29 *Unger v Sanchez* [2009] VSC 541 (1 December 2009).

30 *Re Carn; Moerth v Moerth (No 1)* [2011] VSC 176 (4 March 2011)—one applicant was unsuccessful; *Bruce v Matthews* [2011] VSC 185 (5 May 2011).

31 *Coombes v Ward* [2002] VSC 61 (21 March 2002), upheld by the Court of Appeal in *Coombes v Ward* [2004] VSCA 51 (4 March 2004).

32 *Suffern v Suffern-Noble* [2002] VSC 389 (11 September 2002); *Read v Nicholls* [2004] VSC 66 (16 March 2004), although this claim failed for want of evidence rather than lack of responsibility to make provision.

33 *Armstrong v Sloan* [2002] VSC 229 (14 June 2002).

34 *Sanderson v Bradley* [2004] VSC 231 (30 June 2004); *Petersen v Micevski* [2007] VSC 280 (14 August 2007).

35 *MacEwan Shaw v Shaw* (2003) 11 VR 95.

36 *Sherlock v Guest* [1999] VSC 431 (12 November 1999).

37 *Jackson v Newns* [2011] VSC 32 (18 February 2011). The Court summarily dismissed the plaintiff's application in this case.

38 *Valbe v Irlicht* [2001] VSC 53 (8 March 2001).

39 *Lee v Hearn* (2002) 7 VR 595, upheld by the Court of Appeal in *Lee v Hearn* (2005) 11 VR 270.

40 *Schmidt v Watkins* [2002] VSC 273 (24 July 2002).

41 *Re Bull; Bentley v Brennan* [2006] VSC 113 (7 April 2006).

2.20 As the legislation envisages, each case is decided on its own facts and circumstances, having regard to:

- the statutory criteria
- what a wise and just person in the position of the deceased person would have deemed it their moral duty to do.[42]

2.21 Many claims are settled before being heard in court and, for this reason, limited information about these cases is available. The range of relationships that applicants had with the deceased person in settled cases may be different from the range that proceeded to court hearing. The Commission is interested in receiving more information about family provision matters that have settled before trial.

Question

FP1 What factors affect a decision to settle a family provision application rather than proceeding to court hearing?

'Adequate provision' for 'proper maintenance and support'

2.22 Once the court has determined that the applicant is a person for whom the deceased had responsibility to provide, it may only order provision, or further provision, for an applicant if it determines that the deceased person's will or the operation of intestacy provisions has failed to make *adequate* provision for the applicant's *proper* maintenance and support.[43] These terms have been the subject of judicial consideration.

2.23 The classic statement of what is 'adequate' and 'proper' is found in the decision of the Privy Council in *Bosch v Perpetual Trustee Co Ltd*:[44]

> The use of the word 'proper' in this connection is of considerable importance. It connotes something different from the word 'adequate'. A small sum may be sufficient for the 'adequate' maintenance of a child, for instance, but, having regard to the child's station in life and the fortune of his father, it may be wholly insufficient for his 'proper' maintenance.

2.24 This has been elaborated upon by the High Court, which has held that 'adequacy of the provision that has been made is not to be decided in a vacuum',[45] that it is not to be determined 'by looking simply to the question whether the applicant has enough upon which to survive or live comfortably',[46] and that the terms 'adequate' and 'proper' must be considered in the context of:

- the applicant's age, sex, condition, 'mode of life and situation generally'
- the applicant's needs and capacity, and resources for meeting those needs
- the nature, extent and character of the estate and other claims upon it
- what the will-maker regarded as superior claims or preferable dispositions.[47]

2.25 When deciding what is 'adequate' and 'proper' in a particular case, the court is informed by the statutory factors, listed at [2.10] of this chapter.

42 See discussion of this point in *Forsyth v Sinclair (No 1)* [2010] VSCA 147 (22 June 2010). The concept of 'moral duty' is discussed further at [2.99]–[2.101], below.
43 *Administration and Probate Act 1958* (Vic) ss 91(3)–(4)(b) (emphasis added).
44 [1938] AC 463, 476.
45 *Vigolo v Bostin* (2005) 221 CLR 191, 231 [122] (Callinan and Heydon JJ).
46 Ibid.
47 *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9, 19 (Dixon CJ), cited in *Draskovic v Bogisevic* [2007] VSC 36 (1 March 2007) [24].

The applicant's need

2.26 When determining whether provision in a particular case is adequate and proper, the financial need of the applicant is often a central consideration.

2.27 Financial need has been prioritised in some of the cases to the extent that an applicant will not receive a larger share of the estate unless they demonstrate financial need. In *Collicoat v McMillan*, for example, Justice Ormiston said that:[48]

> 'need' must be demonstrated before the jurisdiction is exercised. It follows that those who are capable of supporting themselves comfortably, and are likely to able to do so for the rest of their lives, will find it difficult to show any breach of moral obligation to make adequate provision for proper maintenance and support.

2.28 The Court of Appeal has since considered and approved the statement of Justice Ormiston in *Collicoat v McMillan*.[49]

2.29 However, like adequate provision for the applicant's proper maintenance and support, need is a relative concept. In the often-cited words of High Court Justices Fullagar and Menzies in *Blore v Lang*, in some instances the applicant's need 'is not for the bread and butter of life but for a little of the cheese or jam' that a wise and just testator[50] would have provided if circumstances allowed.[51]

2.30 The Supreme Court of Victoria has emphasised that even if an adult child of the deceased person is independently wealthy, the deceased person may still have a responsibility to provide for them:[52]

> Because a child has been prudent in his or her financial decisions and thus accumulated a degree of wealth is no reason, where no other competing claim is made, to conclude that a moral obligation to provide for that child does not exist.

2.31 Further, an applicant need not be poor or experiencing financial hardship in order to be awarded a greater share of the estate: 'it is not necessary for a plaintiff to be indigent, or in difficult financial circumstances, to qualify for provision'.[53]

Orders for provision and property that may be subject to an order

2.32 If the court determines that the deceased person had responsibility to make adequate provision for an applicant's proper maintenance and support, and did not do so, it may then make an order for provision (or 'maintenance order').[54] In Victoria, the court can only make provision out of the estate of a deceased person.[55]

2.33 Unless the court orders otherwise, provision is to be made by those entitled to share in the estate in proportion to their interests in the estate.[56] Where the deceased person dies leaving a will, the order for provision is treated as a modification to the will.[57] Where the deceased person dies wholly or partially intestate, the order operates as a modification of the intestacy provisions in the Administration and Probate Act.[58]

48 *Collicoat v McMillan* [1999] 3 VR 803, 820 [47].
49 *Blair v Blair* (2004) 10 VR 69, 79 [21] (Chernov JA).
50 'Wise and just testator' is used here as a phrase that commonly appears in the case law. The Commission generally uses the term 'will-maker' rather than 'testator'.
51 *Blore v Lang* (1916) 104 CLR 124, 135 (Fullagar and Menzies JJ, dissenting).
52 *Berkelmans v Bulach* [2009] VSC 472 (29 October 2009) [73] (Forrest J).
53 *Unger v Sanchez* [2009] VSC 541 (1 December 2009) [99], cited in *Story v Semmens* [2011] VSC 305 (1 July 2011) [86] (Zammit AsJ). *Unger v Sanchez* cites Privy Council and High Court authority for the proposition that there is no need for the plaintiff to be in difficult financial circumstances in order to qualify for provision: *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463, 481; *Blore v Lang* (1916) 104 CLR 124, 135 (Fullagar and Menzies JJ, dissenting); *Vigolo v Bostin* (2005) 221 CLR 191, 230–1 [122] (Callinan and Heydon JJ).
54 *Administration and Probate Act 1958* (Vic) ss 91(1)–(3).
55 Ibid s 91(1).
56 Ibid s 97(2). There is also a proviso to this provision that deals with the situation where one piece of property is given to separate beneficiaries successively (that is, to one beneficiary for life and another thereafter). In this scenario, the two separate interests in the property are not to be treated separately for the purposes of meeting a successful family provision claim, but charged against the property as a whole: s 97(2).
57 *Administration and Probate Act 1958* (Vic) s 97(4)(a).
58 Ibid s 97(4)(b). Intestacy is discussed in a separate consultation paper.

Farm property and orders for provision

2.34 The Commission notes that particular issues arise when the principal estate asset is a farm. There are two main considerations in relation to farms in the family provision context:

- The farm is often an indivisible asset.
- One or more of the children in the family are likely to have spent many years working on the family farm for little reward, and it may be their livelihood.

2.35 The statutory criteria in the Administration and Probate Act, set out at [2.10] above, give the court broad jurisdiction when determining a family provision claim.[59] For example, the court is required to consider the size and nature of the estate and any contribution (not for adequate consideration) of the applicant to building up the estate.[60]

2.36 As with other types of family provision cases, the court does not interfere lightly with dispositions under the deceased person's will. Wherever possible, the court seeks to leave dispositions of farming property intact and tries to make provision for successful applicants out of other property in the estate.[61] It will take into account contributions and commitments made by particular beneficiaries to particular properties.[62]

2.37 If there is only a single piece of farming property in the estate from which provision could be made, the court will look for a creative solution so that the farm property, or parts of it, do not need to be sold. For example, in *Torney v Shalders*, Justice Mandie ordered that the deceased person's daughters receive substantial monetary legacies, 'charged on the real estate', or farm property, that had been left to the deceased person's son.[63] The court was satisfied that, given the son's 'substantial independent asset position', he would be able to satisfy these charges without having to subdivide or sell the farm property.[64]

Time limits and extension of time

2.38 An application for family provision must be made within six months of the grant of probate or letters of administration, although the court may extend the time a person has to make an application.[65]

2.39 The principles that govern extension of time, as set out by Justice Gillard in *Groser v Equity Trustees*, are:[66]

- whether the estate has been finally distributed, because once the estate has been distributed, the rights of the beneficiaries become 'conclusive and indefeasible'
- whether beneficiaries are likely to be prejudiced by an extension of time
- the period of delay and the reason given for it, and
- the strength of the substantive claim—if the claim is unlikely to succeed, there would be little point in granting an extension of time in which to bring it.

2.40 However, the Victorian Court of Appeal has held that the discretion conferred on the court to grant an extension of time 'should not be confined by any rigid rules'.[67] This suggests that the criteria the courts consider in determining whether or not to grant an extension of time should serve as a guide only, rather than as rules of strict application.

59 *Administration and Probate Act 1958* (Vic) s 91(4).
60 Ibid ss 91(4)(g), (k).
61 See, eg, *Re Monshing; Woods v Stevenson (No 1)* [2003] VSC 498 (19 December 2003) [14].
62 Ibid.
63 *Torney v Shalders* [2009] VSC 268 (3 July 2009) [126].
64 Ibid [121]. For further discussion of the interaction between family provision legislation and inheritance of farms, see, eg, M B Voyce, 'The Impact of the Testator's Family Maintenance Legislation as Law and Ideology on the Family Farm' (1993) 7 *Australian Journal of Family Law* 191.
65 *Administration and Probate Act 1958* (Vic) s 99.
66 *Groser v Equity Trustees Ltd* (2007) 16 VR 101, 105 [27], 107 [36] (Gillard J).
67 *Ansett v Moss* [2007] VSCA 161 (22 October 2007) [6] (Buchanan JA, Redlich JA and Cavanough AJA agreeing).

2.41 If the court grants an extension of time for a party to make an application for family provision, any property that has already been distributed cannot be made subject to an order for family provision.[68]

2.42 The National Committee for Uniform Succession Laws recommended that applications for family provision should be made no later than 12 months after the date of the deceased person's death, with a discretion of the court to extend time.[69]

Question

FP2 Is the current period within which an application for family provision can be made in Victoria (six months from the grant of representation):

(a) satisfactory?

(b) too short?

(c) too long?

Issues

Opportunistic claims

Introduction

2.43 Family provision law, both in Victoria and elsewhere in Australia, has been criticised for enabling too many applicants with weak claims to apply for a share of a deceased person's estate.[70] It seems that the problem is not that provision will be made for undeserving claimants, but that any opportunistic claim that is defended or settles results in legal costs that diminish the size of the estate.

2.44 The problem exists in relation to litigated claims, as well as to the vast majority of family provision matters that settle before reaching trial. In preliminary discussions, the Commission has heard this referred to as estates being 'held to ransom' by opportunistic family provision claimants. Professor Myles McGregor-Lowndes and Frances Hannah describe this as 'applicants at the very margin "gaming" executors into settlement in order to protect the estate from litigation costs and delays'.[71]

2.45 There is a perception that people make speculative claims for family provision in the expectation that their costs will be paid by the estate, or that the personal representative[72] will settle the matter to avoid incurring costs associated with litigation.

68 *Administration and Probate Act 1958* (Vic) s 99.

69 National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General*, Queensland Law Reform Commission Report 58 (2004) Draft Family Provision Bill 2004 cl 9 ('*2004 Supplementary Report*').

70 See, eg, Kay O'Sullivan, 'Clarity is crucial for those dealing with a death: The anguish of the bereaved can be worsened by uncertainty over their inheritance', *Supplement*, *The Age* (Melbourne), 29 June 2012, 11.

71 Myles McGregor-Lowndes and Frances Hannah, 'Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs?' (2009) 17 *Australian Property Law Journal* 62, 63.

72 'Personal representative' is used in this consultation paper to refer to the executor or administrator of the estate.

Ineffectiveness of costs provisions

2.46 Ordinarily in civil proceedings costs follow the event—that is, the unsuccessful party pays their own costs and some of the costs of the other side. Usually in civil proceedings, the amount of the successful party's costs that the unsuccessful party must pay are 'party and party' costs: 'all costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party',[73] and no more. Recovering party and party costs from the unsuccessful party does not cover everything paid by the successful party to their solicitors.

2.47 The Supreme Court of Victoria has noted that, 'in applications under Part IV, orders for costs very often depart from the ordinary rule applicable in civil litigation'.[74] Rather than the costs rules applied in other civil proceedings, special costs rules apply in family provision proceedings. The Administration and Probate Act specifies that, in family provision proceedings, the court may:

- under section 97(7)—order that the applicant bear their own costs and the costs of the defendant personal representative, if the court is satisfied that the application 'has been made frivolously, vexatiously or with no reasonable prospect of success',[75] and
- under section 97(6)—subject to section 97(7), make any order that is, in the court's opinion, just.[76]

2.48 The Supreme Court of Victoria has held that section 97(6) of the Administration and Probate Act is limited by section 97(7)—'in the ordinary course, an order for costs in family provision cases may not be made against the plaintiff simply because the application has failed'.[77]

2.49 A successful family provision applicant will usually receive costs, on the solicitor and client basis, out of the estate.[78] The solicitor and client measure of costs is 'all costs reasonably incurred and of reasonable amount'.[79] Subject to any costs recovered from an unsuccessful applicant, the defendant personal representative will usually receive indemnity costs out of the estate.[80] Costs on an indemnity basis are all costs, except those that are of an unreasonable amount and have been unreasonably incurred.[81]

2.50 An unsuccessful family provision applicant cannot expect to have their costs paid by the estate. This was emphasised by Associate Justice Gardiner in *Re Carn; Moerth v Moerth (No 2)*.[82] That could happen in a particular case, but the court's starting point would be that the unsuccessful applicant should bear their own costs or, if their case was particularly unmeritorious, pay the party and party costs of the estate.[83] In some cases, unsuccessful applicants still do receive their costs out of the estate, but this is the exception rather than the rule. The most common costs order if an applicant has been unsuccessful is 'no order as to costs', meaning that the unsuccessful applicant bears their own costs and the defendant personal representative receives their costs out of the estate on an indemnity basis.[84]

73 *County Court Civil Procedure Rules 2008* (Vic) r 63A.29; Supreme *Court (General Civil Procedure) Rules 2005* (Vic) r 63.29.
74 *Re Bull; Bentley v Brennan (No 2)* [2006] VSC 226 (30 June 2006) [3].
75 *Administration and Probate Act 1958* (Vic) s 97(7).
76 Ibid s 97(6).
77 *Re Bull; Bentley v Brennan (No 2)* [2006] VSC 226 (30 June 2006).
78 Ibid [3]; *Re Sitch (No 2)* [2005] VSC 383 (11 August 2005) [2]; *Whitehead v State Trustees Ltd (No 2)* [2011] VSC 516 (19 October 2011) [6].
79 *County Court Civil Procedure Rules 2008* (Vic) r 63A.30; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 63.30.
80 *Re Sitch (No 2)* [2005] VSC 383 (11 August 2005) [2]; *Re Bull; Bentley v Brennan (No 2)* [2006] VSC 226 (30 June 2006) [3]; *Whitehead v State Trustees Ltd (No 2)* [2011] VSC 516 (19 October 2011) [6]. This measure of costs is sometimes called costs 'on the trustee scale' or costs 'had and retained out of the estate'.
81 *County Court Civil Procedure Rules 2008* (Vic) r 63A.30.1; Supreme *Court (General Civil Procedure) Rules 2005* (Vic) r 63.30.1.
82 *Re Carn; Moerth v Moerth (No 2)* [2011] VSC 275 (4 March 2011) [26] (Gardiner AsJ).
83 Ibid [26]–[31] (Gardiner AsJ).
84 See, eg, *Collicoat v McMillan* [1999] 3 VR 803—in relation to the unsuccessful plaintiff (there were multiple plaintiffs); *Coombes v Ward (No 2)* [2002] VSC 84 (27 March 2002); *Re Bull; Bentley v Brennan (No 2)* [2006] VSC 226 (30 June 2006).

2.51 As noted at [2.47] above, the Administration and Probate Act allows the court to go even further than ordering an unsuccessful family provision applicant to bear their own costs—it may order that the unsuccessful applicant also bear the costs of the defendant personal representative in defending the application.[85] When this power was introduced, then Attorney-General Jan Wade said that it was intended to 'ensure that only genuine applications are made'.[86]

2.52 However, the courts have very rarely exercised their power to order an unsuccessful family provision applicant to pay the defendant personal representative's costs. See, for example, *Corbett v Corbett*[87] and *Re Carn; Moerth v Moerth (No 2)*.[88]

2.53 The Commission has heard views that section 97(7) is not successful in deterring family provision applicants from making opportunistic claims. One reason for this is that both the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) and the *County Court Civil Procedure Rules 2008* (Vic) contain provisions that allow the court to dismiss any application that 'is scandalous, frivolous or vexatious'.[89] Therefore, most matters that would satisfy section 97(7) of the Administration and Probate Act for the purposes of a costs order should not have proceeded to trial.

2.54 It appears that section 97(7) does not operate effectively as a deterrent to opportunistic or baseless claims. Professor Prue Vines states: 'The argument that taking costs out of the estate encourages wasteful litigation is commonly accepted'.[90]

Use of summary judgment power of the court in deterring claims

2.55 The power of the court to summarily dismiss applications also has the potential to deter spurious claims from being made or, at the very least, to ensure that they are dealt with at the earliest possible stage so that cost to the estate is minimised. There are multiple sources of power for the courts to enter summary judgment in family provision proceedings: the *Civil Procedure Act 2010* (Vic), the County Court Civil Procedure Rules and the Supreme Court (General Civil Procedure) Rules.[91]

2.56 Under the Civil Procedure Act, a court may give summary judgment in a civil proceeding if it is satisfied that a claim, defence or counterclaim, or part thereof, has no real prospect of success.[92] The word 'real' has been interpreted as directing the court to consider 'whether there is a realistic as opposed to fanciful prospect of success'.[93]

2.57 This is contrasted with the test under the rules of court, which 'has usually been expressed to be whether the cause of action is hopeless or bound to fail'.[94] Slightly different tests apply under the rules of court depending on whether a plaintiff is applying for summary judgment or a defendant is applying for a summary stay or dismissal of a plaintiff's claim.

2.58 Irrespective of the test applied, the Commission has been told that the court's power to enter summary judgment is rarely exercised in family provision proceedings. It is not clear whether the recent Supreme Court judgments in *Jackson v Newns*[95] and *Napolitano v State Trustees*,[96] in which applications for family provision were summarily dismissed, signal a willingness to exercise this power more frequently.

85 *Administration and Probate Act 1958* (Vic) s 97(7).
86 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 October 1997, 436 (Jan Wade).
87 *Corbett v Corbett* (Unreported, Supreme Court of Vic, Byrne J, 4 July 1997) 11–12.
88 *Re Carn; Moerth v Moerth (No 2)* [2011] VSC 275 (4 March 2011).
89 *Supreme Court (General Civil Procedure) Rules 2010* (Vic) r 23.01; *County Court Civil Procedure Rules 2008* (Vic) r 23.01.
90 Prue Vines, *Bleak House Revisited? Disproportionality in Family Provision Estate Litigation in New South Wales and Victoria* (Australasian Institute of Judicial Administration, 2011) 34 ('*Bleak House Revisited?*').
91 Any Victorian court can enter summary judgment under the *Civil Procedure Act 2010* (Vic) pt 4.4; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) OO 22–3; *County Court Civil Procedure Rules 2008* (Vic) OO 22–3.
92 *Civil Procedure Act 2010* (Vic) ss 63(1), 3 (definition of 'civil proceeding').
93 *Napolitano v State Trustees Ltd* [2012] VSC 345 (15 August 2012) [5].
94 Ibid.
95 [2011] VSC 32 (18 February 2011).
96 [2012] VSC 345 (15 August 2012).

2.59 Some legal practitioners have expressed the view that family provision applications are so fact-based that it is difficult for courts to summarily dismiss them. Some have also noted that past reluctance of the courts to summarily dismiss family provision claims had led to a reluctance among legal practitioners to apply for summary judgment.

Questions

FP3 To what extent does the current law allow applicants to make family provision claims that are opportunistic or non-genuine?

FP4 Does section 97(7) of the *Administration and Probate Act 1958* (Vic), which permits the court to order an unsuccessful applicant to pay their own costs and the costs of the defendant personal representative, deter opportunistic applicants from making family provision claims?

FP5 Does the power of the court to summarily dismiss claims deter opportunistic applicants from making family provision claims?

Excessive costs

2.60 In the New Zealand parliamentary debates about the first family provision legislation, concern was expressed that it would provide 'food for lawyers'.[97] In response to this concern, the parliament decided that the cost of making a family provision application should be limited to £3 or £4.[98] Costs in family provision proceedings remain problematic today.

Legal costs in family provision proceedings that are disproportionate to the size of the estate

2.61 Professor Prue Vines, for the Australasian Institute of Judicial Administration, has researched legal costs in family provision applications, and characterises the problem as 'disproportionate costs'—that is, costs that are disproportionate to the size of the estate. Vines states that 'the procedure adopted for resolving a given dispute should be proportionate to the value, importance and complexity of the dispute'.[99] This accords with the overarching obligation, placed on parties and their legal representatives by the Civil Procedure Act, to ensure that costs are reasonable and proportionate to the complexity or importance of the issues in dispute and the amount in dispute.[100]

2.62 Vines' recent study of Victorian and New South Wales family provision cases found that costs were 'disproportionate' (that is, greater than 25 per cent of the value of the estate) in a significant number of cases.[101] However, the study only considered cases in which mediation had failed and which had not settled.[102] Vines notes that these cases would typically involve the highest legal costs of any family provision matters.

97 Joseph Dainow, 'Restricted Testation in New Zealand, Australia and Canada' (1937) 37 *Michigan Law Review* 1107, 1108.
98 Ibid.
99 Vines, *Bleak House Revisited?*, above n 90, 7.
100 *Civil Procedure Act 2010* (Vic) s 24.
101 Vines, *Bleak House Revisited?*, above n 90, 31.
102 Ibid.

2.63 Vines identified a number of factors in these cases that affected whether costs were disproportionate to the size of the estate:

- Use of senior counsel increased the likelihood that costs would be disproportionate.[103]
- Costs were significantly more likely to be disproportionate if the estate was small.[104]
- Costs were more likely to be disproportionate in longer trials.[105]
- The relationship between the applicant and the beneficiaries under the will—costs were more likely to be disproportionate in disputes between siblings, and disputes between the second spouse and children of the first spouse.[106]
- Mediation generally reduced the likelihood of disproportionate costs, particularly if there was a family relationship between the parties.[107] However, it did not reduce the likelihood of disproportionate costs cases if senior counsel were used and tended to increase costs slightly if mediation did not result in settlement.[108]

2.64 These problems are not unique to Victoria—Vines' study found that a higher percentage of cases in New South Wales involved disproportionate costs than in Victoria.[109]

Costs being paid out of the estate

2.65 Whether or not costs are disproportionate to the size of the estate, the Commission notes concern that costs in family provision proceedings are generally too high, and the operation of costs rules means that costs often significantly reduce the value of the estate that is available for distribution to beneficiaries and successful family provision applicants.

2.66 As discussed above at [2.51]–[2.54], section 97(7) of the Administration and Probate Act—which empowers the court to order an applicant whose application was made frivolously, vexatiously or with no reasonable prospect of success to pay their own costs and the costs of the defendant personal representative—arguably does not deter applicants from making opportunistic claims on estates.

2.67 As discussed, even if an applicant is unsuccessful, it is common for there to be no order as to costs.[110] This means that even if the applicant's costs are not paid out of the estate, the estate will nevertheless be diminished by paying the defendant personal representative's costs of defending the application.

2.68 The Commission seeks further information, whether qualitative or anecdotal, about the overall amount of legal costs in family provision, and the impact of costs orders on the estate that remains for distribution among beneficiaries and successful family provision claimants.

Question

FP6 Are costs orders in family provision cases impacting unfairly on estates?

103 Ibid 31–3.
104 Ibid 25.
105 Ibid 27.
106 Ibid 31. Interestingly, Vines notes that the disproportion effect is the greatest where the application involves a dispute between siblings, but that 'this effect seems to disappear if mediation is present': at 31.
107 Vines, *Bleak House Revisited?*, above n 90, 31–2.
108 Ibid.
109 Ibid 31.
110 See [2.51], above, for discussion of this.

Transactions during the deceased person's lifetime that reduce the size of their estate

The perceived problem

2.69 The Commission has been told that people commonly deal with their property before they die so that little of it remains in their estate and the way in which they choose to distribute their property cannot be challenged under family provision legislation. The National Committee for Uniform Succession Laws considered this issue in both its 1997 family provision report[111] and its 2004 supplementary report.[112]

2.70 Professor Rosalind Croucher characterises the issue as follows:

> The issue for those working with the legislation, and, eventually, the legislature, was the extent to which a testator could, or should, be permitted to avoid the operation of the legislation by dispositions of property: either outright or through a range of transactions, some of which were 'will-like', many of which involved trusts and others which involved some kind of contractual obligation undertaken.[113]

2.71 The Commission understands that specific ways in which people minimise property in their estates include: disposing of property during their lifetime; moving property into superannuation; setting up trusts; and holding property jointly with another person.

The National Committee's recommendations about notional estate

2.72 In all Australian states and territories except New South Wales, family provision can usually only be made out of property that is in the deceased person's estate.[114] However, notional estate provisions in New South Wales allow certain property that is not part of the deceased person's estate to be designated as notional estate to satisfy a successful claim for family provision, or pay the costs of family provision proceedings.[115]

2.73 In response to concerns that people were 'avoiding their family provision responsibilities by divesting themselves of property during their lifetime', the National Committee recommended adoption of notional estate provisions, based on those already in operation in New South Wales.[116]

111 National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision*, Miscellaneous Paper 28 (1997) ch 6 ('*1997 Report*').
112 National Committee for Uniform Succession Laws, *2004 Supplementary Report*, above n 69, ch 3.
113 Rosalind Croucher, 'Conflicting Narratives in Succession Law—A Review of Recent Cases' (2007) 14 *Australian Property Law Journal* 179, 190 ('Conflicting Narratives in Succession Law').
114 However, in Queensland, a *donatio mortis causa*—or gift made in anticipation of death—is regarded as estate property for the purposes of a family provision application: *Succession Act 1981* (Qld) s 41(12). For discussion of this, see: Croucher, 'Conflicting Narratives in Succession Law', above n 113, 191; John K de Groot and Bruce W Nickel, *Family Provision in Australia* (LexisNexis Butterworths, 4th ed, 2012) 53. Additionally, in all states and territories except Victoria, Queensland and Tasmania, property that has been distributed from the estate may be subject to a family provision order in certain circumstances: *Family Provision Act 1969* (ACT) s 20; *Family Provision Act 1970* (NT) s 20; *Inheritance (Family Provision) Act 1972* (SA) s 14(3); *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 8.
115 *Succession Act 2006* (NSW) ss 78(1), 63(5), 99.
116 National Committee for Uniform Succession Laws, *1997 Report*, above n 111, 93–4; National Committee for Uniform Succession Laws, *2004 Supplementary Report*, above n 69. 14, 19–26. The National Committee had also considered draft notional estate provisions in New Zealand, but preferred the New South Wales model on the basis that the provisions were more comprehensive, had been in operation for 17 years and 'by all accounts are now well regarded within that jurisdiction': National Committee for Uniform Succession Laws, *1997 Report*, above n 111, 93.

2.74 The New South Wales provisions allow the court to designate property as notional estate if it is property that has already been distributed from the estate, or property that has been subject to a 'relevant property transaction'.[117] Generally speaking, relevant property transactions captured by the legislation are:[118]

- acts or omissions by the deceased person
- for which full valuable consideration was not received
- that took place within a certain time before the deceased person's death, and
- resulted in property not accruing to the deceased person's estate.

2.75 Examples of the types of transactions that are sometimes covered are failure to sever a joint tenancy and failure to make a binding superannuation nomination in favour of the deceased person's personal representative.[119] A transaction that took place up to three years before the deceased person's death can be captured if it was entered into *with the intention* of depriving someone of family provision, or up to one year before the deceased person's death if it was entered into when the deceased person had a responsibility to make provision for someone.[120]

2.76 The court can only make a notional estate order if it is satisfied that:[121]

- the deceased person left no estate, or
- the deceased person's estate is insufficient to make a family provision order, or any order as to costs, that the court thinks should be made, or
- provision should not be made wholly out of the deceased person's estate because there are other people entitled to apply for family provision orders or because there are special circumstances.

2.77 There are also other factors that the court must take into account before making a notional estate order.[122]

Analysis of the policy and effectiveness of New South Wales notional estate provisions

The New South Wales Law Reform Commission recommendations in 1977

2.78 The New South Wales notional estate provisions were first recommended by the New South Wales Law Reform Commission (NSWLRC) in a 1977 report.[123] The rationale for recommending these provisions was that, without them, family provision legislation could be easily evaded and its effectiveness would be limited.[124] The NSWLRC said that it recommended notional estate provisions with the following situations in mind:

> where a father seeks, in favour of the children of his first marriage, to defeat the claims of his second wife or, in favour of his second wife, to defeat the claims of the children of his first marriage or, in favour of his mistress, to defeat the claims of both his wife and his children.[125]

117 *Succession Act 2006* (NSW) ss 79–81.
118 Ibid ss 75, 83(1).
119 *Succession Act 2006* (NSW) s 75. For the New South Wales Supreme Court's confirmation that superannuation benefits are captured by these provisions, see, eg, *Cabban v Cabban* [2010] NSWSC 1433 (13 December 2010) [41] (Macready AsJ).
120 *Succession Act 2006* (NSW) s 80(2) (emphasis added).
121 Ibid s 88.
122 Ibid ss 83(1), 87, 90.
123 New South Wales Law Reform Commission, *Report on the Testator's Family Maintenance and Guardianship of Infants Act,* 1916, Report No 28 (1977) 68–76.
124 Ibid 68.
125 Ibid 71.

2.79 The NSWLRC also considered that notional estate provisions should be able to operate where there had been an 'unjust gift', and gave the example of a depressed or lonely elderly person who rewards a carer for 'a few months of institutional care … at the expense of many years of family devotion'.[126] Of this type of situation, the NSWLRC said: 'We cannot say how often cases of this kind occur but we believe that their incidence is such that legislation is called for'.[127]

2.80 The NSWLRC stated that the notional estate proposals were met with 'little opposition', and therefore concluded that 'the proposals were widely accepted as being right in principle'.[128] However, Professor Rosalind Croucher notes that, although the arguments against the proposals may have been 'fewer in number', they were 'expressed in strong terms'.[129]

2.81 Croucher provides the example of a submission from a minority of the General Legal Committee of the Law Society, which referred to the notional estate provisions as 'simply to put another nail in the testator's coffin, that the concept of testamentary freedom becomes an absolute myth'.[130]

2.82 Following the publication of the NSWLRC's final report, Professor Woodman of the University of Sydney and Justice Hutley of the New South Wales Court of Appeal also expressed vehement opposition to the notional estate proposals in submissions to the Attorney General. For example, Professor Woodman wrote of notional estate:

> In my view, it represents a savage attack upon the rights of a person to create a settlement affecting his property, and to make gifts if he so desires, and, at the same time, raises difficult questions as to the 'intention of defeating an application for provision' … True enough, property can be placed beyond the reach of an eligible person, but in my view the necessity of including this Part of the Act should be left in abeyance until statistics show whether or not this is being done on sufficient occasions.[131]

2.83 Croucher notes that although these statements were not before the NSWLRC at the time of making its recommendations, 'Even on the responses received, it was a big jump from "little opposition" to "wide acceptance"'.[132]

The National Committee's consideration of notional estate in 1996–97

2.84 In 1996, the National Committee for Uniform Succession Laws published a family provision issues paper, in which it noted that:

> Whether it would be possible to persuade the other States and Territories to follow this approach may perhaps depend on how successful it has been in New South Wales in practice … An evaluation of the legislation, from a New South Wales perspective, must be undertaken as part of the project.[133]

2.85 In recommending adoption of notional estate provisions in its 1997 final report, the National Committee said:

> Anecdotal evidence provided to the New South Wales Law Reform Commission in 1997 suggests that 'notional estate' provisions are working well. The fact that very few notional estate cases go to court may suggest that the anti-avoidance provisions aspects of the legislation are having an effect.[134]

126 Ibid.
127 Ibid 72.
128 Ibid 70.
129 Rosalind Croucher, 'Law Reform as Personalities, Politics and Pragmatics—The *Family Provision Act 1982* (NSW): A Case Study' (2007) 11 *Legal History* 1, 21 ('Law Reform as Personalities').
130 Ibid.
131 Professor R A Woodman, University of Sydney, Faculty of Law, to FJ Walker, Attorney General, 8 December 1978, cited in ibid 1, 6, 21–3.
132 Croucher, 'Law Reform as Personalities', above n 129, 22.
133 National Committee for Uniform Succession Laws, *Uniform Succession Laws: Family Provision,* Queensland Law Reform Commission Working Paper 47 (1995) 43.
134 National Committee for Uniform Succession Laws, *1997 Report*, above n 111, 87.

2.86 There is no reference in the work of the National Committee to any 'evaluation of the legislation', that had been proposed in 1996. The Commission has made a number of inquiries and it does not seem that any such work was ever undertaken or published.

2.87 Of the National Committee's proposal of notional estate provisions, Professor Rosalind Croucher has written:

> What is curious—to me at least—is that there was apparently no discussion in the National Committee's work of the model of the claw-back property provisions. The New South Wales provisions are used because they are there and have been in force for a while now to see if there is anything hugely wrong with them. It is a convenient—and pragmatic—approach to law reform, in sticking to the familiar.[135]

Whether there is a need for notional estate provisions in Victoria

2.88 In discussions to date, the Commission has heard mixed views about the way in which people should be permitted to deal with their property while they are still alive. The view has been expressed that the type of lifetime transactions captured by notional estate laws are just part of estate planning. One concern is that altering transactions entered into by the deceased person during their lifetime, as can occur under notional estate legislation, may give rise to a 'wealth redistribution' regime that goes beyond the remit of family provision legislation.

2.89 There are many reasons why a person may deal with their property in a certain way during their lifetime, including to minimise tax and to provide for their family during their lifetime. The Commission does not have any evidence that people are dealing with their assets during their lifetime in order to deprive their family of provision or inheritance.

2.90 Additionally, transactions entered into by the deceased person during their lifetime can already be set aside if there has been undue influence or unconscionable dealing—the former requiring the party making the decision to be free to do so, without being pressured by a stronger party; the latter dealing with the exploitation by one party to a transaction of a special disability of the other party (such as lack of knowledge or strong affection).[136]

2.91 As discussed above, an analysis of the need for, and effectiveness of, notional estate provisions in New South Wales does not appear to have been undertaken at any stage. In 1977, the NSWLRC seems to have recommended the provisions not on the basis of empirical evidence demonstrating the need for such provisions, but perhaps more in the spirit of the approach to families and property that prevailed at the time—the NSWLRC report briefly mentions the ability of the court to set aside transactions intended to defeat a claim under the *Family Law Act 1975* (Cth).[137]

2.92 In the absence of clear evidence demonstrating the need for such provisions to prevent people from depriving their families of provision in Victoria, or the effectiveness of such provisions in preventing people from doing this in New South Wales, arguably notional estate provisions should not be introduced in Victoria.

2.93 The Commission seeks views on the extent to which people currently deal with their assets to minimise property in their estates and thereby frustrate the operation of family provision laws, and the extent to which they should be permitted to do so. More information will assist the Commission to assess whether there is a need for notional estate provisions in Victoria.

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135 Croucher, 'Towards Uniform Succession', above n 15, 740.

136 For a discussion of undue influence and unconscionable dealing, and a comparison of these doctrines to notional estate, see: Prue Vines, 'Challenging the Testator's Mind by Challenging Lifetime Transactions: Bridgewater v Leahy as Backdoor Probate Law?' (2003) 10 *Australian Property Law Journal* 4.It should be noted that the equitable doctrine of undue influence referred to here is different from the common law doctrine of testamentary undue influence, addressed as part of the Commission's terms of reference.

137 New South Wales Law Reform Commission, above n 123, 71. However, Croucher notes a distinct lack of comment in the state parliamentary debates about what was happening at the federal level in relation to matrimonial property reform: Croucher, 'Law Reform as Personalities', above n 129, 25.

Questions

FP7 To what extent do people deal with their assets during their life in order to minimise the property that is in their estate and frustrate the operation of family provision laws? What are some examples of this?

FP8 Should people be entitled to deal with their assets during their lifetime to minimise the property that is in their estate?

Options for reform

Reviewing the purpose of family provision laws

Introduction

2.94 Before considering specific reforms to family provision laws, it is necessary to reflect on the purpose of those laws. It has been suggested that in order to reduce opportunistic, non-genuine claims being made on deceased estates, and the costs consequences that follow from such applications, fewer people should be able to apply for family provision. Commentators have argued that the purpose of family provision laws, and the class of people eligible to apply for family provision, must be revisited.

2.95 Professor Rosalind Croucher has emphasised the need to distinguish between different types of family provision applicants, and has warned against encouraging the deceased person's adult children to 'bludge'.[138] Discussing family provision law in Australia, Croucher states:

> Family provision is, in my view, right out of hand. It is on a slippery slope where adults are concerned. I would clearly distinguish the position of partners/spouses from that of children. Marriages, or marriage-like relationships, are based on different logic than simply being a child (or analogous relationship) of someone. A good look at family provision legislation in its real context is needed—namely, what role does, and should, property play in families. Unless we seriously look at such questions then we will continue to tinker with the legislation, a bit this way, a bit that, and end up writing a blueprint for bludging.
>
> There is room for looking after those who need it who might otherwise 'become a burden on the state' … But self-reliance is a laudable principle. It is often lost sight of in family provision cases.[139]

2.96 Professor Myles McGregor-Lowndes and Frances Hannah argue that: 'As a matter of public policy, family provision law should, at a minimum, protect those actually dependent upon a will-maker for economic support at the time of death'.[140] However, they are critical of an overly inclusive approach to eligibility to make a family provision application.[141] They also suggest that because family provision laws are 'a construct of the early twentieth century', they 'may no longer be appropriate to the circumstances of the twenty-first'.[142]

138 Croucher, 'Conflicting Narratives in Succession Law', above n 113, 200 (citations omitted).
139 Ibid.
140 McGregor-Lowndes and Hannah, above n 71, 62.
141 Ibid.
142 Ibid 70.

2.97 The term 'family provision', and its predecessor 'testator's family maintenance',[143] describe the policy that underpinned the law: a will-maker has a responsibility to provide for their dependants. The New Zealand parliamentary debates that preceded the introduction of the first family provision legislation in New Zealand identified the following underlying principles of the bill:

> (1) the testator should do justice to his or her dependents [sic];
>
> (2) those persons should not, through the testator leaving his property away from them, be left perhaps a burden on the state.[144]

2.98 In reviewing the law of family provision, it is necessary to consider whether the original purposes of family provision law—providing for dependants and performing a welfare function—are still applicable today. Any proposed reforms must balance the desire to reduce the number of opportunistic or non-genuine claims on estates, with the need to ensure that processes are fair and do not unduly exclude those who have a legitimate claim.

The deceased's 'moral duty' to provide for dependants

2.99 The earliest appellate consideration of the original New Zealand provisions framed the will-maker's duty to dependants as a 'moral duty'.[145] The decision of the Privy Council in *Bosch v Perpetual Trustee Co Ltd*[146] is widely regarded as having embedded the notion of 'moral duty' into Australian family provision law.

2.100 The concept of moral duty remains in the Victorian case law today and there has been significant debate, in both judgments and commentary, about whether it remains a useful touchstone in the determination of family provision applications.

2.101 The Victorian Court of Appeal has noted that although the word 'responsibility' in the Victorian eligibility provision imports the concept of moral responsibility into the Victorian legislation,[147] this concept is not a substitute for consideration of the statutory criteria.[148]

The welfare function of family provision laws

2.102 The High Court has considered the question of whether family provision laws perform a welfare function:

> The legislation was not merely, or even primarily, concerned with relieving the state of the financial burden of supporting indigent widows and children. The courts were not empowered merely to make such provision for an applicant as would rescue the applicant from destitution. The legislative power was to make 'proper' provision.[149]

2.103 Although lessening the burden on the state may not have been the sole, or even primary, purpose of family provision legislation, this passage of the High Court's judgment in *Vigolo v Bostin*[150] acknowledges that it is at least one purpose of the legislation.

143 The term 'testator's family maintenance' remained in Victoria's law until 1962, when it was replaced with 'family provision': *Administration and Probate (Family Provision) Act 1962* (Vic) ss 1–3.
144 Dainow, above n 97, 1109. The Commission generally uses the term 'will-maker' rather than 'testator'.
145 *Re Allardice; Allardice v Allardice* (1910) 29 NZLR 959, cited in Justice R N Chesterman, 'Does Morality Have a Place in Applications for Family Provision Brought under s 41 of the Succession Act 1981?' (Paper presented at the Queensland Law Society Annual Succession Law Conference, Sunshine Coast, 1 November 2008) 3.
146 [1938] AC 463.
147 *Blair v Blair* (2004) 10 VR 69; *Lee v Hearn* (2005) 11 VR 270.
148 *Coombes v Ward* [2004] VSCA 51 (4 March 2004) [12]–[13] (Chernov JA). See also *Blair v Blair* (2004) 10 VR 69, 76 [13] (Chernov JA); *Forsyth v Sinclair (No 1)* [2010] VSCA 147 (22 June 2010) [60]–[65] (Neave JA, Redlich JA and Habersberger AJA agreeing).
149 *Vigolo v Bostin* (2005) 221 CLR 191, 199–200 (Gleeson CJ).
150 Ibid.

2.104 The earliest family provision legislation responded not only to the question of whether a husband and father should be able to exclude his family from his will, but also 'whether a man should be allowed to throw his family on the State for support'.[151] However, this early rationale for family provision laws presupposes dependency of the deceased person's family on the deceased person.[152] Such a rationale may no longer be applicable to Victoria's broadly-cast family provision legislation.

2.105 The Commission seeks views about whether the original aims of family provision law continue to be applicable to modern family provision legislation and, if not, how the purpose of family provision law should be recast.

Questions

FP9 Should the purpose of family provision legislation be to protect dependants and prevent them from becoming dependent on the state?

FP10 Are there wider purposes or aims that family provision laws should seek to achieve?

Limiting eligibility to make a family provision application

Introduction

2.106 In preliminary discussions, stakeholders have expressed the view that the class of people who are permitted to apply to the court for redistribution of a deceased person's estate in their favour should be reassessed. Placing limits on those who are entitled to apply has been suggested as a solution to the number of opportunistic claims on estates. The Commission has considered a number of options in relation to who should be permitted to apply for family provision.

2.107 The Commission notes that in most other states and territories, family provision applicants are limited to those who fall within a statutory list of relationships to the deceased person. Generally speaking, the deceased person's partner and children are always permitted to apply,[153] and former spouses,[154] stepchildren[155] and grandchildren[156] are permitted to apply in limited circumstances.

2.108 Prior to the *Wills Act 1997* (Vic), Victorian law only permitted the deceased's widow, widower or children to make a family provision application.[157] Arguably, a return to a strict list approach of this nature would risk excluding legitimate claims, a problem that the 1997 amendments sought to remedy.[158]

151 Rosalind Atherton (Croucher), *Victorian Attorney-General's Law Reform Advisory Council Expert Report 1: Family Provision* (1997) 20 ('*Expert Report 1*').
152 Ibid 21.
153 Stepchildren are always permitted to apply in Tasmania and the ACT: *Testator's Family Maintenance Act 1912* (Tas) ss 3A, 2; *Family Provision Act 1969* (ACT) ss 7(1)–(4). In other jurisdictions, they are only permitted to apply if they were maintained by the deceased person: *Family Provision Act 1970* (NT) ss 7(1)–(4); *Inheritance (Family Provision) Act 1972* (SA) s 6; *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 7(1); *Succession Act 1981* (Qld) ss 41, 5AA.
154 *Testator's Family Maintenance Act 1912* (Tas) ss 3A(d)–(e); *Family Provision Act 1970* (NT) ss 7(1)(a), (2); *Inheritance (Family Provision) Act 1972* (SA) s 6(b)—the deceased's former spouse is always entitled to apply in South Australia, regardless of maintenance: *Family Provision Act 1972* (WA) s 7(1)(b).
155 *Testator's Family Maintenance Act 1912* (Tas) ss 2, 3A; *Succession Act 1981* (Qld) ss 40–41; *Family Provision Act 1969* (ACT) ss 7(1)(d), (2); *Family Provision Act 1970* (NT) ss 7(1)(d), (2); *Inheritance (Family Provision) Act 1972* (SA) s 6(g).
156 *Family Provision Act 1969* (ACT) ss 7(1)(e), (3); *Family Provision Act 1970* (NT) ss 7(1)(e), (3); *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 7(1)(d). Note that in South Australia, there is no requirement that the grandchild's parents have died or that the grandchild was being maintained by, or was dependent on, the deceased: *Inheritance (Family Provision) Act 1972* (SA) s 6(h).
157 *Administration and Probate Act 1958* (Vic) s 91 (since amended).
158 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 October 1997, 433 (Jan Wade, Attorney-General).

2.109 The Commission puts forward three other options and seeks submissions on which of these, if any, is the preferable means for reducing opportunistic claims on estates:

- Option 1: implementing the National Committee's proposal
- Option 2: introducing a flexible list of eligible applicants, as in New South Wales
- Option 3: introducing a threshold requirement of dependence and/or need to Victoria's 'responsibility' test.

Option 1: Implementing the National Committee's proposal

2.110 The National Committee for Uniform Succession Laws proposed the following categories of eligibility to make a family provision application:

- a person who was the wife or husband of the deceased person at the time of the deceased person's death
- a person who was the de facto partner of the deceased person at the time of the deceased person's death[159]
- a non-adult child of the deceased person (defined as a person who was under the age of 18 at the time of the deceased person's death; including natural and adopted children, but not stepchildren)
- a person to whom the deceased person owed a responsibility to provide maintenance, education or advancement in life.[160]

The National Committee had Victoria's legislation in mind when drafting its 'responsibility' provision.[161]

2.111 Applicants in the National Committee's first three proposed categories—spouse, de facto partner, non-adult child—would be automatically entitled to apply for family provision, whereas the court would be required to consider a list of statutory factors in relation to applicants in the fourth proposed category in determining whether the person was an 'eligible applicant'.[162]

2.112 Of its proposed approach to eligibility, the National Committee stated that it 'combined the Victorian approach of a general criteria-based category with a restricted form of the traditional approach, under which particular categories of persons are specified'.[163] Professor Rosalind Croucher describes the first three proposed categories as 'status-based' and the fourth category as 'criteria-based' or 'circumstances'. Croucher notes the significance of moving adult children out of the status-based category and into the criteria-based category.[164]

2.113 Although the National Committee's approach is slightly different from the Victorian approach, and statutory criteria are not considered in relation to the deceased person's spouse, de facto partner or non-adult child, the National Committee's recommendation would not limit the class of people entitled to apply for family provision in Victoria. The same applicants would be able to apply under the National Committee's responsibility provision as can currently apply under Victoria's responsibility provision.

159 De facto partners were not specifically recognised until the National Committee's 2004 supplementary report: National Committee for Uniform Succession Laws, *2004 Supplementary Report*, above n 69.

160 Ibid 8–10, Appendix 2: Model Family Provision Legislation cls 6–7; National Committee for Uniform Succession Laws, *1997 Report*, above n 111, 26.

161 In relation to the National Committee's fourth proposed category of eligibility, the wording had originally been 'a person to whom the deceased owed a *special* responsibility to provide maintenance education or advancement in life': National Committee for Uniform Succession Laws, *1997 Report*, above n 111, 26. However, in the 2004 supplementary family provision report, the National Committee removed the word special 'for consistency with Victorian legislation': National Committee for Uniform Succession Laws, *2004 Supplementary Report*, above n 69, 4 (footnote 26).

162 National Committee for Uniform Succession Laws, *1997 Report*, above n 111, 27–8.

163 National Committee for Uniform Succession Laws, *2004 Supplementary Report*, above n 69, 3–4.

164 Croucher, 'Towards Uniform Succession', above n 15, 739.

2.114 Arguably, the first three categories proposed by the National Committee would almost always be subsumed within the criterion of responsibility under the Victorian legislation. However, if this is the case, it may nevertheless be desirable to adopt the National Committee's recommendation and allow these categories of applicant automatic access to the court.

2.115 The Commission notes that a number of states have reviewed their family provision laws in recent years, but did not adopt the test for eligibility proposed by the National Committee.[165]

Question

FP11 Should Victoria implement the National Committee's proposed approach to eligibility to apply for family provision?

Option 2: Introducing a flexible list of eligible applicants, as in New South Wales

2.116 In preliminary discussions, several stakeholders have expressed support for a New South Wales-style approach to eligibility to apply for family provision. The New South Wales legislation contains a list of 'eligible persons'. However, there are two categories that go beyond the categories of relationship recognised in other states' and territories' family provision legislation.[166] It has been suggested to the Commission that this approach would limit the broad class of people who may apply in Victoria, while still providing greater flexibility than the list approach taken in other jurisdictions.

2.117 The New South Wales legislation recognises the deceased's spouse, de facto partner and child as eligible to make a family provision application in all circumstances.[167]

2.118 It also recognises the following people as eligible:

- a former wife or husband of the deceased person
- a grandchild of the deceased person who was, at any time, wholly or partly dependent on the deceased person
- a member of the deceased person's household who was, at any time, wholly or partly dependent on the deceased person, and
- a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death.[168]

However, the court may only make an order in favour of this second group of applicants if there are 'factors warranting the making of the application'.[169]

165 *Succession Amendment (Family Provision) Act 2008* (NSW); *Inheritance (Family and Dependants Provision) Amendment Act 2011* (WA), not yet proclaimed. New South Wales retained its own approach to eligibility, rather than implementing the recommendations of the National Committee, because '[s]uch a change may lead to a flood of new claims being made on estates from people who are not currently entitled to apply in New South Wales': New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 October 2008, 10284 (Barry Collier).

166 Although note that there is some flexibility in Queensland, where the legislation permits any person under the age of 18 or a parent of an infant child of the deceased person to apply for provision, provided that they were being wholly or partly maintained by the deceased person: *Succession Act 1981* (Qld) ss 41(1), 40 (definition of 'dependant'). An order can only be made in favour of such applicants if the court considers, having regard to the extent to which the applicant was being maintained or supported by the deceased and the extent to which that need continues, that it is proper that some provision should be made: s 41(1A).

167 *Succession Act 2006* (NSW) s 57(1).

168 Ibid ss 57(1)(e)–(f). People in these categories were already eligible applicants prior to the introduction of the *Succession Amendment (Family Provision) Act 2008* (NSW), under the *Family Provision Act 1982* (NSW) s 6(1) (definition of 'eligible person') (repealed).

169 *Succession Act 2006* (NSW) s 59(1)(b).

2.119 In relation to a dependent member of the deceased person's household, the court has held that dependence is not limited to financial dependence, but includes a person relying on or looking to the deceased, rather than others, for anything necessary or desirable for their maintenance and support.[170] Judicial consideration has also been given to what it means to be a member of a household.[171]

2.120 A 'close personal relationship' is defined as 'a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support or personal care'.[172] It does not include relationships in which domestic support or personal care is provided for fee or reward.[173] Applicants in this category do not qualify as a de facto partner or domestic partner of the deceased person, and are therefore required to demonstrate that there are factors warranting the making of the application before an order in their favour will be made.[174]

2.121 The Commission seeks views as to whether Victoria should consider the New South Wales approach to eligibility, and whether it would have the effect of reducing opportunistic claims, while dealing, in part, with concerns that a list-based approach would exclude certain applicants with meritorious claims.

2.122 In presenting this option for discussion, the Commission notes that costs in family provision proceedings are just as problematic in New South Wales as they are in Victoria.[175] This suggests that limiting eligibility in this way will not, of itself, resolve problems of opportunistic claims and excessive costs in family provision proceedings.

Questions

FP12 Should Victoria limit eligibility to make a family provision application in the same way that New South Wales has?

FP13 If Victoria were to adopt the New South Wales approach:

(a) Are the categories recognised in New South Wales sufficient or should others be included?

(b) Should applications by certain categories of applicant be further limited? If so:

- What should the nature of such further limitation be? For example, should the limitation be a requirement to show 'factors warranting the making of the application', as in New South Wales, or some other test, such as 'exceptional circumstances' or 'special circumstances'?
- To which categories of applicant should the additional limitation apply?

170 See, eg, *Marando v Rizzo* [2012] NSWSC 739 (5 July 2012) [61] (Hallen AsJ).
171 See, eg, *Popescu v Borun* [2011] NSWSC 1532 (16 December 2011) (Macready AsJ).
172 *Succession Act 2006* (NSW) s 3(3).
173 Ibid s 3(4).
174 Ibid s 59(1)(b).
175 Vines, *Bleak House Revisited?*, above n 90, 31.

Option 3: Introducing a threshold requirement of dependence and financial need to Victoria's 'responsibility' test

2.123 Another way to minimise opportunistic or non-genuine claims may be to retain Victoria's current 'responsibility' criterion for eligibility to make a family provision application, but require the applicant:

- to have been wholly or partly dependent on the deceased person immediately before the deceased person's death, and/or
- to demonstrate financial need.

2.124 These factors are currently included in the statutory list of factors that the court must consider when determining whether the deceased person had responsibility to provide for the applicant, whether an appropriate amount of provision was made, and whether the applicant should receive a share, or a larger share, of the estate.[176] However, the factors of dependence and need are balanced against a range of other factors, and are not prerequisites to the court's exercise of jurisdiction.

2.125 Under this option, the test would remain one of whether the deceased person had responsibility to make adequate provision for the applicant's proper maintenance and support.[177] It would not rely on any particular relationship between the applicant and the deceased person. However, eligibility to make an application would be limited by dependence and/or financial need.

2.126 This option responds to concerns that, in the words of Professor Rosalind Croucher, unless the role of property in family and other relationships is reconsidered, family provision law risks discouraging self-reliance and becoming 'a blueprint for bludging'.[178]

2.127 The Commission notes Croucher's view that limiting eligibility by dependence alone may actually encourage 'sponging',[179] and that '[l]ists and dependence-based qualifications are limited in their ability to reach all relationships of moral obligation',[180] and seeks views on this. It seems that this option may lessen the ability of applicants to make opportunistic claims on estates, without arbitrarily limiting applicants on the basis of legislatively defined relationships with the deceased person. It embodies the original family provision principle that dependants should be looked after and, if possible, should not become reliant on the state.

Questions

FP14 Should Victoria retain its current 'responsibility' criterion for eligibility to make a family provision application, but require applicants to have been dependent on the deceased person? If so, should 'dependence' be limited to financial dependence?

FP15 Would including a dependence requirement encourage dependence on the deceased person during their lifetime, in order to benefit after their death?

FP16 Should Victoria retain its current 'responsibility' criterion for eligibility to make a family provision application, but require applicants to demonstrate financial need?

176 *Administration and Probate Act 1958* (Vic) ss 91(4)(a)–(d), (h), (m).
177 See the current test in ibid s 91(1).
178 Croucher, 'Conflicting Narratives in Succession Law', above n 113, 200 (citations omitted). The full quotation is reproduced at [2.95], above.
179 Atherton (Croucher), *Expert Report 1*, above n 151, 20, citing R D Oughton (ed), *Tyler's Family Provision* (Butterworths, 2nd ed, 1984).
180 Atherton (Croucher), *Expert Report 1*, above n 151, 96.

Amending costs rules and principles

Introduction

2.128 As discussed at [2.51]–[2.54] and [2.66] above, costs rules in family provision proceedings are arguably not deterring opportunistic claimants and are not protecting estates from legal costs incurred in defending nuisance claims. Section 97(7) of the Administration and Probate Act, which permits the court to order costs against a family provision applicant whose application is frivolous, vexatious or has no reasonable prospect of success, arguably is not achieving its aim to ensure 'that only genuine applications are made'.[181]

2.129 The Commission has been told that family provision applicants are able to make speculative claims with the expectation that they will not have to pay the defendants' costs and may even have their own legal costs paid out of the estate. Even if the applicant is unsuccessful and ordered to bear their own costs, in most instances the estate will still be reduced by the costs of the defendant personal representative in defending the application. These concerns are discussed more fully at [2.60]–[2.68], above.

2.130 The value of estates will continue to be unduly reduced by legal costs, unless costs rules and principles:

- deter opportunistic claims from being made in the first place
- require the unsuccessful applicant to bear the burden of their own legal costs
- require the unsuccessful applicant to bear the defendant personal representative's costs in certain circumstances, and
- put in place procedures to minimise costs incurred by all parties throughout the process.

2.131 This section sets out a number of possible reforms to costs rules and principles in family provision proceedings to achieve the aim of deterring claimants from making speculative claims. The Commission has considered options in relation to how legal costs should be borne between the parties, when costs should be paid out of the estate, and how overall costs in family provision proceedings might be reduced.

Costs rules if the applicant in family provision proceedings is unsuccessful

2.132 Although family provision case law clearly states that applicants should not expect to have their costs paid out of the estate,[182] the Commission has heard views that this is not reflected in practice. Legal practitioners have suggested that the presumption that an applicant's costs will not be paid out of the estate should be enshrined in legislation. It has been suggested that the starting point for costs orders in family provision cases, where the applicant is unsuccessful, should be that the unsuccessful applicant bears their own costs.

2.133 In preliminary discussions, other legal practitioners suggested that the starting point for costs orders in family provision proceedings should be 'loser pays' or 'costs follow the event' as in other civil proceedings, meaning that the unsuccessful party bears the costs of both parties to the proceeding. However, others considered that this rule would operate too harshly in the family provision jurisdiction, because the law is so uncertain and the cases are determined largely on their facts.

181 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 October 1997, 436 (Jan Wade).
182 See, eg, *Re Carn; Moerth v Moerth (No 2)* [2011] VSC 275 (4 March 2011) [26]–[31] (Gardiner AsJ), discussed at [2.50] and [2.52], above.

2.134 Either approach would require the costs rule in section 97(7) of the Administration and Probate Act, and possibly the rule in section 97(6), to be amended.

Questions

FP17 Should there be a legislative presumption that, in family provision proceedings, an unsuccessful applicant will not receive their costs out of the estate?

FP18 Should one of the following costs rules apply, as a starting point, when an applicant is unsuccessful in family provision proceedings?

(a) Loser pays, costs follow the event—that is, both parties' costs are borne by the unsuccessful applicant as in other civil proceedings.

(b) No order as to costs—the applicant bears the burden of their own costs.

Reducing overall costs of family provision proceedings

2.135 The Commission notes that the Civil Procedure Act places overarching obligations on parties and their legal representatives to:

- take steps to resolve or determine a dispute
- use reasonable endeavours to resolve a dispute by agreement
- narrow the issues in dispute, and
- ensure that costs are reasonable and proportionate to the complexity or importance of the issues in dispute and the amount in dispute.[183]

2.136 These overarching obligations apply to family provision proceedings, which are civil proceedings.[184] All of the obligations listed above are relevant to reducing costs in family provision proceedings, by ensuring that early settlement is a primary objective of the parties, and that applications are resolved as efficiently as possible.

2.137 In addition to these overarching obligations, both the County Court and the Supreme Court have taken measures to attempt to deal with excessive costs and delay in family provision proceedings.

183 *Civil Procedure Act 2010* (Vic) ss 19, 22–4.

184 'Civil proceeding' is defined as any proceeding in a court other than a criminal or quasi-criminal proceeding: *Civil Procedure Act 2010* (Vic) s 3 (definition of 'civil proceeding'). The Civil Procedure Act applies to all civil proceedings with some exceptions, of which family provision is not one: *Civil Procedure Act 2010* (Vic) s 4(1).

2.138 Judge Misso has implemented a number of processes in the Family Property Division of the County Court, which hears family provision applications in that Court. The procedures are consistent with the Court's aim in civil litigation 'to process cases to resolution as efficiently as possible' and determine matters 'quickly and cheaply, consistent with the demands of justice',[185] and include:

- As far as possible, assisting parties with procedures to resolve a dispute as soon as possible if a claim has little merit, or where the defendant has no real defence. For example, parties may be required to swear an affidavit setting out the basis of their claim or defence.
- Interrogatories being permitted, but only in exceptional cases where the time taken is justified by the likelihood that, as a result of the interrogatories, the proceeding is likely to reach resolution at an earlier stage.
- Requiring parties to attend a judicial settlement conference, presided over by a judge, or a mediation within 60 days of the date of filing and service of an appearance. Whether the parties are ordered to attend a judicial settlement conference or intend to mediate, they are required to file and serve a statement setting out the essentials of their claim or defence. These statements are not without prejudice and may be used at trial.
- A pilot program in Melbourne, which initially listed matters for judicial settlement conference rather than allowing them to go to mediation if the amount in dispute was less than $200,000.[186] The ceiling of $200,000 has since been lifted, with judicial settlement conferences undertaken irrespective of the size of the estate.

2.139 Although innovations in the Supreme Court Probate List do not apply to family provision proceedings (which are not heard in that list),[187] the Supreme Court has also implemented measures to reduce costs in family provision proceedings, including:

- dispensing with affidavits and organising mediations before an associate justice on the basis of position papers, if the value of the estate is less than $500,000
- ensuring that there is only one directions hearing and that matters do not repeatedly return to court before the trial date[188]
- the Supreme Court Probate Users Group considering rules about length and content of affidavits in family provision proceedings and otherwise considering ways and means of reducing costs.

2.140 Additionally, the Commission is aware of at least one Supreme Court case in which costs were capped. In the case of *Cangia v Cangia*, where the total value of the estate was $360,000 and further provision was made for the applicant, Justice Whelan had received details of the costs being claimed by the solicitors for each side: $34,687.50 for the executor's solicitors and $62,659.50 for the plaintiff's solicitors.[189] His Honour expressed the view that he 'should order that the costs of each of the parties be paid from the estate in an amount not exceeding $30,000.00'.[190]

185 County Court of Victoria, *Practice Note 6 of 2008—Operation and Management of the Family Property Division*, 21 August 2008, 1.
186 Ibid, 6.
187 Supreme Court of Victoria, *Practice Note No 5 of 2011—Probate List*, 28 April 2011, 1–2.
188 In relation to family provision proceedings, r 16.05 of the *Supreme Court (Miscellaneous Civil Procedure) Rules 2008* (Vic) provides that 'no step shall be taken in the proceeding after appearance until directions have been given in accordance with Rule 16.06'. Matters may return to court for further directions where, for example, there is a breach of orders made or orders for discovery are sought.
189 *Cangia v Cangia* [2008] VSC 455 (31 October 2008) [55].
190 Ibid [56].

2.141 As discussed at [2.55]–[2.59], above, the Supreme Court has also exercised its summary judgment discretion in some family provision matters.[191]

2.142 Several legal practitioners have expressed the view to the Commission that, in their experience, it is less costly to make a family provision application in the County Court than in the Supreme Court, while others considered that the costs were much the same. Other legal practitioners and representatives of the Supreme Court observed that there was no costs disadvantage in proceeding in the Supreme Court rather than the County Court, and that a majority of practitioners continue to issue proceedings out of the Supreme Court.

Questions

FP19 Are family provision proceedings generally less costly in the County Court than in the Supreme Court?

FP20 What measures are working well to reduce costs in family provision proceedings in the County Court and the Supreme Court?

FP21 Are there any additional measures that would assist in reducing costs in family provision proceedings?

191 *Jackson v Newns* [2011] VSC 32 (18 February 2011); *Napolitano v State Trustees Ltd* [2012] VSC 345 (15 August 2012).

Questions

Factors affecting settlement of family provision claims

FP1 What factors affect a decision to settle a family provision application rather than proceeding to court hearing?

Time limits and extension of time

FP2 Is the current period within which an application for family provision can be made in Victoria (six months from the grant of representation):

(a) satisfactory?

(b) too short?

(c) too long?

Opportunistic claims

FP3 To what extent does the current law allow applicants to make family provision claims that are opportunistic or non-genuine?

FP4 Does section 97(7) of the *Administration and Probate Act 1958* (Vic), which permits the court to order an unsuccessful applicant to pay their own costs and the costs of the defendant personal representative, deter opportunistic applicants from making family provision claims?

FP5 Does the power of the court to summarily dismiss claims deter opportunistic applicants from making family provision claims?

Excessive costs

FP6 Are costs orders in family provision cases impacting unfairly on estates?

Transactions during the deceased person's lifetime that reduce the size of their estate

FP7 To what extent do people deal with their assets during their life in order to minimise the property that is in their estate and frustrate the operation of family provision laws? What are some examples of this?

FP8 Should people be entitled to deal with their assets during their lifetime to minimise the property that is in their estate?

Reviewing the purpose of family provision laws

FP9 Should the purpose of family provision legislation be to protect dependants and prevent them from becoming dependent on the state?

FP10 Are there wider purposes or aims that family provision laws should seek to achieve?

Limiting eligibility to make a family provision application

FP11 Should Victoria implement the National Committee's proposed approach to eligibility to apply for family provision?

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