



Victorian
Law Reform
Commission

Succession Laws

CONSULTATION PAPER | WILLS





Published by the Victorian Law Reform Commission

The Victorian Law Reform Commission was established under the *Victorian Law Reform Commission Act 2000* as a central agency for developing law reform in Victoria.

This report reflects the law as at October 2012.

© Victorian Law Reform Commission 2012.

This work is protected by the laws of copyright. Except for any uses permitted under the *Copyright Act 1968* (Cth) or equivalent overseas legislation, no part of this work may be reproduced, in any matter or in any medium, without the written permission of the publisher.

All rights reserved.

This publication of the Victorian Law Reform Commission follows the Melbourne University Law Review Association Inc, *Australian Guide to Legal Citation* (3rd ed, 2010).

VLRC consultation paper number 11

ISBN 978-0-9872222-3-7

Succession Laws consultation papers

- 11 Wills
- 12 Family Provision
- 13 Intestacy
- 14 Executors
- 15 Debts
- 16 Small Estates

This publication is printed on 100% recycled paper.

The paper is Forest Stewardship Council Certified to contain pulp from 100% post-consumer waste and is Made Carbon and Process Chlorine Free.

CHAIR

The Hon Philip Cummins*

SPECIALIST COMMISSIONER

Dr Ian Hardingham QC*

PART-TIME COMMISSIONERS

Bruce Gardner PSM

Saul Holt SC

The Hon David Jones AM*

Eamonn Moran PSM QC*

The Hon Frank Vincent AO QC

* *Commissioners involved in this reference*

CHIEF EXECUTIVE OFFICER

Merrin Mason

REFERENCE TEAM

Lindy Smith (team leader)

Mia Hollick

Natalie Lilford

Joanna O'Donohue

Elena Markushina (intern)

COVER DESIGN

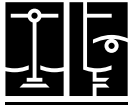
Letterbox

TEXT LAYOUT

GH2 design

EDITOR

Kath Harper



Victorian
Law Reform
Commission

Succession Laws

CONSULTATION PAPER | **WILLS**

Victorian Law Reform Commission

GPO Box 4637
Melbourne Victoria 3001 Australia
DX 144, Melbourne

Level 3, 333 Queen Street
Melbourne Victoria 3000 Australia

Telephone: +61 3 8608 7800
Freecall: 1300 666 555 (within Victoria)
Fax: +61 3 8608 7888

Email: law.reform@lawreform.vic.gov.au
Internet: www.lawreform.vic.gov.au

Contents

| | |
|---|----|
| Call for submissions | 4 |
| Terms of reference | 6 |
| Glossary | 8 |
| 1. Background | 11 |
| Background to the review | 11 |
| Terms of reference | 11 |
| The Uniform Succession Laws project..... | 11 |
| Succession laws in Victoria | 12 |
| The Wills Act..... | 13 |
| The Administration and Probate..... | 14 |
| The Commission’s process..... | 15 |
| This consultation paper | 15 |
| 2. Witnessing wills and undue influence | 16 |
| Introduction..... | 16 |
| Requirements for witnessing a will | 17 |
| Are stricter requirements desirable? | 18 |
| The witness-beneficiary rule..... | 20 |
| Current law..... | 20 |
| National Committee for Uniform Succession Laws..... | 21 |
| Other jurisdictions..... | 22 |
| Should the rule be revived in Victoria? | 22 |
| Prevention of undue influence through other changes to the will-making process | 23 |
| Options for reform | 24 |
| Determining whether a will reflects the will-maker’s true intentions | 25 |
| Testamentary capacity..... | 25 |
| Knowledge and approval and suspicious circumstances..... | 27 |
| Fraud and forgery | 28 |
| Doctrine of undue influence..... | 28 |

| | |
|--|----|
| 3. Statutory wills | 33 |
| Introduction | 33 |
| Statutory wills in Victoria..... | 34 |
| Who can apply..... | 35 |
| Information required for an application | 35 |
| The basis of the decision | 36 |
| Determining the intentions of the incapacitated person..... | 36 |
| People without capacity for whom statutory wills are made | 36 |
| The guiding principle..... | 37 |
| Involvement of the incapacitated person in the hearing..... | 40 |
| Accessibility of the statutory will process | 41 |
| Possible barriers | 41 |
| Options for improving accessibility | 41 |
| Determining who pays for the application | 43 |
| 4. Ademption | 45 |
| Introduction | 45 |
| The ademption rule | 46 |
| Current law—the identity approach | 46 |
| Option for reform—the intention approach | 48 |
| Acts by administrators appointed by the Victorian Civil and Administrative Tribunal..... | 49 |
| Acts by persons holding an enduring power of attorney | 50 |
| Current law..... | 50 |
| National Committee for Uniform Succession Laws..... | 51 |
| Other jurisdictions | 51 |
| Options for reform | 52 |
| Access to a person’s will for anti-ademption purposes..... | 56 |
| Current law..... | 56 |
| Options for reform | 57 |
| Questions | 58 |

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 58 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 58.

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 deemed 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. |
| <i>Bona vacantia</i> | 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 <i>bona vacantia</i> . |
| 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 relative . |
| 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 <i>Supreme Court Act 1986</i> (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 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 This consultation paper seeks views on the Commission's terms of reference relating to wills, which concern:
- witnessing wills and undue influence
 - statutory wills, and
 - ademption.
- 1.32 Possible options for reform are suggested. Our views about the issues and the options will evolve as we continue to explore the issues and consider expressions of opinion from the profession and the public.
- 1.33 The policy framework within which this paper has been prepared is built on the terms of reference and gives priority to:
- the desirability of national consistency
 - upholding testamentary freedom and the will-maker's intentions
 - the protection of older and vulnerable will-makers from undue influence
 - ensuring that the law operates fairly to produce just and equitable outcomes.

2. Witnessing wills and undue influence

Introduction

- 2.1 The Commission has been asked to review and report on: ‘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’.
- 2.2 The making of a will must comply with certain formalities that are specified in the *Wills Act 1997* (Vic). Otherwise, it is not a valid legal document and the deceased person’s estate is distributed under the intestacy scheme established by the *Administration and Probate Act 1958* (Vic).
- 2.3 Central to the formalities is the requirement that the will be in writing and signed by the will-maker in the presence of witnesses. In recent years, the requirements for witnessing a will have been relaxed. This has made it easier for people to make a valid will, particularly those who make their own will without the assistance of a solicitor.¹
- 2.4 Although these initiatives have reduced the complexity of the law and the procedures for making a will, they may be leaving older and vulnerable will-makers more susceptible to undue influence.
- 2.5 In the context of wills, undue influence involves imposing pressure that causes a person to make a will that does not reflect their true wishes.² Common tactics of those seeking to exert undue influence include: exploiting dependencies, abusing relationships of trust, emotional manipulation, isolating the victim and giving false information.³
- 2.6 There are various societal factors that may be making undue influence of vulnerable will-makers more common:
 - People are living longer and are more likely to suffer mental decline and physical vulnerability in later years.
 - Family relationships are more likely to be physically distant and people may be cared for by non-family members towards the end of their lives.
 - More people have significant assets to leave by will than in previous generations.⁴

1 For example, the requirement that the will be signed at the ‘foot or end’ by the will-maker has been abolished. Law Reform Committee, Parliament of Victoria, *Reforming the Law of Wills* (1994) 53–66.

2 The legal definition of ‘undue influence’ for the purpose of determining whether a will is valid is discussed later in this consultation paper.

3 British Columbia Law Institute, *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide*, Report No 61 (2011) 13–16; California Administrative Office of the Courts, *Undue Influence: Definitions and Applications* (March 2010) <<http://www.courts.ca.gov/documents/UndueInfluence.pdf>> 11–12, 28.

4 Fiona R Burns, ‘Elders and Testamentary Undue Influence in Australia’ (2005) 28 *University of New South Wales Law Journal* 145, 146; Daniel C Marson, Justin S Huthwaite and Katina Herbert, ‘Testamentary Capacity and Undue Influence in the Elderly: A Jurisprudent Therapy Perspective’ (2004) 28 *Law and Psychology Review* 71, 72; Nick O’Neill and Carmel Peisa, *Capacity and the Law* (Sydney University Press in co-operation with the Australian Legal Information Institute (AustLII), 2011) chs 4, 2; Roger Kerridge, ‘Wills Made in Suspicious Circumstances: The Problem of the Vulnerable Testator’ (2000) 59(2) *Cambridge Law Journal* 310, 310.

- 2.7 The requirements for witnessing wills are intended to provide some protection from undue influence and help to ensure that only a will that reflects the will-maker's true intentions is admitted to probate. These formalities are discussed in the next section.
- 2.8 Even a will that is properly witnessed may have been signed by a will-maker who has been misled or put under pressure by a self-interested person. When determining whether a will that has been made in compliance with the formalities reflects the will-maker's true intentions, a number of rules and principles of succession law may be applied. These include principles that the will-maker must possess testamentary capacity and know and approve the contents of the will, further protections specifically against fraud and forgery, and the doctrine of undue influence. They are discussed later in this consultation paper.

Requirements for witnessing a will

- 2.9 In Victoria, a will is not validly executed unless it is witnessed by two people. Both must witness the signing by the will-maker, in the presence of the will-maker and each other. They must then sign the will in the presence of the will-maker, but not necessarily in the presence of each other.⁵
- 2.10 The witnesses must be able to see the will-maker sign the document, but do not need to know that the document being signed is a will;⁶ nor do they need to form a view as to the will-maker's capacity to make a will.
- 2.11 A witness can be any competent adult capable of sight, including a beneficiary under the will, and no particular qualifications are required.⁷
- 2.12 Even if these formalities are not followed, the will may still be admitted to probate where the court is satisfied that the person 'intended the document to be his or her will'.⁸ The discretion exercised in these circumstances is referred to as a dispensing power, as the court may dispense with the formal requirements for executing a will, including the witnessing requirements.
- 2.13 The National Committee for Uniform Succession Laws considered the procedural requirements for witnessing a will and made recommendations that were based on proposed Victorian legislation.⁹ However, the National Committee's recommendations diverged from the proposed Victorian model, and the law in a number of jurisdictions, on the question of whether a beneficiary may witness a will. The witness-beneficiary rule is discussed in the next section.
- 2.14 All states and territories otherwise have similar procedural rules for the witnessing of wills.¹⁰

5 *Wills Act 1997* (Vic) s 7(1).

6 *Ibid* ss 8, 10.

7 *Ibid* ss 10–11.

8 *Ibid* s 9.

9 See: 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) 10–12.

10 *Succession Act 2006* (NSW) s 6; *Succession Act 1981* (Qld) s 10; *Wills Act 1970* (WA) s 8; *Wills Act 1936* (SA) s 8; *Wills Act 1968* (ACT) s 9; *Wills Act* (NT) ss 8–9; *Wills Act 2008* (Tas) ss 8–9. An exception, discussed below, is the witness-beneficiary rule, which has been abolished in some jurisdictions and retained in others.

Are stricter requirements desirable?

- 2.15 One approach to providing greater protection from undue influence in the will-making process could be to introduce more stringent requirements for witnessing a will, at least in the case of older and vulnerable will-makers.
- 2.16 For example, compared to the rules for witnessing a will, the rules for witnessing an enduring power of attorney document are more exacting:
- The witness cannot be the person appointed as attorney.
 - The witness must certify that the donor signed the document freely and voluntarily and that the donor appeared to the witness to have the necessary capacity.
 - One of the witnesses must be a person authorised to witness a statutory declaration.
 - Only one of the witnesses can be a relative of the person granting the power or the person appointed as attorney.¹¹
- 2.17 Strengthening the requirements for witnessing wills could increase the likelihood that the will-maker executes the will free of coercion or pressure. The following are possible ways in which this could be done:
- Amending section 8 of the Wills Act to provide that a witness must be aware that they are signing a will.
 - Requiring the witness to certify that the will-maker signed the will freely and voluntarily and that the will-maker appeared to have the mental capacity necessary to make a will.¹²
 - Requiring that one of the witnesses be a person authorised to witness a statutory declaration¹³ (this includes lawyers, police, medical practitioners, dentists, pharmacists, bank managers, accountants and school principals)¹⁴ or an affidavit (a more limited list).¹⁵
 - Requiring one of the witnesses to be a notary (a lawyer who specialises in validating wills) or an independent solicitor who has no connection to the will-maker or beneficiaries. The notary or independent solicitor would be required to assess whether there was evidence of any fraud or pressure or lack of capacity. Where this requirement is not complied with, there would be a need to disprove undue influence and prove capacity.¹⁶
 - Requiring one of the witnesses to be a medical practitioner who provides an assessment of the will-maker's capacity and freedom of will.¹⁷ Obtaining a medical report for a will-maker who is elderly or has been seriously ill is already considered good practice among legal practitioners (and in the United Kingdom it has been described as a golden rule).¹⁸

11 *Instruments Act 1958* (Vic) ss 125–125A(1).

12 This would be similar to the requirement for a witness to an enduring power of attorney, see: *Instruments Act 1958* (Vic) s 125A(1).

13 This requirement exists for witnesses to enduring power of attorney documents: *Instruments Act 1958* (Vic) s 125(3).

14 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 107A(1).

15 The Victorian Parliamentary Law Reform Committee has recently recommended that one witness to a power of attorney document should be a person authorised to witness affidavits or a medical practitioner rather than a person authorised to witness statutory declarations. See: Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 77. Persons authorised to witness an affidavit include: a judge, a justice of the peace, a member of parliament, a legal practitioner, a public servant or police officer: *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 123C.

16 This suggestion is made in: Roger Kerridge, 'Wills Made in Suspicious Circumstances: The Problem of the Vulnerable Testator' (2000) 59(2) *Cambridge Law Journal* 310, 333.

17 Fiona R Burns, 'Elders and Testamentary Undue Influence in Australia' (2005) 28 *University of New South Wales Law Journal* 145, 175.

18 R Kerridge, *Parry and Kerridge: The Law Of Succession* (Sweet and Maxwell, 12th revised ed, 2009) [5.26].

- 2.18 These changes could apply to all will-makers (which may seem unnecessary) or to elderly will-makers only, for example, those aged over 80 years. The critical question that arises is, to whom should any such change in the law apply? Fiona Burns argues that people aged over 80 are most likely to experience physical and mental decline and need constant care and are therefore the most vulnerable to undue influence.¹⁹
- 2.19 Disadvantages of any of these reforms would be that:
- It would weaken national consistency in one of the few areas where the rules are largely consistent across Australian jurisdictions.
 - Executing a will may become more time-consuming and technical, meaning that fewer people make a will. Requiring a solicitor as a witness may add to the cost of the exercise.²⁰
 - If the rules are more complicated, more wills may be invalid, particularly if the will is home-made. However, a will that is not validly executed can be upheld under the dispensing power where the court is satisfied that the person intended the document to be his or her will.²¹
 - These changes may not provide any protection from undue influence where witnesses do not understand their obligations or do not know well the person making the will.

Questions

- W1** Should there be special witnessing provisions in respect of certain will-makers? If so, who should those will-makers be and what should the special witnessing provisions require?
- W2** Should witnesses to the execution of a will be required to understand that the document in question is a will?

¹⁹ Burns, above n 17, 175. Those aged over 80 are the most vulnerable to financial mismanagement: Eastern Health Clinical School, Monash University, *For Love or Money: Intergenerational Management of Older Victorians' Assets Protecting Elders' Assets Study* (2011) 11.

²⁰ J Meredith, 'Miami Advice or California Dreaming: A Statutory Presumption of Testamentary Undue Influence in Australia?' (2011) 31 *Queensland Lawyer* 170, 192.

²¹ *Wills Act 1997* (Vic) s 9.

The witness-beneficiary rule

Current law

- 2.20 The witness-beneficiary rule, or interested witness rule,²² was abolished in Victoria in 1997.²³ In its original form, the rule prevented a witness to a will, or their spouse, from receiving a gift under the will. If the will provided for the witness (or spouse) to receive a gift, the gift would fail, but this would not affect the validity of the will.
- 2.21 The rule originated in 1752 in response to a rule of evidence at the time that an ‘interested’ witness was not a credible witness. In probate proceedings, this meant that a witness who received a gift under a will could not act as a witness to the execution of the will.²⁴ Therefore, Lord Hardwicke’s *Wills Act 1752* created a rule that a witness beneficiary could give evidence as to the due execution of the will, but could not receive any benefit under the will.²⁵
- 2.22 While the rules of evidence later changed to enable an interested witness to give evidence, the witness-beneficiary rule survived in succession law. The justification for the rule then became the avoidance of undue influence.²⁶ Some commentators noted that the rule provides some form of limited protection to vulnerable will-makers from undue influence and fraudulent conduct.²⁷ However, others criticised the rule for the following reasons.
- The rule does not distinguish between innocent and dishonest witnesses. It conveys the assumption that all witness-beneficiaries have acted improperly in some way. This is usually not the case.²⁸ In many cases, it is probable that the witness was merely unaware of the rule.²⁹
 - A person perpetrating a fraud against the will-maker is likely to take steps to disguise any involvement in the making of the will and, for this reason, would be unlikely to witness the will.³⁰ A person trying to establish a false will may be well aware of the law and would ensure that they are not a witness-beneficiary.³¹ In the 1700s, one judge observed: ‘I hardly recollect a case of a forged or fraudulent will, where it has not been solemnly attested.’³²
 - The rule does not prevent other forms of involvement in the will-making process that provide avenues for exerting undue influence, such as drafting the will, taking the will-maker to a solicitor or being present when the will is drafted or executed.³³

22 In this consultation paper, we use the term ‘witness-beneficiary rule’. This rule is also referred to as the interested witness rule.

23 *Wills Act 1997* (Vic) s 11.

24 Law Reform Committee, Parliament of Victoria, above n 1, 84–7.

25 Ibid 86; National Committee for Uniform Succession Laws, above n 9, 18; D E C Yale, ‘Witnessing Wills and Losing Legacies’ (1984) 100 *Law Quarterly Review* 453, 457.

26 National Committee for Uniform Succession Laws, above n 9, 18; Law Reform Committee, Parliament of Victoria, above n 1, 87; D E C Yale, ‘Witnessing Wills and Losing Legacies’ (1984) 100 *Law Quarterly Review* 453, 462.

27 Neville Crago, ‘Reform of the Law of Wills’ (1995) 25 *University of Western Australia Law Review* 255, 262; Law Reform Committee, Parliament of Victoria, above n 1, 88; New South Wales Law Reform Commission, *Wills: Execution and Revocation*, Report No 47 (1986) [8.6]; Law Reform Advisory Committee for Northern Ireland, *Attestation of Wills*, Discussion Paper No 12 (2005) 7.

28 Law Reform Committee, Parliament of Victoria, above n 1, 88; National Committee for Uniform Succession Laws, above n 9, 18; New South Wales Law Reform Commission, *Wills: Execution and Revocation*, Report No 47 (1986) [8.7]; Law Reform Advisory Committee for Northern Ireland, *Attestation of Wills*, Discussion Paper No 12 (2005) 7; Kerridge, above n 16, 311; D E C Yale, ‘Witnessing Wills and Losing Legacies’ (1984) 100 *Law Quarterly Review* 453, 463. *Tonkiss v Graham* [2002] NSWSC 891 (4 October 2002) [87].

29 See, eg, *Tonkiss v Graham* [2002] NSWSC 891 (4 October 2002); *Miller v Miller* [2000] NSWSC 767 (2 August 2000); *Re Emanuel* [1981] VR 113.

30 Neville Crago, ‘Reform of the Law of Wills’ (1995) 25 *University of Western Australia Law Review* 255, 262; Law Reform Committee, Parliament of Victoria, above n 1, 88.

31 D E C Yale, ‘Witnessing Wills and Losing Legacies’ (1984) 100 *Law Quarterly Review* 453, 461; New South Wales Law Reform Commission, *Wills: Execution and Revocation*, Report No 47 (1986) [8.7].

32 *Wyndham v Chetwynd* (1757) 97 ER 377, 381.

33 Kerridge, above n 16, 311; Law Reform Advisory Committee for Northern Ireland, *Attestation of Wills*, Discussion Paper No 12 (2005) 8; D E C Yale, ‘Witnessing Wills and Losing Legacies’ (1984) 100 *Law Quarterly Review* 453, 464.

- The rule particularly disadvantages people who make a will themselves (a home-made will) without the assistance of a solicitor.³⁴ Cases where an innocent witness lost a gift under a will often concerned home-made wills.³⁵
 - A witness to a will may be unaware that they are a beneficiary, as a witness does not need to be aware of the contents of the will.³⁶
- 2.23 Victoria modified the rule in 1977 to allow a witness-beneficiary to take a benefit under the will in the following limited circumstances:
- A witness who would have been entitled to a share of the will-maker's estate if the will-maker had died intestate could receive an amount up to the value of that share.
 - Where a judge was satisfied that the will-maker knew and approved of the gift, and the gift was not included as the result of any undue influence by any person, the witness could receive the gift as specified in the will.³⁷
- 2.24 However, 20 years later the rule was abolished altogether on the recommendation of the Parliamentary Law Reform Committee, following its review of draft legislation to replace the Wills Act. The Committee criticised the rule for reasons that included those outlined above, and concluded that anyone objecting to a benefit given to a witness to the will could challenge the will on the basis that the will-maker acted under undue influence or lacked knowledge of, and did not approve, the contents.³⁸
- 2.25 Despite the abolition of the rule 15 years ago, Victorian solicitors still consider it good practice not to use a beneficiary as a witness to a will, to avoid any suggestion of impropriety.

National Committee for Uniform Succession Laws

- 2.26 At the time that the National Committee for Uniform Succession Laws considered the witness-beneficiary rule, two Australian jurisdictions had abolished the rule and most others had a modified version of the rule that allowed for some exceptions.
- 2.27 While the National Committee acknowledged many of the disadvantages of the rule outlined above, it recommended retaining it in a modified form that allowed for some exceptions.
- 2.28 The National Committee recommended that a gift to a witness should not fail where either:
- at least two of the witnesses are not beneficiaries
 - everyone who would benefit from the failed gift consents in writing to the gift not failing, or
 - the court is satisfied that the will-maker knew and approved of the gift and it was made freely and voluntarily by the will-maker.³⁹

34 Law Reform Committee, Parliament of Victoria, above n 1, 91; Law Reform Advisory Committee for Northern Ireland, *Attestation of Wills*, Discussion Paper No 12 (2005) 9.

35 See, eg, *Verrall v Jackson* [2006] QSC 309 (23 October 2006). However, a will made by a solicitor may also use a witness-beneficiary, see: *Tonkiss v Graham* [2002] NSWSC 891 (4 October 2002); *Re Emanuel* [1981] VR 113.

36 Law Reform Advisory Committee for Northern Ireland, *Attestation of Wills*, Discussion Paper No 12 (2005) 8.

37 *Wills Act 1958* (Vic) s 13(3); *Administration and Probate Act 1958* (Vic) pt V. These provisions were inserted by the *Wills (Interested Witnesses) Act 1997* (Vic). For an example of the application of these provisions, see *Re Emanuel* [1981] VR 113.

38 Law Reform Committee, Parliament of Victoria, above n 1, 88–9, 92.

39 National Committee for Uniform Succession Laws, above n 9, 22.

Other jurisdictions

- 2.29 South Australia, Western Australia and the Australian Capital Territory have also abolished the witness-beneficiary rule, bringing the number of jurisdictions to have done so to four.⁴⁰
- 2.30 In the other four Australian jurisdictions, the rule has been retained in the form recommended by the National Committee for Uniform Succession Laws.⁴¹ There have been a number of cases where a witness-beneficiary has been able to keep a gift under the will where they have been able to demonstrate that the will-maker knew and approved of the gift and it was made freely and voluntarily.⁴²

Should the rule be revived in Victoria?

- 2.31 As Victorian law is different to the National Committee's recommended approach, the Commission needs to consider whether it would be desirable to adopt the Committee's recommendation, which would mean reintroducing the witness-beneficiary rule in a modified form.
- 2.32 There are some apparent benefits of reintroducing the rule, including:
- National consistency. The National Committee's recommended version of the rule applies in four Australian jurisdictions. On the other hand, it does not apply in four other jurisdictions.
 - The rule may provide some form of limited protection from undue influence to vulnerable will-makers.
- 2.33 The following possible disadvantages of reintroducing the rule have also been identified:
- The rule is not a particularly effective way of protecting vulnerable will-makers from undue influence because anyone seeking to exercise undue influence can be expected to disguise their involvement in the will-making process. The rule does nothing to protect the will-maker from other forms of involvement by a self-interested person, such as in drafting the will.
 - The rule may be unnecessary, as the act of a beneficiary witnessing a will may raise suspicious circumstances or provide evidence of undue influence (discussed below).
 - Reintroducing the rule could lead to the anomaly that a will with no witnesses may be valid under section 9 of the *Wills Act* while the operation of a will witnessed by a beneficiary may be invalid in relation to that witness.
 - Reintroducing the rule across the board may be a drastic measure when the limited objective is to afford greater protection to older and vulnerable will-makers.

Question

W3 Should Victoria reintroduce the witness-beneficiary rule in the form recommended by the National Committee for Uniform Succession Laws?

Prevention of undue influence through other changes to the will-making process

- 2.34 The formalities for making a valid will, including the witnessing requirements discussed above, are intended to reduce the risk of undue influence and fraud when a will is being made.⁴³ However, the increasing concern about older and vulnerable will-makers being subject to pressure concerning their wills has led some judges and commentators to suggest other ways of preventing undue influence in the will-making process.⁴⁴
- 2.35 The key suggestion in this area of prevention is to ensure that solicitors take greater care when making wills.
- 2.36 In Victoria, solicitors must comply with professional conduct and practice rules. Rule 10 of the *Professional Conduct and Practice Rules* concerns solicitors who prepare wills that provide for them to receive a benefit.⁴⁵ It is the only professional rule that specifically applies to drafting a will.
- 2.37 The rule generally prohibits solicitors from drafting a will under which they may receive a substantial benefit, other than the commission they may claim if appointed executor and reasonable professional fees. Exceptions apply when they draft wills for family members or fellow solicitors with whom they work.
- 2.38 If the will appoints the solicitor or associate as executor, the solicitor must inform the will-maker in writing, before the will is signed, of any entitlement to claim commission and charge professional fees for administering the estate. If the solicitor or their firm or associate is entitled to claim commission as executor, the will-maker must be informed of the option of appointing someone else, who might not make a claim.
- 2.39 A solicitor who has doubts about a client's capacity to make a will is currently under no professional obligation to obtain a medical assessment.
- 2.40 In Victoria, there are no guidelines for solicitors making a will apart from rule 10 dealing with receiving a benefit under a will. In other jurisdictions, professional bodies have created guidelines that deal with capacity, undue influence or both. For example, the New South Wales Law Society publishes a practical guide on what to do when a client's capacity is in doubt.⁴⁶ The British Columbia Law Institute has published a guide for professionals making wills on recommended practices relating to potential undue influence.⁴⁷ In addition to these guides, other resources exist that document good practice when taking instructions for a will, risk factors for undue influence, key questions for determining whether will-making capacity is in doubt and best practice for obtaining expert medical reports on capacity and influence issues.⁴⁸
- 2.41 In Victoria, Seniors Rights Victoria has recently published a guide for lawyers on assets for care.⁴⁹ This guide addresses questions of capacity and undue influence but is mainly concerned with transactions during an older person's lifetime rather than will-making.

43 Kerridge, above n 16, 311.

44 See, eg, *Pates v Craig* (Unreported, Supreme Court of New South Wales, Santow J, 28 August 1995); Kerridge, above n 16, 333; Burns, above n 17, 174.

45 Law Institute of Victoria, *Professional Conduct and Practice Rules* (at 30 June 2005) r 10.

46 Law Society of New South Wales, *When a Client's Capacity is in Doubt: A Practical Guide for Solicitors* (2009). See also New South Wales Attorney General's Department, *Capacity Toolkit* (2008).

47 British Columbia Law Institute, *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide*, Report No 61 (2011).

48 See, for example: Nick O'Neill and Carmel Peisa, *Capacity and the Law* (Sydney University Press in co-operation with the Australian Legal Information Institute (AustLI), 2011) ch 4; *Pates v Craig* (Unreported, Supreme Court of New South Wales, Santow J, 28 August 1995) 37; K Shulman et al, 'Assessment of Testamentary Capacity and Vulnerability to Undue Influence' (2007) 164(5) *American Journal of Psychiatry* 725; New South Wales Attorney General's Department, *Capacity Toolkit* (2008).

49 Seniors Right Victoria, *Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse* (2012).

Options for reform

2.42 There are various measures that could be used to ensure that solicitors who make wills take greater care to protect vulnerable people from undue influence. These measures could help to ensure that fewer will-makers die leaving a will that does not reflect their true intentions.

2.43 Possible reforms include:

- A professional requirement to obtain a medical report at the time a will is made where a will-maker's capacity to make a will that conveys their true intentions is in doubt. This could apply to all will-makers over a particular age (for example, 80 years) or to situations where the solicitor is otherwise in doubt about capacity.
- A professional requirement to refuse to act or, alternatively, to obtain additional independent advice, when an existing client seeks a will on behalf of another person that would confer a significant benefit on the existing client. Justice Santow of the New South Wales Supreme Court has observed:

It should perhaps be recognised by the relevant professional body as a rule of ethics, that a legal practitioner must avoid such a conflict of interest when preparing a will, either by not acting, or by procuring additional, truly independent advice, where this is in circumstances where an intended principal or major beneficiary is an established client and where the will is instigated by that client.⁵⁰

- Publication of Victorian guidelines on assessing capacity and vulnerability to undue influence in will-making.

Questions

W4 Would introducing a professional requirement that solicitors obtain a medical capacity assessment for their clients prior to drafting a will for them be useful in preventing undue influence?

(a) If so, in what circumstances should the requirement apply (such as where a will-maker is over a particular age)?

(b) If not, what disadvantages would there be in such a requirement?

W5 Would introducing a professional requirement that solicitors must either decline to act or seek independent advice when an existing client asks them to draft a will for another person that would confer significant benefits on the existing client be useful in preventing undue influence?

W6 Should guidelines be provided for professionals who make wills in Victoria dealing with how to minimise the incidence of undue influence on older and vulnerable will-makers? If so, what should those guidelines contain?

W7 In what other ways could the process of preparing a will by a solicitor be improved to protect vulnerable will-makers from undue influence?

Determining whether a will reflects the will-maker's true intentions

- 2.44 When an older or vulnerable will-maker makes a new will towards the end of their life, concerns can arise about whether it reflects their true wishes. A person who wants to challenge the validity of the will after the will-maker dies may raise various claims. These may include claims that:
- the will-maker did not have testamentary capacity
 - the will-maker did not know and approve of the contents of the will
 - the will was brought about by fraud or is a forgery
 - the will-maker acted under undue influence.
- 2.45 In practice, a number of these claims are often raised together, although different legal rules and considerations apply.⁵¹
- 2.46 This section provides a brief overview of the principles that underpin these claims, as they are relevant to a consideration of how succession law provides some protection, aside from the witnessing requirements for a valid will.

Testamentary capacity

- 2.47 In order for a will to be valid, the will-maker must have had testamentary capacity at the time it was made.⁵² Wills made by older and vulnerable will-makers are often challenged on the basis of a lack of testamentary capacity, even if it is suspected that the will-maker was acting under undue influence, because lack of testamentary capacity is easier to prove.⁵³
- 2.48 The test for testamentary capacity is a common law test, classically stated in the 1870 United Kingdom case of *Banks v Goodfellow*.⁵⁴ A person must be of sound mind, memory and understanding to make a will. However, a will-maker is assumed to have been of sound mind unless evidence presented to the court calls into question the issue of whether they had testamentary capacity—in which case it is up to the propounder of the will (usually the executor) to prove that they did.⁵⁵
- 2.49 According to *Banks v Goodfellow*, in order to have the requisite soundness of mind the person must:
1. understand the nature and effect of a will
 2. understand the nature and extent of their property
 3. comprehend and appreciate the claims to which they ought to give effect
 4. be suffering from no disorder of the mind or insane delusion that would result in an unwanted disposition.⁵⁶
- 2.50 This is considered a relatively low threshold test, reflecting the policy that a person's right to make a will should be upheld whenever it is possible to do so.⁵⁷ For example, in addition to the four-part test, the common law has acknowledged that there may be a 'lucid interval' where a person suffering from a mental illness may have will-making capacity.⁵⁸

51 Nick O'Neill and Carmel Peisa, *Capacity and the Law* (Sydney University Press in co-operation with the Australian Legal Information Institute (AustLII), 2011) 20; Burns, above n 17, 157. See, eg, *Nicholson v Knaggs* [2009] VSC 64 (27 February 2009); *Tobin v Ezekiel* [2011] NSWSC 81 (1 March 2011); *Brown v Wade* [2010] WASC 367 (9 December 2010); *Brand v Brand* (Unreported, Supreme Court of New South Wales, Rolfe J, 10 December 1991).

52 Or, if the will is drafted by someone else on the instructions of the will-maker, at the time the instructions are given.

53 Burns, above n 17, 157–9.

54 (1870) LR 5 QB 549, 565 (Cockburn CJ).

55 *Re Hodges*; *Shorter v Hodges* (1988) 14 NSWLR 698, 706.

56 *Banks v Goodfellow* (1870) LR 5 QB 549, 565.

57 Nick O'Neill and Carmel Peisa, *Capacity and the Law* (Sydney University Press in co-operation with the Australian Legal Information Institute (AustLII), 2011) chs 4, 14; *Re Estate of Griffith (decd)*; *Easter v Griffith* (1995) 217 ALR 284, 295–6 (Kirby P).

58 See, eg, *Kantor v Vosahlo* [2004] VSCA 235 (16 December 2004).

- 2.51 When the test has been applied in more recent cases, account has been taken of new knowledge of medical and psychological matters and changing circumstances in society.⁵⁹ For example, Justice Windeyer of the New South Wales Supreme Court has observed that many people have now handed over the management of their share portfolios and real estate to advisers and may not have a proper understanding of the value of the assets that generate their income. This should not be a bar to a finding of capacity on the basis that they do not meet part two of the test, which requires them to understand the nature and extent of their property.⁶⁰
- 2.52 Part three of the test, that the person should comprehend and appreciate the claims that others may have, adds a moral element to the test by looking for awareness of who has a reasonable claim on their estate.⁶¹ However, ‘the freedom of testamentary disposition includes a freedom to be unfair, unwise or harsh with one’s own property’.⁶² The mere existence of a will that fails to meet the will-maker’s moral obligations does not necessarily indicate a lack of capacity.
- 2.53 In addition, modern understandings of ‘disorders of the mind’ or ‘insane delusions’, mentioned in part four of the test, are more nuanced. If a person suffers from dementia, this does not necessarily preclude will-making capacity. The existence or otherwise of capacity depends on the severity of the illness and whether it impairs insight, judgment and decision-making skills; that is to say, whether it impacts on the first three parts of the test.⁶³
- 2.54 A measure to prevent challenges to a will is to have a specialist or general medical practitioner assess the person’s will-making capacity. When this occurs, the medical practitioner is usually provided with the *Banks v Goodfellow* four-part test on which to base their assessment.⁶⁴
- 2.55 While both testamentary capacity and undue influence are legal concepts, medical assessment and opinion are important to determining whether a will-maker was of sound mind, memory and understanding and exercised a free will at the time the will came into existence. It is therefore important for legal practitioners, medical practitioners and psychiatrists to work together when developing assessments and strategies to ensure that will-making is accompanied by a sound mind and free will. To this end, interdisciplinary education should be encouraged.⁶⁵

Question

W8 Are any changes to the law relating to testamentary capacity necessary to improve protection for older and vulnerable will-makers?

59 Nick O’Neill and Carmel Peisa, *Capacity and the Law* (Sydney University Press in co-operation with the Australian Legal Information Institute (AustLII), 2011) ch 4, 5.

60 *Kerr v Badran* [2004] NSWSC 735 (11 November 2004) [49]. See also *Brown v Wade* [2010] WASC 367 (9 December 2010) [98].

61 Rosalind F Croucher, ‘Statutory Wills and Testamentary Freedom—Imagining the Testator’s Intention in Anglo-Australian Law’ (2007) 7 *Oxford University Commonwealth Law Journal* 241, 245; Rosalind Croucher, ‘“An Interventionist, Paternalistic Jurisdiction”? The Place of Statutory Wills in Australian Succession Law’ (2009) 32(3) *University of New South Wales Law Journal* 674, 691.

62 *Re Estate of Griffith (decd)*; *Easter v Griffith* (1995) 217 ALR 284, 294 (Kirby P).

63 O’Neill and Peisa, above n 59, ch 4, 17; *Re Brokenshire*; *Equity Trusts Co Ltd v Worts* (1998) 8 VR 659, 675, 678; *Norris v Tuppen* [1999] VSC 228 (25 June 1999) [347].

64 *Nicholson v Knaggs* [2009] VSC 64 (27 February 2009) [661]; O’Neill and Peisa, above n 59, ch 4, 42–53.

65 K Shulman et al, ‘Assessment of Testamentary Capacity and Vulnerability to Undue Influence’ (2007) 164(5) *American Journal of Psychiatry* 725.

Knowledge and approval and suspicious circumstances

- 2.56 In order for a will to be valid, it is necessary for the person seeking a grant of probate to establish that the will-maker had knowledge of, and approved, its contents. Complying with the formal requirements of validity (for example, the witnessing requirements) and having proof of testamentary capacity is usually enough to establish knowledge and approval.⁶⁶
- 2.57 However, where a suspicious circumstance exists, the person seeking to uphold the will must prove that there was knowledge and approval.⁶⁷ The onus of proof is on that person, not the person challenging the will.⁶⁸ Lack of knowledge and approval is raised more frequently in Australian probate matters than undue influence because it avoids difficult problems of proof.⁶⁹
- 2.58 What may constitute a suspicious circumstance has not been limited by the courts or legislation.⁷⁰ Circumstances that have been held to be suspicious and require further investigation include the following:
- A beneficiary is involved in the will-making process, for example by witnessing the will,⁷¹ writing or preparing the will or taking the will-maker to a solicitor.⁷²
 - The will-maker is 'blind, illiterate, or mentally or physically enfeebled'.⁷³
 - The will has not been read to the will-maker or by the will-maker prior to execution.⁷⁴
 - The will changes a pattern of previous wills by cutting out 'natural' beneficiaries and replacing them with recent acquaintances.⁷⁵
- 2.59 The degree of suspicion will depend on the facts of the case. If suspicion is not removed, probate may not be granted. A previous valid will may be upheld, or the deceased person's property may be distributed according to the intestacy rules as if no will had been made.

Question

W9 Are any changes to the law relating to knowledge and approval and suspicious circumstances necessary to improve protection for older and vulnerable will-makers?

66 *Nock v Austin* (1918) 25 CLR 519, 528.

67 *Ibid*; *Carney v Hall* [2011] SASC 207 (30 November 2011) [13]; *Able Australia Services v Yammas* [2010] VSC 237 (3 June 2010) [7]; *Nicholson v Knaggs* [2009] VSC 64 (27 February 2009) [152]; *Brown v Wade* [2010] WASC 367 (9 December 2010) [321].

68 Matthew Tyson, 'An Analysis of the Differences Between the Doctrine of Undue Influence with Respect to Testamentary and Inter Vivos Dispositions' (1997) 5 *Australian Property Law Journal* 1, 12.

69 Burns, above n 17, 157, 163.

70 *Tyrell v Painton* [1894] P 151, 157; *Bool v Bool* (1941) St. R. Qd. 26, 39.

71 *Tonkiss v Graham* [2002] NSWSC 891 (4 October 2002) [104]; *Re Emanuel* [1981] VR 113; *Miller v Miller* [2000] NSWSC 767 (2 August 2000) [33].

72 *Nock v Austin* (1918) 25 CLR 519; *Re Emanuel* [1981] VR 113; *Able Australia Services v Yammas* [2010] VSC 237 (3 June 2010) [97]; *Roebuck v Smoje* [2000] WASC 312 (20 December 2000) [94]; *Barry v Butlin* (1838) 11 Moore 480, 481; 12 ER 1089; *Tyrell v Painton* [1894] P 151 (where the beneficiary's son wrote and executed the will).

73 *Roebuck v Smoje* [2000] WASC 312 (20 December 2000) [94]; *Able Australia Services v Yammas* [2010] VSC 237 (3 June 2010) [97]; *Shorter v Hodges* (1988) 14 NSWLR 698, 705.

74 *Able Australia Services v Yammas* [2010] VSC 237 (3 June 2010) [97]; *Roos v Kapernkow* (Unreported, Supreme Court of South Australia, Doyle CJ, 21 July 1998) 15.

75 *Petrovski v Nasev* [2011] NSWSC 1275 (17 November 2011) [259]; Anthony Smith, 'Suspicious Circumstances and Wills' (1994) 24 *Queensland Law Society Journal* 347, 352.

Fraud and forgery

- 2.60 A less common basis for challenging a will is to claim that it was brought about by fraud or that it is a forgery.
- 2.61 In the case of fraud, the person challenging the will must show that the will-maker was deceived or misled.⁷⁶ For example, a person may encourage the will-maker to take a false view of a potential beneficiary or mislead the will-maker as to the nature of their relationship with a person. Unlike with undue influence, there is no overbearing of the will-maker's will, rather the will-maker is deceived or misled.⁷⁷
- 2.62 Where a person challenging a will raises the possibility that the will is a forgery, the court must be satisfied that the document is not a forgery and was signed by the will-maker.⁷⁸

Question

W10 Are any changes to the law concerning fraud or forgery necessary to improve protection for older and vulnerable will-makers?

Doctrine of undue influence

- 2.63 In the context of wills, undue influence involves the imposition of pressure on a person that causes them to make a will that does not reflect their true wishes. The legal definition of undue influence is outlined in this section.

Current law

- 2.64 In Victoria, a will or part of a will may be invalid because of undue influence. The doctrine of undue influence is part of the common law and is not referred to in legislation. Traditionally, undue influence has been considered difficult to prove⁷⁹ and 'virtually a dead letter' in probate law.⁸⁰ Until the Victorian case of *Nicholson v Knaggs*⁸¹ in 2009, there had only been three successful cases of undue influence in relation to wills in Australia—all in the 1800s.⁸²
- 2.65 Undue influence as a legal concept is distinct from want of testamentary capacity and want of knowledge and approval, although all three issues are often raised together in practice.⁸³ A will-maker must have testamentary capacity in order to be subject to undue influence; if the will-maker does not have capacity then the will is invalid in any event.

76 *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 136 (15 June 2007) [61]–[65].

77 See, eg, *Robertson v Smith* [1998] 4 VR 165.

78 For more information on forgery see: Rosalind Croucher and John Croucher, 'Forgeries and Wills—A Probate Problem' (2010) 18(1) *Australian Property Law Journal* 1, 27.

79 *Revie v Druiitt* [2005] NSWSC 902 (8 September 2005) [54]; *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 136 (15 June 2007) [70]; *Nicholson v Knaggs* [2009] VSC 64 (27 February 2009) [105]–[107]; New South Wales Law Reform Commission, *Wills: Execution and Revocation*, Report No 47 (1986) [8.34]; Tyson, above n 68, 7; P Hallen, 'Note: Recent Cases' (1992) 66 *Australian Law Journal* 538; Prue Vines, 'Challenging the Testator's Mind by Challenging Lifetime Transactions: Bridgewater v Leahy as Backdoor Probate Law?' (2003) 2 *Australian Property Law Journal* 1, 2; Burns, above n 17, 149, 153; Barbara Hamilton, 'The Doctrine of Unconscionable Bargains in Equity: Potent Sword for Estate Lawyers' (2007) 27 *Queensland Lawyer* 180, 180. For cases in which undue influence was unsuccessfully raised in Victoria prior to 2009, see: *Re Smallwood* [2008] VSC 74 (18 March 2008); *Re Ellul dec'd; Ellul v Ellul* [2005] VSC 351 (1 September 2005); *Brokenshire; Equity Trustees Executors & Agency Company Ltd v Worts* (1998) 8 VR 659.

80 New South Wales Law Reform Commission, *Wills: Execution and Revocation*, Report No 47 (1986) [8.32]; Pauline Ridge, 'Equitable Undue Influence and Wills' (2004) 120 *Law Quarterly Review* 617, 622.

81 [2009] VSC 64 (27 February 2009).

82 *Callaghan v Myers* (1880) 1 NSW 351; *Buckley v Millar* (1869) NSWSCR 74; *In the Estate of White* (1892) 18 VLR 715.

83 O'Neill and Peisa, above n 59, 20; Burns, above n 17, 157. See, eg, *Nicholson v Knaggs* [2009] VSC 64 (27 February 2009); *Tobin v Ezekiel* [2011] NSWSC 81 (1 March 2011); *Brown v Wade* [2010] WASC 367 (9 December 2010); *Brand v Brand* (Unreported, Supreme Court of New South Wales, Rolfe J, 10 December 1991).

- 2.66 Traditionally, for undue influence to be proved in relation to a will, it must be shown that there was coercion.⁸⁴ The free will of the will-maker must have been overborne, so that the person was coerced into doing something they did not wish to do.⁸⁵ Power to control the will-maker is not enough to establish coercion.⁸⁶
- 2.67 A number of elements of the doctrine of undue influence have made it difficult to prove:
- The definition of undue influence contemplates coercion only. ‘Pleas, persuasion and protestations’ are all considered legitimate behaviour for a prospective beneficiary.⁸⁷ This has prompted some to observe that the current law permits or even encourages some form of pressure or manipulative conduct by potential beneficiaries.⁸⁸
 - Undue influence in probate law is never presumed from the nature of the relationship (unlike the equitable doctrine of undue influence for lifetime transactions, discussed below).⁸⁹
 - The onus of proof is on the person alleging undue influence.⁹⁰
 - If the person raising undue influence is unsuccessful, costs will usually follow the event, which means, in effect, that the unsuccessful party pays most of the costs of the successful party as well as their own.⁹¹
 - The standard of proof has traditionally been that, where the case is based on circumstantial evidence, undue influence must be the only explanation for the existence of the will.⁹²
- 2.68 In the recent Victorian case of *Nicholson v Knaggs*,⁹³ Justice Vickery departed from the traditional position in relation to the standard of proof. He found that the standard of proof in undue influence is as follows:
- where there is direct evidence—whether, on the balance of probabilities, the will of the will-maker was overborne to the requisite degree by conduct proven by direct evidence⁹⁴
 - where there is circumstantial evidence—whether the circumstances raise a more probable inference in favour of what is alleged than not, after the evidence has been evaluated as a whole.⁹⁵

84 *Boyse v Rossborough* (1857) VI H.L.C. 1192, 1211; *Wingrove v Wingrove* (1885) 11 PD 81, 82; *Parfitt v Lawless* (1872) LR 2 P&D 462, 470; *Craig v Lamoureux* [1920] AC 349, 357; *Petrovski v Nasev* [2011] NSWSC 1275 (17 November 2011) [264]. Fiona Burns notes that some colonial cases from the 1800s went beyond coercive conduct only and looked at all the circumstances of the case, but this position was later rejected in Australia: Burns, above n 17, 153.

85 *Hall v Hall* (1868) LR 1 P&D 481, 482; *Wingrove v Wingrove* (1885) 11 PD 81, 82; *In the will of Wilson* (1897) 23 VLR 197, 198–9; *Revie v Druitt* [2005] NSWSC 902 (8 September 2005) [51]; *Roebuck v Smoje* [2000] WASC 312 (20 December 2000) [127]; *Re Smallwood* [2008] VSC 74 (18 March 2008) [8].

86 *Revie v Druitt* [2005] NSWSC 902 (8 September 2005) [53]; *De Bruin v De Bruin* [2004] WASC 20 (20 February 2004) [17]; *Craig v Lamoureux* [1920] AC 349, 357; *Wingrove v Wingrove* (1885) 11 PD 81, 82.

87 *Hall v Hall* (1868) LR 1 P&D 481, 482; *Parfitt v Lawless* (1872) LR 2 P&D 462, 469–70; *Roebuck v Smoje* [2000] WASC 312 (20 December 2000) [127]; *Nicholson v Knaggs* [2009] VSC 64 (27 February 2009) [144]; *Tobin v Ezekiel* [2011] NSWSC 81 (1 March 2011) [40]; *Thomas v Nash* [2010] SASC 153 (25 May 2010) [79].

88 New South Wales Law Reform Commission, *Wills: Execution and Revocation*, Report No 47 (1986) [8.34]; Richard Boaden, ‘Undue Influence in Relation to Wills’ (1994) 68 *Law Institute Journal* 56, 57; Kerridge, above n 16, 328; *Brand v Brand* (Unreported, Supreme Court of New South Wales, Rolfe J, 10 December 1991) 117.

89 *Winter v Crichton* (1991) 23 NSWLR 116, 121; *Thomas v Nash* [2010] SASC 153 (25 May 2010) [79]; *Craig v Lamoureux* [1920] AC 349, 456.

90 *Revie v Druitt* [2005] NSWSC 902 (8 September 2005) [51]; *Winter v Crichton* (1991) 23 NSWLR 116, 121; *Re Smallwood* [2008] VSC 74 (18 March 2008) [9]; *Brand v Brand* (Unreported, Supreme Court of New South Wales, Rolfe J, 10 December 1991) 118; *Nicholson v Knaggs* [2009] VSC 64 (27 February 2009) [108]; *Parfitt v Lawless* (1872) LR 2 P&D 462, 470.

91 *Re Cutcliffe’s Estate*; *Le Duc v Veness* [1959] P6, 16–21; *In the Will of Wilson* (1897) 23 VLR 197, 206.

92 ‘It is not sufficient to show that the circumstances attending [the will’s] execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis’: *Boyse v Rossborough* (1857) VI H.L.C. 1192, 1212; 10 ER 1192, 1212. Followed in: *In the will of Boyd* (1872) VLR (I, E & M) 46, 48; *Craig v Lamoureux* [1920] AC 349, 357; *Winter v Crichton* (1991) 23 NSWLR 116, 121; Burns, above n 17, 149. Fiona Burns has noted that some colonial cases from the 1800s held that undue influence was ‘the most likely explanation’ for the existence of the will: Burns, above n 17, 154.

93 *Nicholson v Knaggs* [2009] VSC 64 (27 February 2009).

94 See also *Petrovski v Nasev* [2011] NSWSC 1275 (17 November 2011) [274].

95 [2009] VSC 64 (27 February 2009) [116], [127].

2.69 In addition, in *Nicholson v Knaggs* the Court defined ‘undue influence’ by emphasising that:

The key concept is that of ‘influence’. The influence moves from being benign and becomes undue at the point where it can no longer be said that in making the testamentary instrument the exercise represents the free, independent and voluntary will of the testator. It is the effect rather than the means which is the focus of the principle.⁹⁶

Following *Nicholson v Knaggs*, undue influence may now be easier to prove in Victoria.⁹⁷

Other jurisdictions

2.70 The doctrine of undue influence is part of the common law in all Australian jurisdictions. As in Victoria, proving undue influence in other Australian jurisdictions has been difficult and nearly all cases have failed.⁹⁸

2.71 The decision in the Victorian case of *Nicholson v Knaggs* has been applied in Western Australia⁹⁹ but it is not yet clear whether it will be adopted in other Australian jurisdictions.

2.72 In Canada, the province of British Columbia has recently introduced a rebuttable presumption of undue influence where the will-maker is in a position of dependence on or domination by a beneficiary.¹⁰⁰ The test of domination or dependence is the same test used in British Columbia for lifetime transactions.¹⁰¹ This is discussed below as an option for reform.

Options for reform

2.73 Due to the difficulty of proving undue influence, various suggestions have been made for reforming the common law. Reform may be considered desirable because of our ageing population and other societal factors mentioned at the beginning of this consultation paper. If undue influence remains unnecessarily difficult to establish, there is the potential for wills to be upheld that do not represent the will-maker’s true intentions.¹⁰²

96 Ibid [150]. Similarly, a recent NSW decision found that to prove undue influence, a party must show that ‘the disposition is not regarded as the free and voluntary act of the [will-maker]’: *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 136 (15 June 2007) [63].

97 See, eg, Andrew Verspaandonk, ‘Testamentary Undue Influence: Back to the Future’ (Paper presented at the Third Annual Wills and Estates Disputes Intensive: A Conference by Television Education Network, Gold Coast, Queensland, 2010) 61.

98 See, eg, *Tobin v Ezekiel* [2011] NSWSC 81 (1 March 2011); *Thomas v Nash* [2010] SASC 153 (25 May 2010); *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 136 (15 June 2007); *Smith v Sahrner* [2007] QSC 102 (10 May 2007); *Revie v Druitt* [2005] NSWSC 902 (8 September 2005); *De Bruin v De Bruin* [2004] WASC 20 (20 February 2004); *Green v Critchley* [2004] QSC 022 (24 February 2004); *Roebuck v Smoje* [2000] WASC 312 (20 December 2000); *Clanachan v Moeskops* (Unreported, Supreme Court of New South Wales, Cohen J, 17 April 1997); *Lyons v Talbot* (Unreported, Supreme Court of Western Australia, Commissioner Macknay, 31 August 1993); *Brand v Brand* (Unreported, Supreme Court of New South Wales, Rolfe J, 10 December 1991); *Pates v Craig* (Unreported, Supreme Court of New South Wales, Santow J, 28 August 1995).

99 *Brown v Wade* [2010] WASC 367 (9 December 2010).

100 *Wills, Estates and Succession Act*, SBC 2009, c 13, s 52.

101 British Columbia Law Institute, *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide*, Report No 61 (2011) 10–11.

102 O’Neill and Peisa, above n 59, 25; Pauline Ridge, ‘Equitable Undue Influence and Wills’ (2004) 120 *Law Quarterly Review* 617; Kerridge, above n 16; Burns, above n 17.

Applying the equitable doctrine of undue influence to wills

- 2.74 One common suggestion for reform is that the equitable doctrine of undue influence, which applies to transactions during a person's life, should also apply to wills.¹⁰³ While sharing a common title, the doctrines of undue influence in equity and in probate are based on different principles.¹⁰⁴
- 2.75 The equitable doctrine allows a gift or transaction to be set aside where a person is in a position of influence over the donor, unless the person who benefits can satisfy the court that no undue influence was used. Certain classes of relationship are presumed to be ones of influence (for example, parent and minor child, doctor and patient, solicitor and client).
- 2.76 In other cases, the relationship must be proved to be one of ascendancy, power or domination on the one hand, and dependence or subjection on the other.¹⁰⁵ Once the relationship is established, the donee must satisfy the court that the transaction was the free and independent act of a person exercising judgment (to rebut the presumption of undue influence). Evidence that the person received independent advice is one way of proving this.¹⁰⁶
- 2.77 The key differences between equitable undue influence and probate undue influence are:
- In probate, undue influence must amount to coercion; in equity, the presumed pressure may fall short of coercion.
 - The equitable doctrine presumes that undue influence arises from particular relationships, but in probate undue influence is never presumed.
 - The probate doctrine focuses on the mind of the will-maker and on ensuring that the will reflects their wishes. The equitable doctrine focuses on the conscience of the dominant person—a transaction may be set aside even where, at the time of its conclusion, the weaker party was apparently willing for the transaction to occur.¹⁰⁷
 - The burden of proof is on the person alleging undue influence in probate, but is on the person denying undue influence in equity (where the relationship has been proven to be one of dominance and dependence).¹⁰⁸
- 2.78 Advantages of applying the equitable doctrine of undue influence in the probate context include the following:
- It would allow for greater scrutiny of wills and protection of will-makers, as the principles are broader than existing probate principles.¹⁰⁹ It would assist in situations where there are suspicions of pressure and influence but insufficient evidence of actual coercion.¹¹⁰
 - It would encourage the use of independent advisers in the making of a will.¹¹¹

103 New South Wales Law Reform Commission, *Wills: Execution and Revocation*, Report No 47 (1986) [8.34]; Pauline Ridge, 'Equitable Undue Influence and Wills' (2004) 120 *Law Quarterly Review* 617; Barbara Hamilton, 'The Doctrine of Unconscionable Bargains in Equity: Potent Sword for Estate Lawyers' (2007) 27 *Queensland Lawyer* 180, 187; British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework*, Report No 45 (2006) 53–4.

104 Tyson, above n 68, 1; Pauline Ridge, 'Equitable Undue Influence and Wills' (2004) 120 *Law Quarterly Review* 617, 621.

105 R P Meagher, J D Heydon and M J Leeming, *Equity, Doctrines and Remedies* (Butterworths LexisNexis, 2002) 514.

106 New South Wales Law Reform Commission, above n 27, [8.31]; Fiona R Burns, 'Undue Influence Inter Vivos and the Elderly' (2002) 26 *Melbourne University Law Review* 499, 505; Pauline Ridge, 'Equitable Undue Influence and Wills' (2004) 120 *Law Quarterly Review* 617, 617–18.

107 Tyson, above n 68, 4, 8.

108 Prue Vines, 'Challenging the Testator's Mind by Challenging Lifetime Transactions: Bridgewater v Leahy as Backdoor Probate Law?' (2003) 2 *Australian Property Law Journal* 1, 3–4.

109 Burns, above n 17, 170; Meredith, above n 20, 192.

110 Fiona R Burns, 'Reforming Testamentary Undue Influence in Canadian and English Law' (2006) 29 *Dalhousie Law Journal* 455, 472.

111 New South Wales Law Reform Commission, *Wills: Execution and Revocation*, Report No 47 (1986) [8.34].

2.79 Disadvantages of applying the equitable doctrine of undue influence in probate include:

- Beneficiaries will often have influence over a will-maker, particularly if they are caring for the will-maker in the last years of their life.¹¹² A presumption of undue influence in these relationships may disturb legitimate gifts and interfere with testamentary freedom.¹¹³
- A presumption of undue influence is more relevant in relation to lifetime transactions where a person may be left destitute during their lifetime and can speak for themselves in relation to the circumstances of the case.¹¹⁴
- It may lead to increasing levels of litigation.¹¹⁵

Changing the definition of undue influence

2.80 Other suggestions for reform include changes to the legal concept of undue influence itself. For example, Fiona Burns has suggested that the test of what undue influence is should focus on whether the will-maker has executed a will that expresses their independent wishes, rather than on the act of coercion.¹¹⁶ Attention would be directed to the will-maker's circumstances rather than the behaviour of the beneficiary and would cover situations where the beneficiary used forms of manipulative conduct aside from coercion to obtain a gift in the will.¹¹⁷ This approach to the definition of undue influence has already been applied in Victoria in *Nicholson v Knaggs*,¹¹⁸ as well as in New Zealand¹¹⁹ and Canada.¹²⁰

Questions

W11 Should the equitable doctrine of undue influence for lifetime transactions be applied to wills?

W12 Are there changes that could usefully be made to the doctrine of undue influence as it currently operates in the probate context?

112 Ibid.
113 Vines, above n 108, 11; Burns, above n 17, 152–3; Meredith, above n 20, 192; Burns, above n 110, 469, 473–4.
114 Tyson, above n 68, 10; Burns, above n 17, 153; Burns, above 110, 469; *Craig v Lamoureux* [1920] AC 349, 356.
115 New South Wales Law Reform Commission, above n 111, [8.34]; Meredith, above n 20, 193.
116 Burns, above n 17, 176.
117 See, eg, *Brand v Brand* (Unreported, Supreme Court of New South Wales, Rolfe J, 10 December 1991).
118 [2009] VSC 64 (27 February 2009) [150].
119 *Carey v Norton* [1998] 1 NZLR 661.
120 *Re Kohut Estate* (1993) 90 Man R (2d) 245, [38]; Burns, above n 17, 177.

3. Statutory wills

Introduction

- 3.1 The Commission has been asked to review and report on ‘whether the current requirements that allow the Supreme Court to authorise wills for persons who do not have testamentary capacity should be revised’.
- 3.2 Since 1997, the Supreme Court has had the power under Part 3 of the *Wills Act 1997* (Vic) to authorise a will for a person lacking testamentary capacity.¹ The Court determines whether to authorise a will proposed by the applicant and does not make the will. However these wills are commonly referred to as statutory wills and this terminology is used in this paper.
- 3.3 Broadly speaking, the power is based on a similar power that was introduced in the United Kingdom in 1969 in mental health legislation. Victoria was the third Australian state to introduce provisions of this type, after Tasmania and South Australia.
- 3.4 Also in 1997, the National Committee for Uniform Succession Laws released its report on the law of wills, which included recommendations for court-authorized wills that were based on Victoria’s draft legislation. The National Committee’s proposed uniform legislation is therefore similar to the Victorian provisions.²
- 3.5 When it was first proposed that Australian courts be given the power to authorise wills, there was some opposition. One commentator remarked that it would ‘create an interventionist, paternalistic jurisdiction exercisable even though an applicant had no claim on intestacy, no claim under family provision legislation, and no claim as a creditor of the estate’.³

1 The Commission’s terms of reference refer to the power to authorise a will for a person lacking testamentary capacity only, not a person under 18 who understands the nature of a will (the court has a power to make a will for a person aged under 18 under section 20 of the *Wills Act 1997*). For an outline of the concept of testamentary capacity, see Chapter 2 of this consultation paper.

2 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) 40–58. One key difference is in relation to the ‘guiding principle’ discussed below.

3 Neville Crago, ‘Reform of the Law of Wills’ (1995) 25 *University of Western Australia Law Review* 255, 258.

- 3.6 However, all states and territories have now introduced legislation that empowers the courts to authorise wills and various benefits have been recognised. These include the following:
- The use of the power can enhance the rights and dignity of persons with a disability by facilitating the appropriate disposition of their property on death, having regard to their situation.⁴ It can be seen as an ‘expression of autonomy, exercised in a surrogate sense’.⁵
 - A will that is authorised by the court can reflect a judgment based on merit rather than family connection. For example, a person can be rewarded for the caring role they have played in the person’s life.⁶ A statutory will can also be used to ‘punish’ those who have deliberately disassociated themselves from, or behaved badly towards, the incapacitated person.⁷ The ability to ‘reward and punish’ by making a moral judgment about family members and others is the basis of testamentary freedom.⁸
 - The fact that a person or organisation may have no claim on intestacy, no claim for family provision and no claim as a creditor is exactly the reason why statutory wills are useful.⁹ For example, a statutory will can recognise the role of a non-family member who acts as a carer, a charity that has assisted the incapacitated person, or a charity that the incapacitated person has some connection to.¹⁰
- 3.7 This chapter discusses the key features of Victoria’s statutory will provisions and some options for reform to ensure that the system is operating fairly and effectively.

Statutory wills in Victoria

- 3.8 Since being given the power to do so, the Victorian Supreme Court has authorised approximately 32 statutory wills in a variety of circumstances. They include the following:
- removing from a previous will a de facto partner where the relationship had broken down prior to the person’s incapacitating accident¹¹
 - removing from a previous will a husband who had been charged with the attempted murder of the incapacitated person¹²
 - removing from a previous will a friend who had since misused his position as administrator by selling off the incapacitated person’s property and taking the money as a loan to himself¹³
 - creating a will for an incapacitated person leaving more than half of the estate to a nephew by marriage who was looking after her¹⁴
 - remedying a current will where there may have been a problem with lack of capacity, valid execution or ademption.¹⁵

4 New South Wales Law Reform Commission, *Wills for Persons Lacking Will-Making Capacity*, Report 68 (1992) [2.4]. Rosalind Croucher, ‘“An Interventionist, Paternalistic Jurisdiction”? The Place of Statutory Wills in Australian Succession Law’ (2009) 32(3) *University of New South Wales Law Journal* 674, 696; Victoria, *Parliamentary Debates*, Legislative Assembly, 23 May 2007, 1601 (Rob Hulls, Attorney-General).

5 Rosalind F Croucher, ‘Statutory Wills and Testamentary Freedom—Imagining the Testator’s Intention in Anglo-Australian Law’ (2007) 7 *Oxford University Commonwealth Law Journal* 241, 264 (‘Statutory Wills and Testamentary Freedom’).

6 *Ibid* 263.

7 *Ibid* 244.

8 *Ibid* 244, 264.

9 Rosalind Croucher, ‘“An Interventionist, Paternalistic Jurisdiction”? The Place of Statutory Wills in Australian Succession Law’ (2009) 32(3) *University of New South Wales Law Journal* 674, 696; Law Reform Committee, Parliament of Victoria, *Reforming the Law of Wills* (1994) 36–7.

10 See, eg, *State Trustees v Do and Nguyen* [2011] VSC 45 (23 February 2011); *Plowright v Burge* [2005] VSC 490 (16 December 2005); *Monger v Taylor* [2000] VSC 304 (2 August 2000); *Payne v Smyth as litigation guardian for Welk* [2010] QSC 45 (22 February 2010); *Re Kelso* [2010] NSWSC 357 (22 April 2010); *Re the Estate of Crawley* [2010] NSWSC 618 (9 June 2010); *Re Brown* [2009] SASC 345 (11 November 2009).

11 *Plowright v Burge* [2005] VSC 490 (16 December 2005).

12 *De Gois v Korp* [2005] VSC 326 (18 August 2005).

13 *State Trustees Ltd v Hayden* (2002) 4 VR 229.

14 *Monger v Taylor* [2000] VSC 304 (2 August 2000).

15 Ademption is discussed in Chapter 4 of this consultation paper.

- 3.9 Elsewhere in Australia, statutory wills have been authorised in other situations:
- Where a child suffered a disability and the father was not involved in the care of the child, a statutory will avoided an intestacy pursuant to which the father would receive half the estate (largely consisting of a compensation award). These cases recognise the burden of care on the mother and sometimes other siblings.¹⁶
 - To exclude a perpetrator of violence against the incapacitated person who may be entitled under the intestacy rules to criminal injuries compensation recovered by the person.¹⁷

Who can apply

- 3.10 The Wills Act states that any person may make an application for a statutory will. Applications are usually made by:
- family members
 - other potential beneficiaries such as carers and friends
 - administrators, guardians or solicitors involved in the incapacitated person's affairs.
- 3.11 It is legitimate for a beneficiary to bring an application for a statutory will,¹⁸ and most cases are brought by people who are proposing a will under which they would receive a benefit.

Information required for an application

- 3.12 The Wills Act sets out a list of information that the court may require the applicant to provide when seeking authorisation of a statutory will. This information includes:
- a reasonable estimate of the size and character of the estate
 - a draft of the proposed will
 - any evidence of the wishes of the person
 - any evidence of the likelihood of the person acquiring or regaining will-making capacity
 - the terms of any wills previously made by the person
 - any evidence of the likelihood of a family provision claim being made after the person's death
 - the circumstances of any person for whom provision might reasonably be expected to be made under the will
 - details of any persons who may be entitled to claim on intestacy
 - any evidence of any gift for a charitable or other purpose that the person might reasonably be expected to give or make by will.¹⁹
- 3.13 This list of information is very similar to that recommended by the National Committee for Uniform Succession Laws²⁰ and used in other states.²¹

16 *Payne v Smyth as litigation guardian for Welk* [2010] QSC 45 (22 February 2010); *Re Sultana* [2010] NSWSC 915 (16 August 2010); *AB v CB* [2009] NSWSC 680 (20 July 2009); *Deecke v Deecke* [2009] QSC 65 (1 April 2009); *Hoffman v Waters* [2007] SASC 273 (20 July 2007); *Bryant v Blake* [2004] SASC 369 (19 November 2004); Jeneve Frizzo, 'Court Ordered Wills—Part 1' (2012) 14 *Retirement and Estate Planning Bulletin* 144, 145.

17 *Re Kelso* [2010] NSWSC 357 (22 April 2010); *Re Fenwick* [2009] NSWSC 530 (12 June 2009).

18 *AB v CB* [2009] NSWSC 680 (20 July 2009); *Re Will of Jane* [2011] NSWSC 624 (20 July 2011) [93].

19 *Wills Act 1997* (Vic) s 28.

20 National Committee for Uniform Succession Laws, above n 2, 56.

21 *Wills Act 1936* (SA) s 7(4); *Wills Act 1968* (ACT) s 16B; *Wills Act 2007* (NT) s 20(2); *Wills Act 1970* (WA) s 41; *Wills Act 2008* (Tas) s 23; *Succession Act 1981* (Qld) s 23; *Succession Act 2006* (NSW) s 19(2).

The basis of the decision

- 3.14 When considering whether to authorise a will proposed by the applicant, the court must be satisfied that:
- the person does not have testamentary capacity
 - the proposed will reflects what the intentions of the person would be likely to be, or what the intentions of the person might reasonably be expected to be, if he or she had testamentary capacity (the ‘guiding principle’ discussed in the next section), and
 - it is reasonable in all the circumstances for the court to authorise the will.²²

Determining the intentions of the incapacitated person

People without capacity for whom statutory wills are made

- 3.15 Statutory will applications are brought in two distinct sets of circumstances:
- for people who have never had the necessary capacity to make a will (‘nil capacity’)
 - for people who have had the capacity to make a will but have lost that capacity (‘lost capacity’).

People with nil capacity

- 3.16 Some applications for statutory wills are for people who have never had will-making capacity. This includes people who were born with a severe intellectual disability or who were so injured when young as to be permanently deprived of capacity.
- 3.17 An application for a statutory will may be brought in this situation because the person has a significant estate arising from payment of compensation, a victims of crime award or an inheritance.
- 3.18 The policy justification for making a statutory will in this circumstance is to avoid the results of intestacy. Intestacy may be inappropriate because:
- a family member who has not been involved in the person’s life would receive a benefit²³
 - a family member who has caused incapacity would benefit²⁴
 - a person or organisation not entitled under intestacy rules would be an appropriate beneficiary.²⁵

22 *Wills Act 1997* (Vic) s 26.

23 See, eg, *Payne v Smyth as litigation guardian for Welk* [2010] QSC 45 (22 February 2010); *Re Sultana* [2010] NSWSC 915 (16 August 2010); *AB v CB* [2009] NSWSC 680 (20 July 2009); *Deecke v Deecke* [2009] QSC 65 (1 April 2009); *Hoffman v Waters* [2007] SASC 273 (20 July 2007); *Bryant v Blake* [2004] SASC 369 (19 November 2004). See also: Victoria, *Parliamentary Debates*, Legislative Assembly, 23 May 2007, 1601 (Rob Hulls, Attorney-General).

24 See, eg, *Department of Human Services v Nancarrow* [2004] VSC 450 (1 November 2004).

25 See, eg, *Re C, a Patient* (1991) 3 All ER 866; *Department of Human Services v Nancarrow* [2004] VSC 450 (1 November 2004).

People who have lost capacity

- 3.19 The second, and more common, category of statutory wills cases is that of lost capacity. This refers to people who have had will-making capacity in the past, but have lost that capacity, usually due to dementia or an accident resulting in loss of capacity, such as acquired brain injury. In these cases the person may:
- have a prior valid will, but circumstances may have changed to make the will no longer appropriate (particularly where a previous beneficiary has behaved badly towards the incapacitated person)²⁶
 - have no valid will, but the results of intestacy would be inappropriate (for example, the estate would go to a family member who is not involved in the person's life or who has caused the incapacity, or to the Crown).²⁷
- 3.20 In these circumstances, the policy justification for authorising a statutory will is to ensure that the will reflects what the intentions of the person would be likely to be or might reasonably be expected to be, having regard to the current situation, as an 'expression of autonomy, exercised in a surrogate sense'.²⁸

The guiding principle

- 3.21 The task of determining the intentions of someone who has never had the capacity to make a will is quite different to that of determining the intentions of someone who once had the necessary capacity, and may have made a will in the past. In each jurisdiction, the court is assisted by a statutory guiding principle,²⁹ or central requirement for approval of a proposed will.
- 3.22 The guiding principle in Victoria since 2007 has been that the will must reflect 'what the intentions of the person would be likely to be or what the intentions of the person might reasonably be expected to be'.³⁰ Before then, the Court had to be satisfied that the proposed will 'accurately reflects the likely intentions of the person, if he or she had testamentary capacity'.³¹
- 3.23 The Court interpreted the original test restrictively and declined to authorise a statutory will in two instances.³² In the Court of Appeal case of *Boulton v Sanders*, the Court found that the test 'demands a substantial degree of precision and exactitude about the "likely intentions"'.³³ Due to the high threshold set by this case, and to ensure that the Court could authorise a will for a person who never had will-making capacity, the guiding principle was amended to its current form.³⁴

26 See, eg, *Plowright v Burge* [2005] VSC 490 (16 December 2005); *De Gois v Korp* [2005] VSC 326 (18 August 2005); *State Trustees Ltd v Hayden* (2002) 4 VR 229; *Hill v Hill* [2001] VSC 83 (28 March 2001); *Re Brown* [2009] SASC 345 (11 November 2009). This could include an application to revoke a prior will in favour of intestacy, see: *Public Trustee v Phillips* [2004] SASC 142 (28 May 2004). See also Matthew Groves, 'As the Court Wills' (2009) 83(10) *Law Institute Journal* 36, 36.

27 See, eg, *McKay v McKay* [2011] QSC 230 (10 August 2011); *Monger v Taylor* [2000] VSC 304 (2 August 2000); *Re Kelso* [2010] NSWSC 357 (22 April 2010); *Re the Estate of Crawley* [2010] NSWSC 618 (9 June 2010); *Re Fenwick* [2009] NSWSC 530 (12 June 2009).

28 Croucher, 'Statutory Wills and Testamentary Freedom', above n 5, 264.

29 New South Wales Law Reform Commission, *Wills for Persons Lacking Will-Making Capacity*, Report 68 (1992) [2.20].

30 *Wills Act 1997* (Vic) s 26(b).

31 The original s 26(b) was repealed and replaced by the *Wills Amendment Act 2007* (Vic) s 3, effective 15 August 2007.

32 *Boulton v Sanders* (2004) 9 VR 495; *Re Fletcher; ex parte Papaleo* [2001] VSC 109 (1 May 2001). Other Victorian cases prior to the 2007 amendment to the guiding principle did authorise statutory wills in lost capacity cases. See *State Trustees Ltd v Hayden* (2002) 4 VR 229; *De Gois v Korp* [2005] VSC 326 (18 August 2005); *Plowright v Burge* [2005] VSC 490 (16 December 2005).

33 *Boulton v Sanders* (2004) 9 VR 495, 516 [112], citing with approval *State Trustees v Hayden* (2002) 4 VR 229 (Mandie J).

34 Victoria, *Parliamentary Debates*, Legislative Assembly, 23 May 2007, 1600 (Rob Hulls, Attorney-General).

Other jurisdictions

- 3.24 The guiding principle for when a court may authorise a statutory will is a key area of difference between Victorian law and the law in other jurisdictions. However, there is little consistency across the other jurisdictions.
- 3.25 For example, depending on the jurisdiction, the court may authorise a proposed statutory will where it:
- is or *might* be one that *would* have been made by the proposed will-maker if he or she had capacity³⁵ (Northern Territory, Queensland)
 - is, or is *reasonably likely to be*, one that *would* have been made by the person if he or she had capacity (New South Wales, Australian Capital Territory and Tasmania)³⁶
 - is one which *could* be made by the person if they were not lacking capacity³⁷ (Western Australia)
 - would *accurately* reflect the *likely intentions* of the person³⁸ (South Australia and, before 2007, Victoria)
 - is in the best interests of the incapacitated person³⁹ (United Kingdom).
- 3.26 While some of these differences appear insignificant or semantic, they have led to different approaches in the way the courts deal with this type of substitute decision making.⁴⁰
- 3.27 Australian courts have urged caution in dealing with cases from the United Kingdom due to the significant differences in the guiding principle there.⁴¹ Differences in the guiding principle across Australian jurisdictions also make it more difficult for Victorian judges to draw guidance from decided cases in those jurisdictions.

National Committee for Uniform Succession Laws

- 3.28 The National Committee for Uniform Succession Laws recommended that the court should have the power to authorise a statutory will that ‘is or *might* be one that *would* have been made by the proposed will-maker if he or she had capacity’ (emphasis added).⁴²
- 3.29 It based its recommendation on draft Victorian legislation that was not subsequently adopted in Victoria. Victoria chose to follow South Australia instead, before amending the principle in 2007.
- 3.30 However, the principle recommended by the National Committee has been adopted by the Northern Territory and Queensland.

35 National Committee for Uniform Succession Laws, above n 2; *Wills Act 2000* (NT) s 21(b); *Succession Act 1981* (Qld) s 24(d).

36 *Succession Act 2006* (NSW) s 22(b); *Wills Act 1968* (ACT) s 16E(b); *Wills Act 2008* (Tas) s 24(b).

37 *Wills Act 1970* (WA) s 42(1)(b).

38 *Wills Act 1936* (SA) s 7(3)(b). For judicial criticism of this principle as too difficult to achieve, see: *Hoffman v Waters* [2007] SASC 273 (20 July 2007) [30].

39 *Mental Capacity Act 2005* (UK) ss 1(5), 4.

40 Rosalind Croucher, ‘“An Interventionist, Paternalistic Jurisdiction”? The Place of Statutory Wills in Australian Succession Law’ (2009) 32(3) *University of New South Wales Law Journal* 674, 681.

41 See, eg, *Boulton v Sanders* (2004) 9 VR 495, 500 [17]; *Re Fenwick* [2009] NSWSC 530 (12 June 2009) [148]; *Re Fletcher, ex parte Papaleo* [2001] VSC 109 (1 May 2001) [20]; *McKay v McKay* [2011] QSC 230 (10 August 2011) [79].

42 National Committee for Uniform Succession Laws, above n 2, cl 21(b).

Should Victoria adopt the National Committee's recommendation?

- 3.31 The Commission is required to have regard to, and conduct specific consultation on, relevant recommendations made by the National Committee. The terms of reference also point out that state and territory Ministers have agreed to adopt the National Committee's recommendations with the aim of maximising national consistency. In the absence of evidence that the Victorian approach has any advantages over the National Committee's recommendation, the Commission is guided by the principle that national consistency is desirable.
- 3.32 Arguably, the Victorian approach has advantages over the National Committee's recommendation.
- 3.33 There are two limbs to the guiding principle recommended by the National Committee. The proposed will must be one that either:
- *would* have been made by the proposed will-maker, or
 - *might* have been made by the proposed will-maker.
- 3.34 The difficulty with the principle is that it arguably does not adequately cover cases where the person has never had the necessary capacity to make a will. The first limb would not necessarily cover such cases, having regard to the reasoning in *Boulton v Sanders*, because it requires a high level of certainty about the person's intentions. The second limb may not cover all nil capacity cases either: how can a court determine what a person who never had capacity *might* have done? Nevertheless the Commission is not aware that difficulties have arisen in this context in either Queensland or the Northern Territory.
- 3.35 The Victorian test ('what the intentions of the person would be likely to be or what the intentions of the person might reasonably be expected to be') is arguably more objectively expressed.
- 3.36 The Commission seeks comments on which of the two guiding principles is preferable:
- where the proposed will 'is or might be one that would have been made by the proposed will-maker if he or she had capacity' (as recommended by the National Committee and adopted by Queensland and the Northern Territory), or
 - where the proposed will reflects 'what the intentions of the person would be likely to be or what the intentions of the person might reasonably be expected to be if he or she had testamentary capacity' (current Victorian approach).

Question

W13 Should Victoria adopt the National Committee's recommended guiding principle for authorising a statutory will or retain the current principle?

Involvement of the incapacitated person in the hearing

- 3.37 The Commission has recently recommended, in relation to guardianship laws, that those making decisions on behalf of a person without capacity should use a ‘substituted judgment’ approach. This includes, among other things, acting in consultation with the person and encouraging the person to participate in decisions as far as is reasonably possible.⁴³
- 3.38 In Victoria, the person on whose behalf a statutory will is proposed is entitled to appear when the application is considered by the court.⁴⁴ However, there is no statutory requirement that the person be involved in the proceedings if possible, or even informed of them. The legislation imposes no obligations on the applicant to provide the incapacitated person with information or seek to involve them in the decision.⁴⁵
- 3.39 Approaches taken in other jurisdictions suggest ways of providing incapacitated persons with a better opportunity to participate in statutory wills proceedings in Victoria.
- 3.40 In the United Kingdom, the incapacitated person must be given the opportunity to participate in the decision if possible.⁴⁶ This requirement is consistent with the rights of persons with a disability as outlined in the United Nations Convention on the Rights of Persons with Disabilities.
- 3.41 Comparable legislation in New South Wales and the Australian Capital Territory specifies that the court may order separate representation for the incapacitated person.⁴⁷ This may occur where it seems that the interests of the incapacitated person and the applicant are in conflict.⁴⁸
- 3.42 In many if not all instances, the degree of incapacity will be such that, without the appointment of a litigation guardian, the person will not be able to meaningfully participate in the decision. In other instances, however, a person may be able to communicate and express preferences.
- 3.43 Of the two approaches outlined above, that taken by New South Wales and the Australian Capital Territory caters both for people who are unable to meaningfully participate in the proceedings and for those who can. It provides for their interests to be represented in all cases. While the approach in the United Kingdom ensures that those who can participate have the opportunity to do so, it does not extend to those who cannot.
- 3.44 However, while separate representation may allow for greater involvement of the incapacitated person, it may lead to increased costs and time spent in applications.

Question

W14 Should the provisions of the *Wills Act 1997* (Vic) concerning statutory wills specify that the court may order separate representation for the incapacitated person (rather than stating that the incapacitated person is entitled to appear on the application)?

43 Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) 399.

44 *Wills Act 1997* (Vic) s 29(a). See also *Wills Act 1936* (SA) s 7(7). Under s 29 other persons are also entitled to appear: an Australian legal practitioner representing the person (s 29(b)), an enduring power of attorney holder (s 29(c)), or a guardian or administrator of the person (s 29(d)).

45 Of course, it will always be open to the court to direct that such action be taken.

46 *Mental Capacity Act 2005* (UK) c 9, s 4(4).

47 *Succession Act 2006* (NSW) s 25; *Wills Act 1968* (ACT) s 16H.

48 *AB v CB* [2009] NSWSC 680 (20 July 2009) [13]–[14].

Accessibility of the statutory will process

- 3.45 Over the 15 years that the statutory will provisions have been operating in Victoria, approximately 32 wills have been authorised by the Court—an average of between two and three wills per year. This indicates that the scheme is not being used by those that it is intended to assist, particularly given that there are thousands of people of full age in Victoria who lack capacity to make or change a will.

Possible barriers

- 3.46 The Commission is unsure why the provisions are so rarely used but has identified a number of possible barriers to making an application for a statutory will in circumstances where it may seem appropriate to do so:
- The fear of incurring costs may be a deterrent against making an application for a statutory will. The Commission has surveyed all solicitors who have made successful statutory will applications in Victoria. The results indicate that the average cost of an uncontested statutory will application is \$7600. Where an application is contested, the cost can be significantly greater, with the most expensive application costing approximately \$40,000.
 - The two-stage process for making an application⁴⁹ may give the impression that the application process is more difficult than it actually is. In practice, there is only one hearing.
 - Prospective applicants may not have access to information that would alert them to the possibility that a statutory will may be desirable. For example, an administrator appointed by the Victorian Civil and Administrative Tribunal (VCAT) may not be aware that a represented person has a will, or be familiar with the contents of a will they do know about, or perceive that the results of an intestacy would be inappropriate. Even where a person is aware that a current will is inappropriate, they may not have access to other relevant information such as the contact details of family members or information about the person's assets and financial affairs generally.
 - As applications are not often made, many members of the legal or any other relevant profession may not be aware of the possibility of applying for a statutory will. It has been suggested to the Commission that legal practitioners are more familiar with making applications for family provision and are likely to advise clients who would have a strong claim for a share of the estate to apply under that scheme rather than make a statutory will application while the incapacitated person is alive.

Options for improving accessibility

Remove reference to a two-stage application process from the Wills Act

- 3.47 There are various options available for making the statutory will provisions simpler, cheaper and more accessible. One possibility would be to amend the legislation to remove the two-stage application process, which is not used in practice and may deter those unfamiliar with the process from making an application.
- 3.48 The two-stage process is intended to guard against unmeritorious applications, particularly baseless claims that a person lacks testamentary capacity.⁵⁰ However, arguably this purpose may be adequately served by the prospect of having to pay the costs of an unsuccessful application.

49 *Wills Act 1997* (Vic) s 21(2). However, s 27(2) empowers the court to determine that the application for leave to apply for an order under s 21 proceed as an application for such an order.

50 *Boulton v Sanders* (2004) 9 VR 495, 499 [11]; *Monger v Taylor* [2000] VSC 304 (2 August 2000) [22].

3.49 As Justice DeBelle pointed out when commenting on similar provisions in South Australia, the costs of an application are substantial and, where a frivolous, vexatious or unmeritorious application is made, the applicant will be required to pay costs. Justice DeBelle suggested that this is a sufficient disincentive against unmeritorious claims and that a two-stage process is unnecessary.⁵¹

Hear applications at VCAT rather than in the Supreme Court

3.50 Another possible reform may be for applications for statutory wills to be decided in the Guardianship List of VCAT rather than in the Supreme Court. In Tasmania, the Guardianship and Administration Board may make a will for a person who lacks capacity where the person does not have an existing will.⁵²

3.51 Possible advantages of this could include:

- Reduced costs and formality. For example, almost all applications for a statutory will in the Supreme Court involve an appearance by a barrister. This would not be necessary at VCAT.
- VCAT members have relevant experience in dealing with the affairs of persons lacking capacity.
- Compared with Supreme Court proceedings, there would be greater visibility of the procedure in the Guardianship List among those working with persons lacking capacity.

3.52 A possible disadvantage is that unlike Supreme Court judges, VCAT members do not have opportunity to develop expertise in succession law.

Permit applications to be considered by a judge in chambers

3.53 In New South Wales, statutory will applications that are not opposed may be dealt with on the papers by a judge in chambers, in accordance with the *Civil Procedure Act 2005* (NSW).⁵³ There is therefore no need for counsel to appear and make submissions and this presumably reduces costs of applications. There is no equivalent practice in Victoria.

Questions

W15 How can the statutory will procedure be made more accessible? In particular, would any of the following reforms be desirable?

- (a) Remove reference to the two-stage application process for statutory wills from the *Wills Act 1997* (Vic).
- (b) Have applications for statutory wills heard in the Guardianship List of the Victorian Civil and Administrative Tribunal rather than in the Supreme Court.
- (c) Encourage judges to decide unopposed statutory will applications on the papers without a hearing in open court.

W16 Are any other changes desirable to the statutory will provisions of the *Wills Act 1997* (Vic)?

51 *Hoffman v Waters* [2007] SASC 273 (20 July 2007) [27].

52 *Wills Act 2008* (Tas) ss 29–38.

53 *Re Fenwick* [2009] NSWSC 530 (12 June 2009) [263]; *Civil Procedure Act 2005* (NSW) ss 71(d), (f).

Determining who pays for the application

- 3.54 There are no costs provisions that are specific to statutory will applications in the Wills Act or the court rules. Costs are in the discretion of the court.
- 3.55 The starting point for determining who will pay the costs of an application is therefore the general rule that 'costs follow the event', which means in effect that most of the costs of the successful party are paid by the unsuccessful party.
- 3.56 However, the operation of this rule is not clear where a matter is successful but not contested. In this case, the costs are paid either from the 'estate' of the incapacitated person or by the applicant.⁵⁴
- 3.57 A key difference in statutory will applications from usual succession law proceedings is that the incapacitated person is still alive and has care needs due to their lack of capacity. Any order that costs come from the estate of the incapacitated person will deplete the assets of a living person. This factor will weigh heavily with the court where the estate is modest, and may lead to a successful applicant being denied costs out of the incapacitated person's estate.
- 3.58 Given this key difference, Victorian courts have developed specific principles related to costs in statutory will applications. In the case of successful applications, the court has expressed concern that 'the will-maker is still alive and entitled, so long as she lives, to enjoy her assets undiminished by the burden of paying the costs of those whose claims anticipate her demise'.⁵⁵ Applicants who stand to benefit from the proposed will, whether or not they are successful, may be required to meet their own costs.
- 3.59 Justice Byrne noted that where a successful applicant is a beneficiary 'her costs in due course may be recouped from the estate which she may inherit'.⁵⁶ The Court of Appeal has stated:
- Where an application is brought by and for the benefit of persons including the applicant, rather than by a disinterested administrator, the ordinary principles governing costs in adversarial litigation properly apply. It should not be presumed that the estate, rather than an unsuccessful applicant, will be ordered to pay the costs of the proceeding merely because there is 'a fair case of dispute'.
- In determining whether it is appropriate to exercise the discretion to order that the costs of an application ... be paid from the estate of a living but incapacitated person, the avoidance of any potentially adverse impact on that vulnerable person's long-term security and welfare will always be an important consideration.⁵⁷
- 3.60 However, where an application is brought by an administrator who receives no benefit under the proposed will, the court will usually allow the administrator costs from the represented person's estate. Justice Hansen has stated that a disinterested administrator 'would at least normally be entitled to recoup his costs out of the estate of the represented person. That does not mean that where appropriate he may not recover costs from another party'.⁵⁸

54 The term 'estate' in this context is used to refer to the assets of the incapacitated person.

55 *Hill v Hill (No 2)* [2001] VSC 135 (22 May 2001) [8].

56 *Ibid* [9].

57 *Boulton v Sanders* (2004) 9 VR 495, 521 [153]–[154].

58 *Plowright v Burge* [2006] VSC 69 (2 March 2006) [10].

- 3.61 Following a review of 25 successful applications for statutory wills in Victoria, the Commission has found that:
- Costs were paid from the estate of the incapacitated person in 15 cases. Ten of these matters involved applicants who received a benefit under the statutory will, while four involved ‘disinterested’ applicants such as administrators.⁵⁹
 - No order for costs was made in nine cases (meaning that the applicant and the defendant, if the matter was contested, paid their own costs).⁶⁰
 - Costs were ordered to be paid by an unsuccessful defendant in one case.
- 3.62 As outlined above, Victorian courts have developed some general principles in relation to who pays the costs of statutory will applications. These principles are based on the general costs rules for civil litigation.
- 3.63 The Commission is interested in whether the costs regime broadly described above is considered fair, or whether more specific costs rules, set out in legislation, should apply to this type of application.
- 3.64 The Commission notes that no other Australian jurisdiction has specific costs provisions relating to statutory will applications, and that the judgments of the courts in relation to costs have been developing in a consistent way across Australia.⁶¹
- 3.65 In particular, the Commission is interested in receiving comments about whether the costs principles should be different depending on whether the applicant is disinterested (for example, an administrator who does not receive a benefit under the proposed will) or not (for example, a child of the incapacitated person seeking a large share of the estate under the proposed will).

Question

W17 Should the *Wills Act 1997* (Vic) include costs provisions specific to statutory will applications?

If so, what should the costs provisions provide? Should the legislation distinguish between interested and disinterested applicants?

59 For a reported case where the applicant’s costs were paid from the estate see: *Plowright v Burge* [2006] VSC 69 (2 March 2006) [14].

60 For reported cases where parties paid their own costs in successful applications see: *Hill v Hill (No 2)* [2001] VSC 135 (22 May 2001); *Monger v Taylor* [2000] VSC 304; *Re Palmer* [2003] VSC 21.

61 See *Re Will of Jane [No 2]* [2011] NSWSC 883 (12 August 2011); *Hoffman v Waters* [2007] SASC 273 (20 July 2007); *Re Keane; Mace v Malone (No 2)* [2011] QSC 98 (25 March 2011); *RAK* [2009] SASC 288 (11 September 2009).

4. Ademption

Introduction

- 4.1 The Commission has been asked to review and report on ‘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’.
- 4.2 ‘Ademption’ is a legal term that describes what happens when something that is left as a gift in a will is no longer owned by the will-maker at the time of their death. This can occur in a number of ways:
- The gifted property has been sold (for example, the family home has been sold to fund aged care).
 - The gifted property has been stolen, lost or destroyed (for example, through fire or other natural disaster where there may be insurance payable).
 - The gifted property has changed from the way it was described in the will (for example, the will refers to shares in a particular company and the company has been taken over by another company).
- 4.3 Ademption can be avoided through careful will drafting. For example, a beneficiary can be left a percentage of the estate after the assets are sold rather than being left particular property, or a will can state that the beneficiary should also be entitled to the proceeds of the sale or insurance proceeds of a particular item of property.¹
- 4.4 However, ademption problems often occur where the will is made at home rather than with the assistance of a solicitor.² It is important to ensure that the rule does not operate unfairly and allows a will-maker’s intentions to be realised as far as possible, including those expressed in home-made wills.
- 4.5 The Commission is seeking views on the following possible reforms:
- changing the ademption rule to allow for consideration of the will-maker’s intentions
 - providing an exception to the ademption rule for actions taken by a person acting under an enduring power of attorney³
 - allowing access to a person’s will by a person acting under an enduring power of attorney.

1 Alberta Law Reform Institute, *Wills and the Legal Effect of Changed Circumstances*, Final Report No 98 (2010) 155; Matthew Groves, ‘Adeply Avoiding Ademption’ (2010) 84(8) *Law Institute Journal* 36, 39; Mary Lundwall, ‘The Case Against the Ademption by Extinction Rule: A Proposal for Reform’ (1993–94) 29 *Gonzaga Law Review* 105, 127; Allan Swan and Chris Groszek, ‘The Widening Scope and Uncertainty of the Doctrine of Ademption’ (2012) 14 *Retirement and Estate Planning Bulletin* 138, 139.

2 David Onega, ‘Hegel’s Hobbled Heritage: The Ohio Supreme Court’s Use of the Doctrine of Ademption to Prey on the Incompetent’ (1997) 26 *Capital University Law Review* 201, 224; Mary Lundwall, ‘The Case Against the Ademption by Extinction Rule: A Proposal for Reform’ (1993–94) 29 *Gonzaga Law Review* 105, 126.

3 An exemption already exists in relation to actions taken by an administrator. See *Guardianship and Administration Act 1986* (Vic) s 53(1).

The ademption rule

Current law—the identity approach

- 4.6 In Victoria, ademption is part of the common law—the *Wills Act 1997* (Vic) does not itself deal with ademption.
- 4.7 The law distinguishes between specific and general gifts when interpreting the provisions of a will. A specific gift is of some property that is owned by the will-maker and is described in a way that separates it from other assets, for example ‘my car’. A general gift is of something which the will-maker directs shall be procured by the executor or the value of which shall be paid out of the estate by the executor.⁴
- 4.8 Ademption applies only to specific gifts. When determining whether ademption has occurred, the court asks two questions:
- is the gift specific (rather than general)?
 - if it is a specific gift, is the gifted property in the estate?
- 4.9 If the gifted property is not in the estate, the gift fails. The beneficiary receives nothing and cannot receive the cash equivalent of the gifted property.⁵
- 4.10 This rule is clear and easy to apply and avoids a case-by-case determination of the will-maker’s intent.⁶ It is based on the assumption that, if a specific gift is no longer in the estate, the will-maker intended that the beneficiary would receive nothing in its place.⁷ If the will-maker did not intend this, they could have amended their will after the item was disposed of.⁸
- 4.11 The rule as it applies in Victoria is sometimes described as reflecting the ‘identity approach’ because, unless the specific gift as described in the will contemplates property that can be identified in the estate, the gift fails.

The effect of the identity approach to ademption

- 4.12 Although it produces a level of certainty, the identity approach to ademption is inherently inflexible and thus is capable of producing unjust results.
- 4.13 Ademption may operate harshly and contrary to the likely intentions of the will-maker.⁹ The law assumes that a will-maker would intend a gift of specific property to fail if the property is no longer owned by them. However, in many cases, the will-maker may simply not have thought about what they would like to happen in this event.¹⁰

4 *Re Plowright* [1971] VR 128.

5 *Ashburner v MacGuire* [1786] 2 BRO. C. C. 62, 63; Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death: Text and Cases* (LexisNexis Butterworths, 3rd ed, 2009) 470.

6 Alberta Law Reform Institute, *Wills and the Legal Effect of Changed Circumstances*, Final Report No 98 (2010) 151; Christina Walsh, ‘A Costly Application of Strict Statutory Construction: The Ohio Supreme Court’s Interpretation of Ohio’s Nonademption Statute’ (1996–7) 28 *University of Toledo Law Review* 631, 631; David Onega, ‘Hegel’s Hobbled Heritage: The Ohio Supreme Court’s Use of the Doctrine of Ademption to Prey on the Incompetent’ (1997) 26 *Capital University Law Review* 201, 206.

7 Christina Walsh, ‘A Costly Application of Strict Statutory Construction: The Ohio Supreme Court’s Interpretation of Ohio’s Nonademption Statute’ (1996–7) 28 *University of Toledo Law Review* 631, 634.

8 David Onega, ‘Hegel’s Hobbled Heritage: The Ohio Supreme Court’s Use of the Doctrine of Ademption to Prey on the Incompetent’ (1997) 26 *Capital University Law Review* 201, 206.

9 Note, ‘Ademption and the Testator’s Intent’ (1961) 74 *Harvard Law Review* 741, 746; Alberta Law Reform Institute, *Wills and the Legal Effect of Changed Circumstances*, Final Report No 98 (2010) 151; Walsh, above n 7, 631; United States Uniform Probate Code (2006) comment on § 2-606; Mary Lundwall, ‘The Case Against the Ademption by Extinction Rule: A Proposal for Reform’ (1993–94) 29 *Gonzaga Law Review* 105, 108; *Re Morton* [1963] VR 40, 53–4.

10 Mary Lundwall, ‘The Case Against the Ademption by Extinction Rule: A Proposal for Reform’ (1993–94) 29 *Gonzaga Law Review* 105, 126.

4.14 Where a specific item has sentimental rather than economic value, it may be correct to assume that the will-maker intended no alternative gift (for example, a gift of a fishing rod or a photograph album).¹¹ However, ademption often arises where the gift is of significant economic value, such as a house, a car or shares in a company.¹² It may be unrealistic to assume that a will-maker will remember to change their will when such property is disposed of. Sometimes change may not be possible, ademption having occurred because, for example, the property was sold by someone else without the will-maker's knowledge or the property was destroyed in an accident that caused the will-maker's death.¹³

4.15 Due to the sometimes harsh operation of the rule, the common law has created various exceptions and ameliorating approaches. One commentator has stated:

It is to be expected that when courts enunciate such an unsatisfactory rule as the one which totally eliminates intention as a factor in determining ademption, they will create even more unsatisfactory exceptions to undo the draconian results of such a rule ... Many cases are decided on fortuitous word choices in wills. In every area there are virtually identical cases reaching opposite results. The conclusion is a rule that is neither logical nor easy to apply.¹⁴

4.16 Common law principles that seek to avoid the effect of ademption include:

- A presumption in favour of interpreting a gift as a general rather than a specific legacy.¹⁵ Specific legacies are subject to ademption; a general legacy is not. For example, a 'legacy equal to 15 per cent of the market value of the house property' was held to be a gift of an amount of money rather than a share in the house.¹⁶
- If the property has changed in 'name and form only' but is substantially the same thing, ademption will not occur.¹⁷ For example, ademption may be avoided where money held in a particular bank account has been moved to another bank account, or a mink coat has been 'converted' into a stole.¹⁸ Gifts of stocks or shares may be saved in this way where there has been a reorganisation, merger or corporate name change.¹⁹
- A wrongful act by a third party will usually not adeem a gift. A fraudulent, tortious or unauthorised act leading to the disposition of property without the will-maker's knowledge has been held to be an exception to ademption.²⁰ For example, where a property is sold by a person seeking to exercise a power of attorney and the conditions for the exercise of the power have not been met, there will be no ademption.²¹
- Property that is lawfully sold on behalf of a will-maker without the will-maker's knowledge may operate as an exception to the ademption principle. This is discussed in more detail below.

11 Ibid.

12 Note, 'Ademption and the Testator's Intent' (1961) 74 *Harvard Law Review* 741.

13 Alberta Law Reform Institute, *Wills and the Legal Effect of Changed Circumstances*, Final Report No 98 (2010) 154; Omega, above n 8, 206; Lundwall, above n 10, 109. See, eg, *Durrant v Friend* (1852) 5 DeG & SM 342, where a gift of property lost at sea in an accident that caused the death of the will-maker was adeemed.

14 Lundwall, above n 10, 113–4.

15 *Re Plowright* [1981] VR 128; *McBride v Hudson* (1962) 107 CLR 604, 616–19; Note, above n 12, 743; Omega, above n 8, 207.

16 *Moylan v Rickard* [2010] QSC 327 (6 September 2010).

17 *Oakes v Oakes* [1852] 68 Eng Rep 680, 683; *Slater v Slater* [1907] 1 Ch 665, 672; *McBride v Hudson* (1962) 107 CLR 604, 613; *Pohlner v Pfeiffer* (1964) 112 CLR 52, 79; *Re Blake* (2009) 25 VR 27, 35 [43]; *RL v NSW Trustee and Guardian* [2012] NSWCA 39 (19 March 2012); *NSW Trustee and Guardian v Ritchie* [2011] NSWSC 715 (4 July 2011).

18 Note, above n 12, 744.

19 Lundwall, above n 10, 112; Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death: Text and Cases* (LexisNexis Butterworths, 3rd ed, 2009) 470.

20 *Jenkins v Jones* (1866) LR 2 Eq 323, 328; *Earl of Shaftsbury v Countess of Shaftsbury* [1716] 2 Vern 748; *Power v Power* [2011] NSWSC 288 (14 April 2011); *Johnston v Maclarn* [2002] NSWSC 97 (27 February 2002) [17]; *Banks v National Westminster Bank* [2005] EWHC 3479 (Ch) [10], [29]; *RL v NSW Trustee and Guardian* [2012] NSWCA 39 (19 March 2012).

21 *Power v Power* [2011] NSWSC 288 (14 April 2011).

Option for reform—the intention approach

- 4.17 An alternative to the identity approach to ademption would be an ‘intention approach’.
- 4.18 The law of ademption in Roman Law was based on the intention approach; the court asked: ‘did the will-maker wish the beneficiary to have the value of the property even if it no longer existed at the time of death?’²² English courts rejected this approach in favour of the identity approach to ensure greater certainty. However, some commentators have advocated a return to the intention approach to better promote the likely intentions of the will-maker and therefore provide greater fairness between beneficiaries.²³

Presumptions

- 4.19 In order to retain some certainty and yet ensure a level of flexibility, the intention approach could reflect either:
- a presumption against ademption,²⁴ or
 - a presumption in favour of ademption.
- 4.20 The presumptions would be rebuttable. In the first case, the presumption would be rebuttable by evidence that the will-maker would not have wanted the designated beneficiary to have derivative rights in the event of sale. In the second case, the presumption would be rebuttable by evidence that the will-maker would not have intended ademption to occur in the event of sale.

Determining the will-maker’s intention

- 4.21 In order to determine a will-maker’s intention the court would look at:
- The provisions of the will as a whole. For example, if the will leaves a house to one child and the residue to another, it is unlikely that the will-maker would intend the first child to receive nothing if the house were sold.²⁵
 - The nature of the specific gift and whether its value is sentimental or economic (for example, a fishing rod compared to a house)—did the will-maker intend to benefit the person economically?²⁶ Where a gift is both sentimental and valuable, further inquiry will be required.²⁷
 - The beneficiary of the specific gift. Where the beneficiary is a close family member or friend, it is arguably less likely that the will-maker would intend the gift to be adeemed. Where the beneficiary is an institution, ademption may be more likely (for example, where a particular painting is left to a museum, it is unlikely the will-maker would want the museum to take a cash gift as an equivalent).²⁸
 - Whether granting a monetary sum instead of the specific gift would conflict with other intentions of the will-maker, for example, by reducing the amount available in the estate for other gifts.²⁹

22 Alberta Law Reform Institute, *Wills and the Legal Effect of Changed Circumstances*, Final Report No 98 (2010) 153; Note, above n 12, 741.

23 Note, above n 12; Lundwall, above n 10; Onega, above n 8.

24 The US Uniform Probate Code includes a ‘mild presumption against ademption’. See *United States Uniform Probate Code* (2006) commentary on § 2-606. As well as this ‘intention approach’ the Uniform Probate Code also includes exceptions to the ademption rule so that a specific beneficiary may obtain: a balance of purchase price owed at the time of death on sale of the gift, and unpaid insurance proceeds where the gift has been destroyed or damaged and the net sale price of a gift that is sold by a person acting as an agent for a will-maker who is incapacitated: s 2-606.

Lundwall, above n 10, 126.

25 Note, above n 12, 747.

26 Lundwall, above n 10, 126; Note, above n 12.

27 Lundwall, above n 10, 127; Note, above n 12, 748.

28 Note, above n 12, 749.

Questions

- W18** Should the ademption rule be changed to one based on the will-maker's intentions? If so, in what way? For example:
- Should the *Wills Act 1997* (Vic) provide a presumption against ademption?
 - Should the *Wills Act 1997* (Vic) provide a presumption in favour of ademption that would allow a beneficiary of a specific gift to present evidence that the will-maker would not have intended ademption?
- W19** What effect (if any) would changing the ademption rule to one based on the will-maker's intentions have on:
- the cost and time involved in administering an estate?
 - the fairness of the outcome?

Acts by administrators appointed by the Victorian Civil and Administrative Tribunal

- 4.22 One legislative exception to ademption that applies in Victoria is for actions of administrators appointed by the Victorian Civil and Administrative Tribunal (VCAT). Section 53(1) of the *Guardianship and Administration Act 1986* (Vic) provides that:
- A represented person and her or his heirs, executors, administrators, next of kin, devisees, legatees and assigns have the same interest in any money or other property arising from or received in respect of any sale, mortgage, exchange, partition or other disposition under the powers given to an administrator by an order of the Tribunal which have not been applied under those powers as she, he or they would have had in the property the subject of the sale, mortgage, exchange, partition or disposition if no sale, mortgage, exchange, partition or disposition had been made.
- 4.23 In its recent review of guardianship laws, the Commission recommended that a similar provision be included in new guardianship legislation and extended to intestacies and joint assets.³⁰
- 4.24 The Commission has been informed that there is some uncertainty regarding the operation of section 53, in particular:
- what administrators should do with any interest earned on sale proceeds
 - what the accounting obligations are for an administrator, for example, whether any sale proceeds need to be kept separately.

- 4.25 The next section outlines some alternative ways of providing a legislative exception for actions of substitute decision makers. The Commission believes that an exception for actions of administrators should be in the same terms as an exception for persons holding an enduring power of attorney.

Question

W20 Have you experienced any difficulties with the operation of section 53 of the *Guardianship and Administration Act 1986* (Vic)?

Acts by persons holding an enduring power of attorney

- 4.26 Whether Victoria retains the identity approach or moves to an intention approach, one area where an additional exception to the ademption rule seems justified is where property has been disposed of by a person acting on the will-maker's behalf, such as a person with an enduring power of attorney.³¹
- 4.27 It is becoming increasingly common for the family home to be sold to fund aged care, often by a person acting on the will-maker's behalf when the will-maker has lost capacity.³² In a recent Victorian case, Justice Hargrave stated:
- People are living longer than in the past and their physical health is outlasting their mental capacity. It is commonplace for properties owned by incapacitated persons to be sold under the authority of enduring powers of attorney, to fund accommodation bonds and other necessities and comforts for an ageing population.³³

Current law

- 4.28 In Victoria, where a VCAT-appointed administrator sells a represented person's asset, any beneficiary under the represented person's will has the same interest in any money or other property gained as a result of sale as if the property had not been sold (as outlined in the previous section). However, there is no similar legislative provision where the person is acting under an enduring power of attorney rather than as an administrator.
- 4.29 The Commission has been informed that persons acting under an enduring power of attorney who need to sell the family home are often advised to seek appointment by VCAT as an administrator before selling the property. This is one way to ensure that any testamentary gift of the property is not adeemed.
- 4.30 In 2010, the Victorian Parliamentary Law Reform Committee completed an inquiry into powers of attorney legislation. Participants in this inquiry suggested that gifts made in a will should be protected from actions taken by persons acting under a power of attorney. The report recommended further consultation on this issue.³⁴

31 See, eg, Matthew Groves, 'Adeply Avoiding Ademption' (2010) 84(8) *Law Institute Journal* 36; Christopher Groszek, 'Going, Going, Gone: Avoiding Ademption when Assets are Sold' (2012) 86(11) *Law Institute Journal* 48.

32 Matthew Groves, 'Adeply Avoiding Ademption' (2010) 84(8) *Law Institute Journal* 36, 36; *Simpson v Cunning* [2011] VSC 466 (22 September 2011) [45]; Allan Swan and Chris Groszek, 'The Widening Scope and Uncertainty of the Doctrine of Ademption' (2012) 14 *Retirement and Estate Planning Bulletin* 138, 138.

33 *Simpson v Cunning* [2011] VSC 466 (22 September 2011) [45].

34 Victorian Parliamentary Law Reform Committee, *Inquiry into Powers of Attorney* (2010) 203–4.

- 4.31 Recently, Victorian judges have recognised an exception to the ademption rule where a person is acting under an enduring power of attorney.³⁵ In *Simpson v Cunning*, Justice Hargrave not only identified an exception but also called for legislative reform:

The issue requires urgent legislative intervention to resolve any doubt. In the meantime, I would follow *Re Viertel* [a Queensland decision] and recognise a further exception to the ademption principle whenever there is an authorised sale by an attorney in circumstances where: (1) the deceased lacked testamentary capacity; (2) the Court is satisfied that the deceased, if possessed of testamentary capacity, would have intended the donee of the asset in the will to have the remaining proceeds of sale; and (3) the remaining proceeds of sale can be identified with sufficient certainty.³⁶

National Committee for Uniform Succession Laws

- 4.32 The National Committee for Uniform Succession Laws considered the possibility of providing an exception to the ademption rule where a specific gift has been sold by an enduring attorney. The proposal considered by the National Committee provided that the beneficiary would receive an amount equal to the net proceeds of sale of the property and it would be distributed in the same manner as if it were a specific gift.³⁷ However, the National Committee did not make any recommendations in this area, stating that the ademption rule as a whole should be reviewed as a discrete project.³⁸ This project has not been undertaken.

Other jurisdictions

- 4.33 The courts in Western Australia have recognised an exception to the ademption rule where property is disposed of by an enduring attorney.³⁹
- 4.34 However, in New South Wales, Queensland and the United Kingdom, the courts have held that the ademption rule still applies to sale by an attorney where there is no legislative provision stating otherwise.⁴⁰ In the United Kingdom, it has been recognised that this approach can lead to harsh results. However, it has been said that it is up to Parliament to provide an exception to the rule.⁴¹
- 4.35 Where legislation exists in Australia, it deals with actions of attorneys in different ways:
- In South Australia, a beneficiary under a will can apply to the Supreme Court where it appears that their share under the will has been affected by action under an enduring power of attorney, but only where the donor of the power lacked capacity at the time of the exercise of the power. The Supreme Court may make such orders as it thinks just 'to ensure that no beneficiary gains a disproportionate advantage or suffers a disproportionate disadvantage, of a kind not contemplated in the will'.⁴²

35 *Mulhall v Kelly* [2006] VSC 407 (3 November 2006); *Simpson v Cunning* [2011] VSC 466 (22 September 2011).

36 *Simpson v Cunning* [2011] VSC 466 (22 September 2011) [46].

37 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) 113.

38 *Ibid* 113–14.

39 *Re Hartigan* (Unreported, Supreme Court of Western Australia, Parker J, 9 December 1997).

40 *RL v NSW Trustee and Guardian* [2012] NSWCA 39 (19 March 2012); *NSW Trustee and Guardian v Bensley* [2012] NSWSC 655 (4 June 2012); *Orr v Slender* [2005] NSWSC 1175 (21 November 2005); *The Trust Company Ltd v Gibson* [2012] QSC 183 (29 June 2012); *Banks v National Westminster Bank* [2005] EWHC 3479 (Ch).

41 *Banks v National Westminster Bank* [2005] EWHC 3479 (Ch) [30].

42 *Powers of Attorney and Agency Act 1984* (SA) s 11A.

- In New South Wales, a beneficiary under the will of a person who executed a power of attorney has the same interest in surplus money or other property arising from the sale or other dealing with the property by the attorney as if the sale or other dealing had not taken place.⁴³ This provision is similar to the Victorian provision in relation to administrators. There is no requirement that the will-maker lacked capacity at the time of the dealing. There is no obligation on the attorney to keep a separate account of proceeds. In addition, the Supreme Court has the power to vary the operation of this provision if it considers it would result in a beneficiary gaining an unjust and disproportionate advantage or suffering an unjust and disproportionate disadvantage of a kind not contemplated by the will.⁴⁴
- In Queensland, a beneficiary may apply to the Supreme Court for compensation out of the estate where their benefit under a will or on intestacy has been lost due to an act of an attorney.⁴⁵ There is no requirement that the principal lacked capacity at the time of the sale or other dealing by the attorney.

4.36 In Canada, the Alberta Law Reform Institute and the British Columbia Law Institute have recently recommended a legislative exception to ademption for actions of attorneys where the donor of the power lacks capacity.⁴⁶

Options for reform

- 4.37 The following policy reasons have been suggested for providing an exception to the ademption rule for actions by persons acting under a power of attorney:
- It would be consistent with the exception for the actions of administrators.⁴⁷
 - Where there is no exception, this may influence the behaviour of the attorney in a way that does not benefit the incapacitated person. If the attorney knows the terms of the will, they may retain property gifted to them when it would be in the person's best interests to sell, or may sell property to defeat claims of others and increase the residuary estate.⁴⁸ In order to avoid this result, it is said that it is important that any exception to ademption should apply whether or not the proceeds can be traced.⁴⁹
 - An incapacitated person may be unaware of the disposal of the property and will not have the capacity to change their will to deal with this situation.⁵⁰
 - Attorneys and beneficiaries may all be children of the will-maker. Ademption can work unfairly in this situation.⁵¹

Legislative exception to ademption where person acting under power of attorney

- 4.38 While the courts in Victoria recognise an exception for attorneys, a legislative provision would arguably make the law more certain.
- 4.39 A legislative exception could be included in similar terms to the current exception for the actions of administrators under section 53(1) of the Guardianship and Administration Act as outlined in the previous section.
- 4.40 A better model may be provided by legislation that applies in other states. If Victoria were to adopt a different model for enduring powers of attorney, the Commission believes this should also apply to actions of administrators.

43 *Powers of Attorney Act 2003* (NSW) s 22.

44 *Ibid* s 23.

45 *Powers of Attorney Act 1998* (Qld) s 107. See also *Ensor v Frisby* [2009] QSC 268 (7 September 2009).

46 Alberta Law Reform Institute, *Wills and the Legal Effect of Changed Circumstances*, Final Report No 98 (2010) 165; British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework*, Report No 45 (2006) 49–50.

47 Matthew Groves, 'Adequately Avoiding Ademption' (2010) 84(8) *Law Institute Journal* 36, 39.

48 National Committee for Uniform Succession Laws, above n 37, 113; Walsh, above n 7, 649–50, 657–8; Omega, above n 8, 224.

49 Lundwall, above n 10, 116.

50 Groves, above n 47, 38.

51 *Ibid*.

- 4.41 The New South Wales legislative exception, set out at section 22 of the *Powers of Attorney Act 2003* (NSW), is broadly similar to section 53(1) of the Victorian Guardianship and Administration Act but refers to powers of attorney.⁵² Section 22 has effect subject to any order of the court made under section 23. These sections provide that:

22 Effect of adempments of testamentary gifts by attorney under enduring power of attorney

- (1) Any person who is named as a beneficiary (a named beneficiary) under the will of a deceased principal who executed an enduring power of attorney has the same interest in any surplus money or other property arising from any sale, mortgage, charge or disposition of any property or other dealing with property by the attorney under the power of attorney as the named beneficiary would have had in the property the subject of the sale, mortgage, charge, disposition or dealing, if no sale, mortgage, charge, disposition or dealing had been made.
- (2) The surplus money or other property arising as referred to in subsection (1) is taken to be of the same nature as the property sold, mortgaged, charged, disposed of or dealt with.

23 Supreme Court may make orders confirming or varying operation of section 22

- (1) On the application of a named beneficiary referred to in section 22 (1) or such other person as the Supreme Court considers has a proper interest in the matter, the Supreme Court may:
 - (a) make such orders and direct such conveyances, deeds and things to be executed and done as it thinks fit in order to give effect to section 22, or
 - (b) if it considers that the operation of section 22 (1) and (2) would result in one or more named beneficiaries gaining an unjust and disproportionate advantage, or suffering an unjust and disproportionate disadvantage, of the kind not contemplated by the will of the deceased principal—make such other orders as the Court thinks fit to ensure that no named beneficiary gains such an advantage or suffers such a disadvantage.
- (2) An order made by the Supreme Court under subsection (1) (b):
 - (a) may provide that it has effect as if it had been made by a codicil to the will of the deceased principal executed immediately before his or her death, and
 - (b) has effect despite anything to the contrary in section 22.

- 4.42 The New South Wales provisions have several advantages. They provide jurisdiction in the court to ensure that justice is done between beneficiaries when someone acting under an enduring power of attorney disposes of property that is the subject of a specific gift under a will. They also resolve the threshold question of whether an exception to the ademption rule arises in such circumstances. It should be noted that the New South Wales provision establishing the exception applies even though at the relevant time the donor of the power of attorney had capacity. Additionally, the New South Wales provision requires no special accounting by the holder of the power of attorney.

4.43 In South Australia, a beneficiary may apply to the Supreme Court where their share under a will has been affected by a person acting under an enduring power of attorney. Section 11A of the *Powers of Attorney and Agency Act 1984* (SA) states:

- (1) Where—
 - (a) the donor, or former donor, of an enduring power of attorney dies leaving a will; and
 - (b) the donor or former donor had, while the enduring power of attorney was in force, suffered a period of legal incapacity; and
 - (c) it appears at the death of the donor or former donor that, in consequence of any exercise of power by the donee of the enduring power of attorney during that period of incapacity, the share of any beneficiary under the will has been affected, the Supreme Court may, on application by any person who has, in the opinion of the Supreme Court, a proper interest in the matter, make such orders as it thinks just to ensure that no beneficiary gains a disproportionate advantage, or suffers a disproportionate disadvantage, of a kind not contemplated by the will, in consequence of the exercise of the donee's powers during the period of legal incapacity of the donor or former donor.

4.44 An advantage of this approach is that there is no need to determine a person's interest as being 'the same interest' in the property as they 'would have had' if the property had not been sold (as is the case in Victorian legislation for administrators). It may also allow for a distribution that would more accurately reflect the will-maker's intentions in the new circumstances. Additionally, it does not create any accounting obligations on persons acting under an enduring power of attorney and does not raise any issues for that person as to which funds to spend first on care during a person's lifetime. However, the disadvantage is that the determination requires a court hearing which will have cost implications for the estate. In addition, the provision does not resolve the question of whether a common law exception exists as contemplated by *Simpson v Cunning*⁵³ and like cases.

4.45 A further alternative to consider is the Queensland model, which allows a person to apply for 'compensation' rather than an order where a person has gained a 'disproportionate advantage' or suffered a 'disproportionate disadvantage' (as in South Australia and New South Wales). Section 107 of the *Powers of Attorney Act 1998* (Qld) provides:

- (1) This section applies if a person's benefit in a principal's estate under the principal's will, on intestacy, or by another disposition taking effect on the principal's death, is lost because of a sale or other dealing with the principal's property by an attorney of the principal.
 - (1A) This section applies even if the person whose benefit is lost is the attorney by whose dealing the benefit is lost.
- (2) The person, or the person's personal representative, may apply to the Supreme Court for compensation out of the principal's estate.
- (3) The court may order that the person, or the person's estate, be compensated out of the principal's estate as the court considers appropriate but the compensation must not exceed the value of the lost benefit.

- 4.46 This provision also has the advantage of allowing a determination based on the estate's current property, rather than seeking to determine what the beneficiary's interest 'would have been' if the property had not been sold. There is no obligation on the person selling under an enduring power of attorney to account for the proceeds separately and no need for the proceeds to be traceable. The disadvantages are the same as those referred to in relation to the South Australian legislation.

Exception for all acts under a power of attorney or only those where the person has lost capacity?

- 4.47 An additional issue to consider is that, depending on the terms of the document, a power of attorney may be used before a person has lost capacity (for example, where children informally take over an older person's financial decisions).⁵⁴ This is in contrast to the actions of an administrator appointed by VCAT. An administrator will only make financial decisions where the person does not have the capacity to make decisions independently.
- 4.48 Where a person retains will-making capacity, but an attorney exercises an enduring power of attorney to sell an asset, there may be less justification for an exception to the ademption rule, as the person could make a change to their will to deal with the ademption.⁵⁵ However, in practice this may be difficult or unlikely, particularly where an older person is gradually becoming less involved in their own financial affairs.⁵⁶
- 4.49 As noted above, in South Australia legislative modification to ademption only applies where the will-maker is suffering from legal incapacity. However, in New South Wales and Queensland the legislation applies regardless of whether the donor of the power of attorney had legal capacity at the time the property was sold or otherwise disposed of.

Obligations of a person acting under an enduring power of attorney where property is sold during the person's lifetime

- 4.50 In Victoria, an administrator appointed by VCAT must 'keep a separate account and record of the money or other property' where there has been a sale of property that is left as a specific gift in the will. If a similar anti-ademption provision is to apply to those acting under an enduring power of attorney, a similar requirement to account for the funds may be necessary. Doubt exists as to whether section 53 of the Guardianship and Administration Act requires an accounting in respect of the proceeds of sale only or whether the accounting extends to income generated by and capital gains attributable to the proceeds of sale.

54 Lundwall, above n 10, 117.
55 See Walsh, above n 7, 657.
56 Lundwall, above n 10, 117.

- 4.51 If the South Australian, New South Wales or Queensland models are used, there would be no requirement to separately account for the sale proceeds. In South Australia and Queensland, the amount that the beneficiary is entitled to is determined by the court. In New South Wales, the amount may be varied by the court on the application of the beneficiary.

Question

W21 Should an exception to the ademption rule be included in legislation for actions of persons holding an enduring power of attorney, as well as administrators?

If so:

- (a) Should a beneficiary of an otherwise adeemed gift be entitled to:
- the same interest they would have had in the property if it had not been sold (section 53 of the *Guardianship and Administration Act 1986* (Vic)), or
 - an order to ensure that no beneficiary gains a disproportionate advantage or suffers a disproportionate disadvantage (South Australia and New South Wales), or
 - an appropriate order for compensation from the estate (Queensland)?
- (b) Should the exception apply to any actions by the donee of the power, or only those actions taken after the donor of the power has lost capacity?
- (c) In the present context, what special accounting obligations should the donee of the power of attorney have in relation to proceeds of the transaction?

Access to a person's will for anti-ademption purposes

Current law

- 4.52 In order to protect an asset from ademption or to maintain a separate account of the proceeds of sale, an attorney will need to be aware that there is a will and what the provisions of the will are. Under the common law, a person acting under an enduring power of attorney is not entitled to access a principal's will unless this is specifically provided for in the power of attorney document or is required for the management of the person's affairs under the power of attorney.⁵⁷
- 4.53 In contrast, an administrator has a statutory entitlement to open and read a will that they are in possession of.⁵⁸ The Commission has recently recommended that this provision be extended to include the right to apply to VCAT for access to a will that is not in the administrator's possession.⁵⁹ This would ensure that the administrator can deal with the person's assets in a way that maintains the interests of the parties as set out in the will.⁶⁰

57 Ken Aitken, 'Enduring Powers and Wills' (1999) 73(12) *Law Institute Journal* 94, 94.
58 *Guardianship and Administration Act 1986* (Vic) s 58G.
59 Victorian Law Reform Commission, above n 30, 266.
60 Victorian Law Reform Commission, *Guardianship*, Consultation Paper No 10 (2011) 240.

4.54 In its recent inquiry into powers of attorney, the Victorian Parliamentary Law Reform Committee reported mixed views on whether an attorney should be able to access a person's will. The former Trustee Corporations Association of Australia⁶¹ argued that attorneys with financial powers should have the same powers to access a will as administrators appointed by VCAT. The Law Institute of Victoria and State Trustees proposed that attorneys not have access to a will but that the holder of the will (for example, a solicitor) could be authorised to inform the representative of any specific gift in the will if the representative has a medical certificate indicating that the principal has impaired decision-making capacity.⁶²

4.55 The inquiry found that:

The Committee recognises that bequests in a will may impact on a representative's management of a principal's financial and legal matters. However, the Committee does not consider that it has received sufficient evidence on this issue to justify overriding the long-standing common law rule that a representative does not have a right to access a principal's will. ... [T]he Committee suggests that the Victorian Government consults further on this issue, particularly in light of arguments canvassed in the next chapter that representatives should be under an obligation to protect the entitlements of beneficiaries under a will.⁶³

Options for reform

4.56 Allowing a person acting under a power of attorney to access the person's will in the same way as an administrator could have the following advantages:

- If an exception to the ademption doctrine is introduced in the same terms as that for administrators, access to the will would be necessary to allow the attorney to discharge their accounting obligations.
- An attorney may choose to sell certain assets and not others to pay for the donor's care where to do so would preserve the donor's specific testamentary wishes.

4.57 Disadvantages of allowing an attorney access to a person's will include:

- A person would usually expect their will to be a private document until after their death and may not want the person acting under enduring power of attorney to know its contents.
- If a provision similar to the South Australian or Queensland models discussed above is adopted, there may be no need to account for any sale proceeds separately and it may then be unnecessary for the attorney to have access to the person's will (as the court will determine the beneficiary's entitlement).

4.58 An alternative to allowing a person acting under an enduring power of attorney access to a will in the same way as an administrator could be to allow the person who holds the will (for example, a solicitor) to disclose any specific gifts in the will.

Question

W22 Should a person acting under an enduring power of attorney be able to access a person's will in the same way as an administrator? If so, should access depend upon proof of the will-maker's lack of capacity?

61 Now Financial Services Council.

62 Victorian Parliamentary Law Reform Committee, above n 34, 159.

63 Ibid.

Questions

Witnessing wills and undue influence

Requirements for witnessing a will

- W1** Should there be special witnessing provisions in respect of certain will-makers? If so, who should those will-makers be and what should the special witnessing provisions require?
- W2** Should witnesses to the execution of a will be required to understand that the document in question is a will?

The witness-beneficiary rule

- W3** Should Victoria reintroduce the witness-beneficiary rule in the form recommended by the National Committee for Uniform Succession Laws?

Prevention of undue influence through other changes to the will-making process

- W4** Would introducing a professional requirement that solicitors obtain a medical capacity assessment for their clients prior to drafting a will for them be useful in preventing undue influence?
 - (a) If so, in what circumstances should the requirement apply (such as where a will-maker is over a particular age)?
 - (b) If not, what disadvantages would there be in such a requirement?
- W5** Would introducing a professional requirement that solicitors must either decline to act or seek independent advice when an existing client asks them to draft a will for another person that would confer significant benefits on the existing client be useful in preventing undue influence?
- W6** Should guidelines be provided for professionals who make wills in Victoria dealing with how to minimise the incidence of undue influence on older and vulnerable will-makers? If so, what should those guidelines contain?
- W7** In what other ways could the process of preparing a will by a solicitor be improved to protect vulnerable will-makers from undue influence?

Determining whether a will reflects the will-maker's true intentions

- W8** Are any changes to the law relating to testamentary capacity necessary to improve protection for older and vulnerable will-makers?
- W9** Are any changes to the law relating to knowledge and approval and suspicious circumstances necessary to improve protection for older and vulnerable will-makers?
- W10** Are any changes to the law concerning fraud or forgery necessary to improve protection for older and vulnerable will-makers?
- W11** Should the equitable doctrine of undue influence for lifetime transactions be applied to wills?
- W12** Are there changes that could usefully be made to the doctrine of undue influence as it currently operates in the probate context?

Statutory wills

Determining the intentions of the incapacitated person

- W13** Should Victoria adopt the National Committee's recommended guiding principle for authorising a statutory will or retain the current principle?

Involvement of the incapacitated person in the hearing

- W14** Should the *Wills Act 1997* (Vic) concerning statutory wills specify that the court may order separate representation for the incapacitated person (rather than stating that the incapacitated person is entitled to appear on the application)?

Accessibility of the statutory will process

- W15** How can the statutory will procedure be made more accessible? In particular, would any of the following reforms be desirable?
- Remove reference to the two-stage application process for statutory wills from the *Wills Act 1997* (Vic).
 - Have applications for statutory wills heard in the Guardianship List of the Victorian Civil and Administrative Tribunal rather than in the Supreme Court.
 - Encourage judges to decide unopposed statutory will applications on the papers without a hearing in open court.
- W16** Are any other changes desirable to the statutory will provisions of the *Wills Act 1997* (Vic)?

Determining who pays for the application

- W17** Should the *Wills Act 1997* (Vic) include costs provisions specific to statutory will applications? If so, what should the costs provisions provide? Should the legislation distinguish between interested and disinterested applicants?

Ademption

The ademption rule

W18 Should the ademption rule be changed to one based on the will-maker's intentions? If so, in what way? For example:

- (a) Should the *Wills Act 1997* (Vic) provide a presumption against ademption?
- (b) Should the *Wills Act 1997* (Vic) provide a presumption in favour of ademption that would allow a beneficiary of a specific gift to present evidence that the will-maker would not have intended ademption?

W19 What effect (if any) would changing the ademption rule to one based on the will-maker's intentions have on:

- (a) the cost and time involved in administering an estate?
- (b) the fairness of the outcome?

Acts by administrators appointed to the Victorian Civil and Administrative Tribunal

W20 Have you experienced any difficulties with the operation of section 53 of the *Guardianship and Administration Act 1986* (Vic)?

Acts by persons holding an enduring power of attorney

W21 Should an exception to the ademption rule be included in legislation for actions of persons holding an enduring power of attorney, as well as administrators? If so:

- (a) Should a beneficiary of an otherwise adeemed gift be entitled to:
 - the same interest they would have had in the property if it had not been sold (section 53 of the *Guardianship and Administration Act 1986* (Vic)), or
 - an order to ensure that no beneficiary gains a disproportionate advantage or suffers a disproportionate disadvantage (South Australia and New South Wales), or
 - an appropriate order for compensation from the estate (Queensland)?
- (b) Should the exception apply to any actions by the donee of the power, or only those actions taken after the donor of the power has lost capacity?
- (c) In the present context, what special accounting obligations should the donee of the power of attorney have in relation to proceeds of the transaction?

Access to a person's will for anti-ademption purposes

W22 Should a person acting under an enduring power of attorney be able to access a person's will in the same way as an administrator? If so, should access depend upon proof of the will-maker's lack of capacity?



Victorian
Law Reform
Commission

Succession Laws
CONSULTATION PAPER

GPO Box 4637
Melbourne
Victoria 3001
Australia

Level 3
333 Queen Street
Melbourne
Victoria 3000
Australia

Telephone
+61 3 8608 7800

Freecall
1300 666 555 (*within Victoria*)

Fax
+61 3 8608 7888

Email
law.reform@lawreform.vic.gov.au

www.lawreform.vic.gov.au

Succession Laws consultation papers

- 11 Wills
- 12 Family Provision
- 13 Intestacy
- 14 Executors
- 15 Debts
- 16 Small Estates

Printed on 100% recycled paper

