

## VICTORIAN LAW REFORM COMMISSION - SUCCESSION LAWS

Submission by David Shalders

Occupation: Farmer

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

### FAMILY PROVISION

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

- The huge legal expenses
- Fear of and the threat of a worse result. As a farmer, wanting to protect the assets you have built up as best as possible, given the unbelievably bad situation.
- A mistrust of the system and mistrust that justice will prevail.
- Know someone from the farming industry who has been through the system already and doubt that justice will be done as there are too many precedents where farmers have lost as judges think they do, but in reality don't understand farming.

FP2 : The current period within which an application for family provision can be made in Victoria is

- too long

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

- The current laws to a large extent allow opportunistic and non-genuine claims.
- However, if a will includes farm land, greed takes over and the laws allows this to happen.
- Laws are supposed to reflect the attitudes of the community. My belief, and that of everyone I know, is that no one wants their will changed. Why would you do one if you want it changed? No one that I know, is aware that wills are changed. They, as I did, believe, one had to be left out of a will or destitute before a court would change a will.
- In my experience, the current laws allow non genuine and opportunistic applicants all the time because Solicitors and Barristers know judges change or add a clause in a will and encourage people to contest a will.
- This contradicts what happens when a will is made. There would not be a solicitor in the country who has advised a customer that their will, in its current state, will be contested. Everyone leaves their solicitors office satisfied that they have made a legal will and that when the time comes their wishes will be carried out.

- [REDACTED] The current laws do not insist on any supporting documentation. In my case, my legal team asked for all these documents and nothing was supplied. Not one bank statement or tax return. Yet the judge made a decision in their favour without this information.
- [REDACTED]
- [REDACTED] The only one dependent on my mother was me as we were in business together, pooling our land to farm. I had agreed to work with my parents all my life (36 years) as I was to inherit the land. Every generation, to continue farming has to improve and expand the farm. Acreage 20 or 30 years ago supported one or two large families. Today, in order to survive, that same farmer needs more land to support one smaller family. The partner, and sometimes the farmer, also need to have an off farm income. Yet a judge deemed me to be too well off and [REDACTED] awarded substantially more legacies from my mother's estate. I had to get a loan for \$800,000 to pay [REDACTED] and the legal fees. In effect the family provision laws make each generation who wants to farm pay for the same piece of land – generation after generation – but at the current market value price. And judges deem parents, who want to hand down farm land to the next generation, who work for years and years for little or no remuneration, as fond and foolish not wise and just. Farm land prices rise and fall, like all real estate. But the only farmers who sell their land are those getting out of farming.

FP4 Does section 97(7) of the Administration and Probate Act which orders an unsuccessful applicant to pay their costs deter opportunistic applicants from making family provision claims?

- No
- When a farm is involved there are no cases that I know of that are unsuccessful either in court or at mediation.
- Even though the costs are coming from the estate, when a farm is involved, the person who has remained farming, inherits the land and therefore all the estate expenses.
- In my experience, the costs all came out of the estate, which in effect was me. If a family is fractured or dysfunctional and a farm is involved, they do not care for the ramifications, in fact they delight in them.

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

- No
- When a farm is involved, the value of the estate is considered large and not dismissed.

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

- Yes
- My experience involved an additional \$395,000 of legacy to be paid from the estate with legal fees of approx \$400,000 which the estate had to pay. And the estate was me, I was confronted with selling land on which I depended to make a living, or getting a loan to pay these debts. The latter occurred and at the age of 58 I had a debt of \$800,000 to try and service.
- Cases are dragged out, in my experience over three years, and end up in the Supreme Court when the plaintiffs don't have to submit any evidence. And then I have to pay their legal fees.
- In farming in our area, decisions as to the type and volume of crops we plant is made in April/May. We harvest these crops in December/January and have no certainty whether it be weather, yields or prices. So having an additional \$800,000 debt to service pushes us closer to the edge.

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

- My mother and father thought they had dealt well with setting and providing for all their children both during their lives and after their deaths, in their wills.
- What my parents didn't know, and it's too late once you have passed away, was that wills are changed. My parents had supreme faith in their wills. They had regularly been to a solicitor and changed their wills as circumstances changed.
- Due to my experience, where a judge changed my mother's will, my advice to all farming families is transfer your land and assets during your life. This of course has its risks due to marriage separations and so on. It is also wrong, as when you work hard all your life you should be able to do as you wish with your assets when you want. However, this is the only way your wishes will be carried out, as your last will and testament isn't worth the paper it is written on. My experience is that non-farming family members will say and do anything and dead people can't defend themselves.
- Judges and the legal system do not understand farming or farmers.

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

- Yes, providing they are of sound mind.
- It is unbelievable what the legal system will do to you when you are dead that they can't do to you when you are alive ie: tell you how to spend/distribute your money.
- People should be entitled to deal with their assets as they wish in death.
- Judges are changing wills, or adding a clause, because they find the testator is fond and foolish. This is a fair departure from 'being of sound mind'.
- I would have liked to see our judge say to my mother's face that she was fond and foolish, but he did this in his judgement. Such disrespect and oh so wrong.

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

- No
- What does dependant on the state mean? Is it an aged pension? Is it providing for the testators grandchildren? How far into the future should it go? At the moment it provides for unforeseen circumstances, this is too wide.

- [REDACTED]
- [REDACTED]

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

- If you are of sound mind, would you like your will changed?
- If someone was not of sound mind, or had been co-erced or pressured to change their will then there should be laws to protect them.

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

- Insist that will makers include detailed explanations in their wills explaining why they are deviating from the state's interpretation of a 'normal' 'standard' or 'good' will. Get a suitably qualified legal practitioner to advise on wording that is acceptable to a court.

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

- My overriding belief is that your will is your will. If you are of sound mind and not co-erced then the legal system should not change a will.
- However, a dependency at the time of a person's death and for some continuous time prior is a good idea
- To demonstrate a financial need is also a good idea but the legal system must insist on documentation.
- Rather than second guessing what the testator was thinking when they made their will It also needs to be considered recommending more information be included in wills such as why they have left assets to nominated people and why some have varying levels or been excluded. This will assist in unsubstantiated claims being made.

FP15

- When making a will, the testator needs to be well advised by their legal practitioner about dependents. Isolated country people go to their local solicitor and it seems these solicitors need more training in the implications and repercussions of all aspects of a will.

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

- No. Do not retain current criterion.

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

- If unsuccessful, costs should not be borne by the estate

FP18 No order as to costs should apply – the applicant bears the burden of their own costs.

FP19 No idea

FP20 None

FP21

- Have these cases handled by VCAT.
- Alternatively, limit total costs of both sides to \$10,000.
- Adopt the view that providing you are of sound mind and haven't been co-erced, then your will is your will and can't and won't be changed.

David Shalders

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