Shane Newton
[redacted]

21st March 2013.

Dr. I. J. Hardingham
Victorian Law Reform Commission
GPO Box 4637
Victoria 3001.

Dear Ian,

I am writing to express my views on some aspects of possible reform of the law relating to succession.

Transactions to defeat Part IV

In my view there should be an amendment to Part IV of the Administration and Probate Act by the inclusion of a provision which empowers a court to set aside a transaction which is entered into in the lifetime of a testator for the purpose of preventing a person from making an application for provision from the testator's estate.

The legislation contained in Part IV is social legislation designed to prevent a testator who owes a moral duty to a family member (or like individual) failing to perform that duty, thereby leaving that person without adequate provision for their proper maintenance and support.

As I understand it the legislature as long regarded it as important to ensure that testators perform their social responsibility to provide for persons to whom they owe such a duty.

In this context, to permit a testator to avoid that responsibility by resort to a mere device is, I believe, inappropriate. If a person who, for whatever reason (often an unjustified reason) is able to avoid their moral responsibility simply by going to a solicitor and having that solicitor prepare a transfer to the

preferred beneficiary to operate inter vivos then the legislation is open to be called into ridicule.

I am aware of various arguments that are sometimes put in opposition to such a provision. These include that such a provision is an unwarranted incursion into freedom of testamentary disposition or that it would interfere with proper estate planning. In my view these arguments do not carry any weight. Precisely the same arguments could be put for repeal of Part IV itself, but I doubt that many persons would regard that as appropriate.

Of course, I understand that it would be important if any provision of this nature were enacted to ensure that it did not operate to prevent legitimate transactions, even those entered late in life.

For instance, if a person transferred a matrimonial home into the joint names of he and his second wife because he feared that her security in the house might be imperilled upon his death by actions of his children then that might be seen as a legitimate transaction.

On the other hand a person who transferred his estate to one child to the exclusion of another because, for instance, he had had an argument with that child, or because he did not like that person's spouse or politics then such a transaction should be open to being set aside, just as a provision in a will made on that basis would be open to interference by a court.

This protection could be ensured by making it a requirement of the legislation that the transfer have been made for the primary purpose (or similar) of defeating Part IV and by providing that a judge if satisfied that the transaction was made for that purpose would have a discretion to make an order setting the transfer aside.

In my opinion this is an important matter. In my experience there are solicitors who do advise their clients that there is a 'loophole' in Part IV which permits a

determined testator to prevent a disentitled family member making a claim under Part IV.

In my view this is not appropriate. If a testator wants to exclude a person from any benefit then they can do so by excluding them from their will, thereby leaving to a court to decide if such an exclusion was the act of a wise and just testator and in keeping with community standards.

In my view the likely outcome of this will not be to prevent proper estate planning. The only likely outcome is that solicitors will cease advising their clients about the existence of the 'loophole'.

Categories of claimants under part IV

In my view the existing category of persons who can claim, that is 'any person for whom the testator had a duty to make provision' should remain.

Although there are suggestions that the existing law encourages or permits spurious claims in my opinion this is not borne out by experience. Whilst it is true that there are dubious claims commenced this is not, in my experience, endemic, or anything like it. Claims which have little basis are quite rare. Moreover, many cases which might be seen as novel are often readily dismissed by some 'commentators' as spurious when on close consideration they are not. The novelty of these claims is usually a reflection of the way that relationships have changed in many cases.

The fact that some people bring spurious claims is a common scenario in all areas of the law. The manner of dealing with this problem is for the courts to ensure that civil litigation is conducted in a fashion which enables claims of that nature to be dealt with expeditiously. It will not be solved by the introduction of a defined list of eligible claimants.

To attempt to define who may be an eligible claimant by reference to a specific category of relationships would be calculated to cause the arbitrary

refusal of otherwise meritorious claims. The original recommendations which led to the introduction of the Wills Act 1997 demonstrate this, in my view. On my understanding of the reasoning behind those recommendations, if further provision is to be ordered on the basis that a testator owed a duty to make provision to a person then it is sensible and logical for the range of eligible claimants to be defined by that circumstance, as it is under the current legislation.

Otherwise, a court could find in a particular case that a testator owed a duty to a person but could nonetheless be precluded from making an order in that person's favour because they did not fit into one of the pre-defined categories. That would not be a just result and was, from my recollection, the very reason that the legislation was changed in the first place. You will no doubt recall the attempt at judicial legislation by the trial judge in Popple v. Rowe [1998] 1 VR 651 which I understand led to the review of the legislation.

The variety of circumstances in which a testator might owe a duty to make provision is so wide and unknown that it would be inappropriate to attempt to define the categories of potential claimants.

Yours faithfully,

Shane Newton