COMMBAR THE COMMERCIAL BAR ASSOCIATION

Property and Probate Section

On 20 August 2012 the Probate Users committee of the Supreme Court of Victoria was advised that the Property and Probate section ("PP") of the Commercial Bar Association of the Victorian Bar would respond to the Victorian Law Reform Commission review of succession laws.

Six consultation papers for the VLRC were a released on 19 December 2012. The members of PP section being the Chair Robert D. Shepherd of Counsel, the secretary Richard Edmunds of Counsel, and the Monitor James. D. Catlin of Counsel, have conducted relevant inquiries including inviting via e-mail comments and submissions on questions arising out of the review.

The approach they have taken as a result of the approach of the VLRC in the consultation papers is to answer the questions that are posed under the headings in relation to the specified terms of reference.

It intended that this submission be received by the VLRC as a public submission.

EXECUTORS

Question E1 Should the Supreme Court have the power to review amounts charged by executors? If so:

The Supreme Court of Victoria should have this power.

(a) Should the scope of the power be limited to commission, or should it extend to disbursements, fees and any other amounts?

The scope of the power should be limited to commission in the first instance unless an applicant for review establishes special circumstances. In special circumstances disbursements, fees and other amounts should be reviewable unless another law provides

for the review process. In special circumstances a review may include reference by the Court to another Court or person to assist in the review process. There are complicating factors including the time taken to review such elements of the charge and this should be overcome by the most cost-effective reference to an appropriate person.

(b) Should the Court be able to conduct a review on its own initiative or should it be able to do so only on the application of a person interested in the estate?

The Court should be able to conduct a review on its own initiative. The Court is well placed to become aware of commission questions. The limitation of leaving it to only a person interested in the estate may lead to an injustice in respect of an estate in which the commission that has been charged is excessive, but no interested person complains.

(c) Should there be an exemption from review if the will-maker was advised to seek independent advice or the legal practitioner who prepared the will complied with rule 10 of the *Professional Conduct and Practice Rules 2005?*

There should be an exemption from review if the Court is satisfied that the Will maker was advised to seek independent advice or that the legal practitioner complied with rule 10. The exemption should be satisfied by a certificate verified to an appropriate standard which is filed with the court in a review application. Independent advice and/or compliance with rule 10 should remove the potential for estates to be depleted in circumstances where it otherwise could have been said that the testator was unaware of the potential cost to the estate and the right to employ another executor.

(d) Should there be a time limit within which an application for review should be made?

There should be a time limit in which an application for review can be made. The policy of the law generally is to ensure that the States are administered in a timely way. There should be a power to extend the time upon application unless the estate has been finally distributed.

(e) Should the Court be able to order costs against the applicant if the application is frivolous, vexatious or has no prospect of success?

The Court should be able to award costs against the applicant. There should be no limitation to the exercise of the discretion to those cases which are frivolous, vexatious or which have no prospect of success. The rules that are otherwise governing costs including

the development of the law limited to *Calderbank* offers would be precluded by such limitation.

(f) Should the Court be required in normal circumstances to order the executor to pay the costs of the application if the amount is reduced by more than 10 per cent?

If an executor were at risk of paying the costs of the application in circumstances where the amount was reduced by more than 10% further costs would be incurred by executors in obtaining expert costs opinion before making an application. Furthermore the imprecision that presently exists or is inherent in the law that applies to assessment of commission which is essentially one in which the Court exercises significant discretion in its assessment of the "pains and trouble" of the executor, makes it difficult to assess the commissions for pains and trouble. There may be a better argument in respect of capital and income commission that a better assessment of the amount of commission should be able to be made. Arguably, costs of the application should not be refused in circumstances where the application otherwise succeeds and there was opposition to it but the executor's claim is reduced by more than 10%. Costs should be awarded where applications fail or the applicant has caused waste to be suffered by the estate a common example being a failure to invest.

(g) Should the same provisions apply to review of amounts charged by administrators, individual trustees and State Trustees?

The same provisions should apply to other persons unless another law applies. There are persons who are in a position where, like legal practitioners, they are in a position to charge commission in circumstances where the testator may not be made aware of their right to choose another executor who may not claim commission. Individual trustees who are corporations are now required to publish on the Internet details of their charges. It may be argued that legal practitioners and others should publish their charges on the internet and should be subject to costs orders if it is found that any of their charges exceed those which are published.

Question E2 Should legal practitioner executors be required to instruct another law practice to act in relation to an estate?

Legal practitioners should not be required to instruct another law practice to act in relation to an estate. The personal choice of the testator of a legal firm that made the will is in most

cases because they want that firm to do the work. To require instruction of another law practice would cut across personal choice and in a sense their freedom of testation which extends to choice of their executor and in the case of a legal practitioner their firm. Where the legal practitioner is given a gift in the will there may be cases in which they should be required to instruct another law practice in relation to claims against the estate where a choice may have to be made by the court as to the source from which the payment will be made to satisfy the claim or generally in such cases. Further, in cases where they will also make a claim for commission for the work done in litigation, which is often the basis for a claim for commission for pains and trouble suffered, it may be considered by the reasonable bystander that they have an interest in prolonging the litigation. Where it is indicated during estate administration that the legal practitioner will charge commission in relation to litigation and legal costs, then in those circumstances a legal practitioner should be required to instruct another law practice in relation to the claim so that the costs incurred will be limited to legal costs and not commission.

Question E3 How could existing rules for ensuring that will-makers are fully informed about the possible costs to the estate of appointing a legal practitioner executor be improved? Should a will that appoints a legal practitioner executor have to be witnessed by an independent witness?

The provision of information to Will makers should be in aid of making it clear that legal practitioners' costs can be avoided by the appointment of a person who will not charge legal costs and that there is no particular benefit in appointing a legal practitioner executor unless there is particular complexity anticipated in the administration of the estate. Sometimes persons who have been provided the information in rule 10 do not discuss with their named beneficiaries the fact that costs will be incurred which may otherwise be avoided. It may assist in the provision of information if a legal practitioner was required to satisfy himself the estate is likely to be an estate which is in excess of $500,000 or otherwise justifies the appointment. There have been, it appears, cases in which a rule 10 notice has been provided but beneficiaries have indicated that in no circumstances would the deceased have agreed to the costs and or commission of the legal practitioner had they been advised commission would be charged. To overcome the risk that the advice given by the legal practitioner has not been communicated effectively an independent witness who witnesses a will and

certifies in a separate document that they are of the belief that the testator has been advised appropriately about these matters may provide a safeguard. Merely to have an independent witness to the will would seem to provide no safeguard unless they also certify. Other risks are introduced by this further requirement including that it does expose legal practitioners to allegations they did not give proper advice. There should be appropriate protections for them to ensure that this certificate should be presumed, unless it is shown to the contrary, to establish consent. There should be exceptions to a requirement that an independent witness provide the certificate or witness the will including urgency of execution.

Question E4 Should rule 10 of the *Professional Conduct and Practice Rules 2005* be incorporated into the *Wills Act 1997 (Vic)*?

The equivalent of rule 10 should be incorporated into the *Wills Act* 1997 *(Vic)*. Some practitioners are unaware of the rule. In the case of persons who are not legal practitioners it should be a general rule. A section in the *Wills Act 1997 (Vic)* would apply to all.

Question E5 Should legal practitioner executors be required to disclose to beneficiaries the basis on which they charge the estate for their executorial and legal work? If so, should the requirement be set out in legislation or in professional rules?

Legal practitioner executors should disclose to the beneficiaries the basis upon which they charge the estate for their executorial and legal work. Informed consent cannot be given unless this information is provided. It is in line with the requirements for corporate trustees to publish their charges on the internet. Consideration should be given to a requirement for legal practitioner executors who intend to take appointments and charge commission to publish their charges on the internet.

Question E6 Should the common law concerning the minimum information that should be disclosed to beneficiaries when they are being asked to consent to the payment of commission be set out in legislation?

This would assist persons who intend to be executors and charge commission to know what they must disclose. For persons who wish to make complaint, it would also assist them to know whether there is an arguable case for them that the deceased testator was not provided with the minimum information required presently by the common law in relation to beneficiary consents. The inclusion in legislation of these matters is likely to assist those

who wish to make complaint to obtain advice before making a complaint or deciding not to do so.

Question E7 Should legal practitioner executors be entitled to charge an hourly rate for executorial services, rather than being able to claim a percentage of the estate or its income, for commission? Should Victoria adopt the model provision proposed by the National Committee for Uniform Succession Laws?

One of the difficulties in charging for commission in relation to pains and trouble has been the requirement to establish a proper basis for the claim. Enabling legal practitioner executors to charge an hourly rate for executorial services in respect of pains and trouble may assist in more accurately quantifying charges for commission. In relation to claims based upon a percentage of the estate either for capital or income enabling an hourly rate to be charged may provide a more cost-effective outcome in cases where the work to be done is not complex but the capital is large or the income is also large. There is concern that executors' commission claimed on the basis of a percentage of the estate or its income can produce outcomes which are cost ineffective in the case of large estates. The model provision proposed by the National Committee For Uniform Succession Laws ("NCFUSL") is an appropriate method by which these matters should be addressed. The model provision should be adopted.

Intestacy

Defining and setting a limit on next of kin

1 Should Victoria set a limit on next of kin at children of the deceased person's aunts and uncles (the deceased person's first cousins), as recommended by the National Committee?

There should be a limit on next of kin at the deceased person's first cousins. In cases where the schedule so limited produces injustice in that there are persons who establish that the deceased had a responsibility to make provision for them, this can be adjusted by orders made under Part IV of the *Administration and Probate act 1958* in appropriate cases.

Survivorship

2 Should Victoria introduce a survivorship requirement of 30 days, for consistency with the National Committee's recommended approach, the law in New South Wales and Tasmania and the position under the *Wills Act 1997* (Vic)?

For consistency reasons the survivorship requirement should be 30 days. The general consensus is that it is unlikely that there will be injustice caused by increasing the present survivorship requirement. Only one view was expressed to the contrary.

Entitlements of the deceased person's partner or partners

3 Should Victoria increase the partner's statutory legacy to $350,000, adjusted to reflect changes in the Consumer Price Index, as proposed by the National Committee?

There is concern that the statutory legacy if increased to $350,000 would be likely to create the potential for claims to made against estate of persons other than by the partner which ultimately when resolved by agreement or at verdict, will have depleted the estate. Entitlements of children are reduced by this increase. It may be considered that there should be a statutory legacy which is linked to the size of the estate with a maximum at $350,000 and a minimum adjustable according to changes in the CPI set at $150,000.

4 Should Victoria increase the partner's share of the remainder of the estate from one third to one half, as proposed by the National Committee?

Increasing the partner's share of the remainder of the estate from one third to one half as proposed by the National Committee may be thought to create the same potential problems as those that may be created by increasing the statutory legacy to $350,000. For the same reasons a link to the size of the estate may be an appropriate balance.

5 Where the deceased person is survived by multiple partners, but no children (or other issue) who are entitled to a share on intestacy, should Victoria adopt provisions, recommended by the National Committee, which allow the estate to be distributed:

(a) by a distribution agreement, or

(b) by a distribution order, or

(c) equally between the parties?

There is a tension which is created in circumstances where the law recognises that a person who is married may have several unregistered domestic partners and that a person who has a registered domestic partner may also have multiple unregistered domestic partners. This tension presently is balanced by the application of time requirements in effect under which a partner earns their right to take upon intestacy by effluxion of time. The Family Courts of Australia under the *Family Law Act 1975 (Cth)* exercise jurisdiction in relation to property

during the life of the deceased and in cases after the deceased has died where an application has been made for property orders before the death of the deceased. The mere application of a schedule which sets out periods of time within which an interest is in effect earned may not be a just outcome and is one that is likely to give rise to disputes as to the circumstances in which the deceased person was living within those periods. To make provision to be shared equally between the parties is unlikely to produce a just outcome where there is dispute, all the more so where there are more than two parties. There should be a provision where in the case of a dispute, the Court determines the distribution by a distribution order. This is likely to prevent a number of applications being brought under part IV of the *Administration and Probate Act 1958* merely to achieve an outcome which is different to the outcome which is provided by the statute even though it may be, and it is likely to be the case, that the same types of matters considered in Part IV claims will be addressed they will certainly be within a much narrower compass. Issues of length of time of the relationship, contributions to relationships and competing needs of parties give rise to inequality in party's positions and the need for an appropriate distribution order in the event that the parties do not reach agreement as to distribution.

6 Where the deceased person is survived by multiple partners and children (or other issue) who are entitled to a share on intestacy, should both partners be entitled to their own statutory legacy, as well as a share of the remainder?

Both parties should prima facie be entitled to their own statutory legacy as well as a share of the remainder. Any injustice can be adjusted by an application for a distribution order or in the alternative where issues arise as a result any injustice can be overcome by the making of an application under Part IV of the *Administration and Probate Act 1958*. Equality is a convenient starting point to overcome the risk that the effluxion of time will be in favour of one party when prior to their being multiple partners, the first party may have had a relationship with the deceased person of long-standing, which exceeds the statutory period within which a right upon intestacy is earned. Each case must be determined on its own facts. Consideration should also be given to adjusting the share on intestacy by reference to the size of the estate. The size of the share of the partner's entitlement to a statutory legacy should be smaller in the case of smaller states so as to leave sufficient estate to pass to those who otherwise take upon intestacy.

The partner's right to elect to acquire an interest in certain property.

7 Should the right of the deceased person's partner to elect to acquire an interest in the shared home be extended to other property in the estate, as proposed by the National Committee?

The right of the deceased's person partner to elect to acquire an interest in the shared home should be extended to other property in the estate. There is an inherent assumption that the shared home was a residence that was the principal place of residence at the time of the intestate's death and is something that should pass to the partner. Often the position is another asset in the estate which is shared and is larger than the principal place of residence and has been acquired and preserved by the parties. In respect of these large assets there would be no injustice in giving a right to partner to elect. The election must be made in a timely way so the estate administration is not delayed and the election and transfer will be on the basis of a consideration which otherwise does not deplete the estate or otherwise cause injustice to the beneficiaries. The ability to elect may also enable a party to take the benefit of that which they have acquired and preserved even though they may not be registered on title in circumstances where in equity the property would be held on a constructive resulting or implied trust. This may reduce the number of claims in equity by persons who are partners of the deceased. At the time of electing to purchase the interest in the specified property it would then be open to the partner to raise any claims concerning underlying interests in equity and seek agreement upon the value of the interest taking into consideration the claims in equity. A determination of the values of the interest accordingly would have to be made.

Entitlements of the deceased person's children or issue

8 Should Victoria adopt the approach to entitlements of the deceased person's children on intestacy recommended by the National Committee?

The rights of children upon intestacy should be preserved. To remove them is likely to create fertile ground for disputes which may then only be resolved by claims under Part IV with consequential costs to the estate. The experience is that the position of children in other relationships is often one in which there is a tension between children of a first relationship who are now adults and perceive that a strong moral duty is owed to them, against those from a shorter second relationship, often who are minors. The suggestion that for fairness

the children of the deceased person should be entitled to a share, is unlikely to properly manage the tensions created in a way which prevents costs of litigation being paid from an estate in the event of dispute. The Victorian approach to considering the circumstances in which a deceased person owes a moral duty to make provision described as a responsibility to do so is wide and would be inconsistent with an approach whereby children did not have a claim upon intestacy or an entitlement on intestacy. It is often argued that when a deceased person makes no provision in their will for a child or less than the equivalent amount upon intestacy, that provision should be ordered for them. To remove provision for the benefit of children flies in the face of the long history of legislative provisions and decided cases including by the High Court.

***Per stirpes* or *per capita* distribution**

9 Should Victoria:

(a) retain *per capita* distribution and extend its operation so that it applies at each generation to both lineal and collateral relatives when all members of the preceding generation are deceased, or

(b) abolish *per capita* distribution and apply *per stirpes* distribution in all cases?

Victoria should abolish per capita distribution and apply per stirpes distribution in all cases. The distribution per stirpital should be extended so it applies at each generation to both lineal and collateral relatives when all members of the preceding generation are deceased and in all cases. This will remove the complexities of determining the descendants of every degree as well as associated disputes as between lineal and collateral relatives. Construction issues in wills may also be avoided. There is a just outcome in circumstances where the group takes the proportional share to which the deceased ancestor would have been entitled if still living. There is no justification to require all to stand in equal degree of relationship with the deceased, in order to take. Per stirpes distribution also ensures that children of a deceased are adequately provided for should their parents have died.

Taking benefits into account

10 Should Victoria abolish the hotchpot rule, as recommended by the National Committee?

The hotchpot rule should be abolished in Victoria. It was abolished in respect of all persons dying intestate by section 1(2) of the *Law Reform Succession Act 1995 (UK)* in respect of all

intestates dying after 1 January 1996. To abolish the rule in respect of estates in the future is likely to promote certainty. Disputes relating to what has already been received and whether it is in the same interest and should be surrendered will be avoided.

11 Alternatively, should Victoria retain and amend its hotchpot provision:

(a) to replace references to advancement and settlement with more modern, simplified terminology?

(b**) to extend it beyond the deceased person's children and their representatives?**

If hotchpot were extended beyond children of the deceased person, should it apply to the deceased person's partner and/or all next of kin?

The primary view is that the hotchpot rule should not be retained and should be abolished. If it were to be retained references to advancement and settlement are not required to be replaced with more modern simplified terminology. These concepts are well-known to the law and the subject of authority. The hotchpot rule should not be extended beyond the deceased person and their relatives. To do so would require an extensive examination of the elements of the relationship and contributions made financially and otherwise. Similarly to apply it to all next of kin would require an extensive examination of a number of facts.

12 If Victoria were to abolish the requirement to take benefits received during the deceased person's life into account (hotchpot), should it also abolish the requirement to take into account benefits received under a will on partial intestacy?

Hotchpot having been abolished there is no need to retain any requirement to take into account benefits received under a will or partial intestacy. Furthermore in exercise of the power to make a maintenance order under section 91(3) of the *Administration And Probate Act* the Court must not make an order under s.91(1) in favour of person unless the court is of the opinion that the distribution of the estate of the deceased person affected by (a) his or her will if any (b) the operation of the provisions of part one division six or (c) both the will and the operation of the provisions does not make adequate provision for the proper maintenance and support of the person. In this regard consideration is given to the existence of benefits whether they be received upon intestacy a partial intestacy or under the will. This should promote a just outcome without the need to retain hotchpot.

13 If hotchpot is retained and extended beyond children of the deceased person, should the current requirement to take into account benefits received under the deceased

person's will on partial intestacy also be extended beyond children of the deceased person?

Hotchpot should not be retained. If it were a retained for the reasons examined earlier it should not be extended beyond children of the deceased person for the very reason of the difficulty of the fact-finding exercise where the scope of the inquiry is extended beyond the children of the deceased person.

Indigenous intestate estates

14 Are any statistics available about intestacy of Indigenous people in Victoria?

The PP was unable to find statistics on intestacy of indigenous people in Victoria.

15 Are more flexible provisions needed in Victoria for the distribution of Indigenous intestate estates? If so, what form should those provisions take?

More flexible provisions are needed in Victoria for the distribution of indigenous intestate Estates. The *Native Title Act 1993 (Cth)* and other legislation dealing with the property of indigenous people is sufficient justification for taking a more flexible approach. The form which it may take should be by way of powers given to a Court to take into consideration the key concepts found in the Native Title defined in Division two in Part 15. Consideration can be given to providing jurisdiction at a Commonwealth level to determine the distribution of indigenous intestate estates. The Victorian Bar has adopted a reconciliation action plan. It acknowledged that on 3 April 2009 the Australian Government adopted the United Nations declaration on the rights of indigenous peoples. Within that framework the PP is committed to assisting to obtain just outcomes for indigenous people in relation to and intestate estates. The PP has sought input under the reconciliation action plan in relation to questions 14 and 15.

FAMILY PROVISION

Factors affecting settlement of family provision claims

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

It is a trite observation that multifarious factors are involved in the making of the decision to settle a family provision application rather than proceed to Court hearing. There is general consensus about major factors. These include the merit of the claim and the time at which

the settlement of the application is considered. In this regard if no affidavits have been filed in the proceeding it may appear from a costs perspective to be an advantage to keep costs down that settlement then be considered, but the experience is that until people either in a position statement or upon affidavit set out the basis of their claim, the propensity for a family provision claim to settle is low. It is therefore considered an important factor that the claim be detailed in a manner that can be understood by the responding party. The involvement of lawyers in the process is considered to be an important factor in settling a family provision application save that the consequential issue of costs is an important consideration. There is a tension between costs being paid out of the estate or by a party. An important factor in any decision to settle a family provision application on the part of the plaintiff is that the costs to date will be paid from the estate. If those costs are high this can be a factor which militates against settlement, all the more so where the assessment of the claim by the responding party is below the costs which have been incurred to date. Costs agreements between clients and their legal practitioners described in common parlance as "no win no fee" can affect a decision to settle a family provision application in that a plaintiff may proceed in circumstances where they perceive their costs risk to be only to pay the costs of the responding party. Under such agreements the costs they incur in the anecdotal experience may be higher than under cost agreements where there is no "no win no fee" agreement. The effect of this may be that they cannot resolve their claim unless the higher fees are to be paid as part of the settlement. Early advice in relation to the merits of the claim is often a matter affecting a decision to settle and family provision application.

Mediation affects a decision to settle a claim. This is because many parties await mediation before focusing upon the issues of resolution. Judicial mediation is generally agreed to be a cost-effective form of mediation in smaller estates and the fact that a judicial officer is a mediator often is perceived by clients to carry with it formality and a serious approach to the task of resolution. In other cases especially those which are not small estates, private mediation has been found to be a factor affecting a decision to settle a family provision application for a number of reasons. These include reality testing by the mediator. Other factors that affect settlement include: pre-existing relationships; pre-existing animosities; difficulties and assumptions based on statements made by the deceased; whether there is a

perceived "principle" rather than a claim for money. The anecdotal experience is that those who are supported through the process are often able to put the question of the quantum of the claim to one side and consider numerous other matters including potential reconciliation within the family. Experience in other types of law such as family law may indicate that counselling services independent of the Court may assist in dealing with the matters which are impediments to settlement or which are inherent in difficulties that existed between the deceased and other members of the family at the time death. The anecdotal experience is that persons in family provision cases from time to time seek counselling and that this has a positive effect on their approach to the proceeding. There is a tension between persons seeking one-on-one counselling as opposed to seeking counselling with the responding party. In mediation it is often an effective technique to have the parties brought together before the mediator to speak openly and frankly between themselves, the effectiveness of this may be enhanced when confidential counsellors are involved or encouraged to be involved in this aspect of mediation.

The size of the estate is an important factor in decisions made to settle family provision applications. Where the costs of each party can be paid from the estate and there is sufficient in the estate to make provision for the applicant the decision to settle the claim is affected. Where the estate is a large estate there is a tension created because it is likely that the defendant's costs will be paid out of the estate; similarly if the plaintiff succeeds there will be sufficient estate to pay the claim and costs. In the case of smaller estates where it becomes apparent even to the defendant that if the matter proceeds to trial the net return to the defendants will be much lower than what can be agreed between them at mediation, the propensity to settle is higher. The experience of the mediator can be seen to affect the decision to settle a family provision application rather than proceed to Court hearing. There is a danger when a mediator may paint the litigation process as something which cannot ever achieve a just outcome or inaccurately states an amount of costs that suggests that the litigation will be so costly that settlement must be achieved by the parties. The experience of mediators who approach mediation in this way is contrary to proper principles and is not to be encouraged but appears to be a factor affecting decisions to settle claims. Generational estate planning and the failure to engage in such planning before the death of the deceased

often leads to the making of family provision claims. Particular issues do arise when the principle asset of estate asset is a farm or a business. It is true that creative solutions are a factor in settling these types of claims where the business of the farmers is to continue and the sale or cessation of the business would be deleterious to the person who was given it in the will. The risk that a plaintiff who fails at trial will still receive an order for costs out of the estate is a factor often affecting a decision on the part of a responding party to pay the equivalent of what the cost would be at a point in time and litigation or notionally calculated as being about that which would be ordered if the plaintiff failed at trial but an order was made from the estate. Whether it is palatable to a defendant with a strong defence to the claim to pay such amount is a factor affecting the decision to settle a claim. The outcome of an application for summary judgment by the defendant can be a factor in a decision to settle a family provision application.

Where a Court has determined that the proceeding should not be dismissed summarily, there is often a basis upon which the plaintiff can achieve a settlement on the basis that the Court has already determined that the claim is one which should be determined by the court at trial. The risk that a family provision application will be determined summarily, all more so when an application is made, is a factor in making a decision to settle before the hearing and determination of that application. Another a factor affecting decisions to settle by persons under disability include whether the advice of Counsel is that the settlement is one which is all the circumstances is in the interests of the person under disability. Another factor is the width of the discretion provided by the formulaic approach set out in section 91(4(e)-(p) of the *Administration and Probate Act 1958* coupled with the range of decisions in which family provision has been ordered. The age of the parties is also a factor affecting decisions to settle. Many elderly persons must add to their litigation burden, their fear that they would not be able to undergo the trial process. With elderly clients often a factor affecting their decision to settle a family provision application is whether they can obtain a sufficient amount to enable them to move from the family home into assisted accommodation or other residential facilities. Another factor affecting elderly persons' decision-making in this area is whether what they obtained by way of settlement will be passed on to their children or fall back into the estate. Often their children are notional

plaintiffs pushing them to obtain an award. This issue presents a difficulty in cases where there is a dispute between children of a prior relationship and children of a subsequent relationship. In these cases it is a factor affecting a decision to settle that the property that is the subject of the settlement falls back into the estate after the death of the applicant. Another factor is the confidence the client has in the legal representative. Further, similarly, if the legal representative is prepared to provide firm advice to the clients in relation to merits, all the more so if that advice is given at a time when the advice can be considered by the client to be advice which is not provisional in nature or subject to other factors such as further affidavits in reply. The offers made in the proceeding are also factors affecting decisions to settle, whether they are offers of compromise strictly so-called in accordance with the rules or more commonly in these applications *Calderbank* offers. The anecdotal experience is that too often matters come to mediation when no offers have been made. In some cases this is also the position at trial. Alternatively offers which have been made at trial are confusing and incapable of being accepted or are so low that there is no incentive on the part of the responding party to accept them. There should be an order that offers be made before mediation.

Time limits and extension of time

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

(a) satisfactory?

(b) too short?

(c) too long?

The consensus is that the six-month limitation period is satisfactory, because time runs only from a grant of representation. Interested persons are given notice by virtue of the grant being made and thereafter six months is appropriate. In other jurisdictions where time commences to run from the date of death of the deceased notice is not automatically given on the grant of representation being made. The Victorian period is not too short and not too long. Difficulties can arise when applications to extend the time within which an application is made are made after the significant effluxion of time, but before the final distribution of the estate. Similarly if the estate is distributed properly one day after the expiry date there is no basis for a potential application to extend the time to apply. Section 99 of the Act still

continues to refer to extension of time by a period equal to the period between the commencement of proceedings and an application under Part V and the making of an order by the Court granting or dismissing the application. Part V of the Act has been repealed. The section should accordingly be amended. The exception in section 99A(3) in relation to actions against the personal representative who distributes the estate after the expiration of six months but with notice of an intended application is not well understood. Consideration may be given to making it clear what the effect of giving notice with the meaning of section 99A(4) is. It is in effect a six-month and nine-month period assuming notice is given on the last day. Consideration may be given to stating the effect of notice and in this regard compare section 44 (3)(a)-(b) of the *Succession Act* 1981 Queensland.

Opportunistic claims

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

The *Civil Procedure Act* 2010 (Vic) contains provisions including overarching provisions which should prevent legal practitioners assisting an applicant to make to make a family provision claim which is not genuine. The question of whether a claim is opportunistic is often a difficult one to decide. Different circumstances often give rise to different responsibilities to make provision. There is a general consensus that non-genuine claims should not be made with the assistance of a legal practitioner but the experience has been that it is not always the case. The view of the PP was that there are claims which fall clearly within the class of prima facie opportunistic claims. The current law does allow people to make family provision claims without the leave of the Court and accordingly some of those claims can be opportunistic or not genuine. All the more so when the applicant is in person and is not assisted by a legal practitioner who is subject to the *Civil Procedure Act* 2010 overarching provisions; although no particular tendency in this regard can be assumed. Once a claim is made then a decision must be made by the defendant in relation to the claim as to the steps that will be taken in the interlocutory steps. By virtue of s. 65 of the *Civil Procedure Act of 2010* a test which an applicant for summary judgment must satisfy is statutorily defined and is on one view a lower test that had been the case prior to the introduction of that Act. The anecdotal experience is that there are more applications now by defendants seeking summary judgment than previously. The time at which these

applications are successfully made is usually after the service of the plaintiff's affidavits because once affidavits in opposition are filed, there are more likely to be factual and legal issues in dispute (but on the other hand obviously weak claims become more clearly revealed). Opportunistic or non genuine claims should not survive the making of such an application. It is a real question as to whether those opportunistic or non genuine claims which do survive an application for summary judgment do so because the current law allows them to continue or suffers them to continue by virtue of the formulaic approach to be applied by virtue of the provisions of section 91(4)(e)- (p) of the Act. The current law does by virtue of the adoption of a formulaic provision allow applicants to argue that their case is established even though at trial they are found to be cases without merit. The width of the considerations including section 91(4)(p) "*any other matter which the court considers relevant*" may encourage an applicant to attempt to persuade the court that a matter is relevant despite not being included in the other subsections. It was the general consensus that application of s 97(7) of the Act should result in orders that the costs of the application to be made against an applicant in a claim that is ultimately found by the Court to be opportunistic or non genuine, even if it survives a summary judgment application. Be that as it may it may, it can be well argued that if an application for summary judgment is made and the application is not dismissed, the application is unlikely to be one found by the court to be opportunistic or not genuine. There has been an assumption, whether it be a costs myth or based upon actual experience, that because of various factors, including disputes about the size of an estate - or findings that a court makes in relation to evidence of witnesses - that it is very difficult in cases where there are factual disputes on the affidavit material to fit any particular claim within the class of 'opportunistic' or 'non genuine'. It is also the experience that, as a result, even a failed claim by a plaintiff may still result in an order for costs being made out of the estate for the plaintiff whether it be for all of the costs solicitor client costs, party/party costs or any part thereof.

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

Section 97(7) uses terminology that applies to cases which are those which would also fit within the rule 23.01 in the *Supreme Court (General Civil) Procedure Rules 2005.* There are many cases that have considered the meaning of these words. The words "*with no reasonable prospect of success*"" will be descriptive of cases that would be dismissed on application for summary judgment whereas cases which are made frivolously or vexatiously may appear on the face of them to be cases of merit. If the Court takes the view that they were made vexatiously at trial they should be the subject of an order for indemnity costs. This is because if they are vexatious the intention in making the claim is determinative. The general consensus was that s 97(7) did not have a general deterrent effect. It was considered that it was permissive in the use of the words 'may order' and that generally the experience was cases which failed were not accompanied by a finding that they were made within the descriptions in section 97(7).

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

The general consensus was that the power of the Court to summarily dismiss claims did deter opportunistic applicants from pursuing opportunistic family provision claims in a proceeding that had been commenced. The experience was that such claims were made apparently in the hope of a summary judgment application not being made in the proceeding and resolving the case either before an application for summary dismissal or after it was made and before the determination of the application. There appears to be no evidence that, at the outset, applicants even considered the risk of application for summary judgment. There was also a view that at the first directions hearing most applications for summary judgment had not been made and that a referral to mediation at that point was usually made.

Excessive costs

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

The general consensus was that because defendant executors in the main obtained orders that their costs be paid and retained out of the estate of the deceased, that this created unfairness when the executors were also named as beneficiaries and they were upholding the will of the deceased. In the cases where cost orders in family provision cases were made in favour of a successful plaintiff it cannot be said that this impacted unfairly on the estate.

In cases where unsuccessful plaintiffs obtain orders for costs to be paid out of the estate the perception was that this was unfair because the defendant executor had succeeded, and that there was nothing more that the defendant effectively could do in all the circumstances. The hearing and determination of such cases by associate judges and also the jurisdiction of the County Court to hear and determine such applications were considered to be matters which had reduced costs, but not significantly. It was considered that cost orders that are just made in terms of the defendant's costs or the plaintiff's costs being paid from the estate rather than ordering that the burden of the costs shall be paid from specified parts of the estate acted unfairly in relation to beneficiaries who took smaller gifts and yet had to bear the cost burden of the estate. The costs charges by legal practitioners in matters that settle avoid legal scrutiny unless a party pursues rights of taxation. The tendency to want to settle matters quickly and once and for all militates against the pursuit of such rights. This creates a zone in which excessive costs can be charged and effectively sanctioned by the terms of settlement.

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

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

People do deal with assets during their life in order to minimise the exposure of their estates to family provision laws. Several examples were given of this. They include:

1. A transfer during the life of the deceased;
2. The transfer of assets into trusts during their life;
3. The transfer of assets overseas or to places where laws are different;
4. The execution of binding nominations in respect of superannuation in favour of a person;
5. The appointment of a person as appointor to a family trust or guardian of a trust;
6. The appointment of directors of a family trust and the consequential removal of the testator as a director of the trust often with consequential removal of the deceased as a shareholder of the trust;
7. Entering into binding financial agreements under the provisions of the *Family Law Act* 1975 (Cth) ("**FLA**") which operate on their death;

8. Transfer of assets to another person;
9. Gift to a person not for valuable consideration;
10. Transactions not for valuable consideration.

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

The anecdotal evidence is that people dealing with their assets in this way do so on advice. No statistics are known to exist. However the experience of Counsel is that when persons take steps in this regard they often divest the whole of their estate that otherwise would have been in existence at the date of their death. People should be entitled to deal with assets during their lifetime to minimise the property that is in their estate. As a general principle that is in accordance with their freedom. However that may be inconsistent with the power of the Court to give effect to a responsibility to make provision by way of an award of provision. The general consensus was that where the intention of the transferor or donor is to defeat a claim for a family provision and valuable consideration is not given to the donee or transferee in this these transactions within a specified period of time, it should be voidable by the Court in the event that it finds that the family provision claim succeeds, but the estate cannot pay the claim because there is notional estate. Where a person gives valuable consideration for a transaction then there is no justification for preventing the testator dealing with assets the logic being that consideration then passes to the testator in any event. The power of a Court in New South Wales to make notional estate orders under Part 3.3 of Chapter 3 of the *Succession Act* 2006 (NSW) was considered to be a model that should be adopted in Victoria. It was considered to produce a just outcome and to prevent persons being attracted to entering into transactions that prevented applications being made under Part IV of the *Administration and Probate Act 1958* because there was no estate against which an order could be made. It was also thought likely that if these transactions were discouraged, then stamp duties and taxes paid by the deceased during their life to comply with law in relation to these transactions would be avoided and the estate may be consequentially larger as a result.

Reviewing the purpose of family provision laws

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

The purpose of family provision legislation should be to give effect to moral duty. A moral duty, one would think, would be owed in circumstances where a person is dependent on the deceased. Dependency should be just one of the considerations. It is a significant consideration. Persons who are either a partner of the deceased or a child should not have to prove dependency in order to sustain a claim. The general consensus was that if a person was not within this class then it would be unfair to require all other applicants to establish dependency in order to succeed in a claim for family provision. The reason being, it was thought, was that there were many factors which gave rise to a moral duty, need or dependency - however they be construed - being only one of them. The aim of family provision legislation should not be to prevent persons from becoming dependent on the State. There are tensions between making family provision awards which may, as a result, prevent a person being eligible to receive Centrelink pensions and the reality that a person may not continue to receive a pension. The receipt of a pension was considered to be a matter which should be considered when deciding whether provision should be made from the estate, all the more so when the estate is a small estate and/or other persons are ineligible for a pension who are named in the will or take upon intestacy.

Consideration may be given to a submission in support of amendments to the social security legislation which deems a person named as a beneficiary of a trust to hold property for the purposes of Centrelink pensions. The benefit being in those circumstances that if the amendment were made, provision may be made by the setting aside of an amount of money subject to the exercise of discretion by a trustee in relation to distribution of it. At present the purposes of family provision laws are in the main to give effect to moral duty which is quantified by an award whether it be in money or property or another form of order in relation to proprietary interests in the estate, for maintenance and support rather than other altruistic or for other reasons. Frequently in mediations parties seek to recover an item of property which cannot be said to be necessary for their maintenance and support. Consideration should be given to extending the purview of the Act to extend to the provision of such items. Family provision laws should seek to achieve by orders outcomes which will finally determine relationship disputes between the parties to the family relationship and avoid further proceedings. Reference is made to section 81 of the *Family*

Law Act 1975 (Cth). In this regard family provision legislation should provide machinery for the consolidation of all proceedings between parties within the family which are then pending or impact upon the estate of the deceased. Family provision legislation should to the extent possible aim to interface in a streamlined way with the *Family Law Act 1975 (Cth).* The question of the circumstances in which a person may make a family provision application notwithstanding having entered into a binding financial agreement with their partner under the *Family Law Act 1975 (Cth),* should be codified and consistent. It should not be the case that when a person during their life under a binding financial agreement has expected certainty to apply at the date of their death that their executors find that an application has been made under family provision legislation which thwarts the intention of the agreement. The general consensus was that it was artificial, and could result in injustice, if the determination of whether a person was in a de facto relationship with the deceased at the time of their death was a determination in relation to their eligibility to make a claim. The experience is that separations between parties in a relationship occur from time to time. If synchronicity between the death and separation occurs then that person will not be able to make a claim. Consideration should be given to a determination of whether the person had been in a de facto relationship with the deceased and if yes whether they had in all the circumstances a responsibility to make provision for that person.

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

Family provision laws should seek to achieve the aim of ensuring in appropriate cases that a Court can denounce the conduct of a testator in relation to things they did or failed to do in respect of eligible applicants.

Limiting eligibility to make a family provision application

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

Yes. Despite other states not adopting the recommendations, the present Victorian model is the best fit for the proposed approach.

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

No. The Victorian model has a better chance of achieving a just outcome for those who do not fit the traditional eligibility categories. The New South Wales provisions are unnecessarily cumbersome by reason of the extra requirement of proof of "factors warranting the making of the application." Former wives or husbands in many cases have settled their property disputes in the Family Courts. Proof of dependency after a deceased person dies is complicated in cases where the relationship was not one under the same roof.

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

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

Former domestic partners should be included.

(b) Should applications by certain categories of applicant be further limited? If so: What should the nature of such further limitation be? For example, should the limitation be a requirement to show 'factors warranting the making of the application', as in New South Wales, or some other test, such as 'exceptional circumstances' or 'special circumstances'?

- To which categories of applicant should the additional limitation apply?

Special circumstances should be a requirement where an applicant's net assets at the time of death exceed one half of the value of the estate.

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?

No. Financial dependency should be but one of the matters which the Court must consider. By virtue of s 91(4)(m) of the *Administration and Probate Act 1958*, "whether the applicant was being maintained by the deceased person" is already a consideration. There should not be any reference to dependency other than financial dependency. Emotional dependence is better considered under the heading "relationship with the deceased."

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

This is a very real possibility.

FP 16. Should Victoria retain its current 'responsibility' criterion for eligibility to make a family provision application, but require applicants to demonstrate financial need?

In estates under $250,000 this would be sensible.

Amending costs rules and principles

FP 17 Should there be a legislative presumption that, in family provision proceedings, an unsuccessful applicant will not receive their costs out of the estate?

No. There must also be discretion given to the Court or injustice may occur. Any presumption must be rebuttable.

FP 18. Should one of the following costs rules apply, as a starting point, when an applicant is unsuccessful in family provision proceedings?

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

Yes. This will encourage applicants not to pursue claims that are opportunistic or non-genuine.

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

No. This will still encourage applicants to pursue claims that are opportunistic or non-genuine.

FP 19. Are family provision proceedings generally less costly in the County Court than in the Supreme Court?

The anecdotal experience is 'No'. There are lower filing fees but usually fee agreements in place between clients and lawyers. The Supreme Court directions lists, mediation and judicial mediation have resulted in most claims being resolved reasonably early in the proceedings.

FP 20. What measures are working well to reduce costs in family provision proceedings in the County Court and the Supreme Court?

Directions hearings; position papers (rather than affidavits) before mediation in small estate claims; mediation (private and Court assisted); trial on affidavit and applications for compromise in cases where persons are persons under disability. The effectiveness of Counsel as mediators in the vast majority of mediations must be acknowledged. It is rare that a family provision claim is not settled at mediation which generates significant costs

savings from the avoidance of trials. In the ordinary course of a family provision proceeding a trial represents at least 50% of the potential legal costs.

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

Lists of agreed authorities. Court ordered judicial mediation no earlier than one month and not later than 14 days before the date listed for trial.

WILLS

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?

Special witnessing provisions must always be subject to a power to dispense with the requirements of execution and also revocation. There is good reason to implement a regime of special witnessing provisions in relation to persons who are under disability. The special witnessing requirements should be at least one medical practitioner in cases where the disability relates to a medical condition.

W2. Should witnesses to the execution of a will be required to understand that the document in question is a will?

On balance this should not be a requirement. There are arguments in favour of it. It may be that a witness in such circumstances would take more care in the process or remember the circumstances in which the Will was executed including the presentation of the testator and whether they were apparently well medically or apparently under pressure that amounted to influence that was undue. If a witness is told that the document is a Will there may be a propensity for them to enquire as to whether they are a beneficiary and as to the effect of it. This may create a propensity for disputes to arise at a time when it is quite inappropriate that they arise. By requiring witnesses to Wills the law takes a step to reduce the potential problems that arise when as it is often described the deceased is the 'best witness' but cannot give evidence. That should be achievable without the witnesses knowing what the document is.

The witness-beneficiary rule

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

No. The reintroduction is not justified by National consistency as there are four Australian jurisdictions in which it does not apply. The rule in the form recommended will create the potential for elongation of litigation in which the question of whether an exception applies is decided. There is the potential for anomalistic outcomes. It is an unjustifiable and drastic measure when the limited objective is to afford greater protection to older and vulnerable will-makers.

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?

Yes.

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

This is an impractical requirement across the board. It should be a requirement based upon age where the age is over 85 years. It should also be a requirement in cases where: (a) the solicitor is in possession of evidence that causes him to believe there is a question of capacity; (b) where a person has made more than 4 wills in the past year; (c) where the person is in a medical facility such a hospital or nursing facility; (d) where a person has undergone an anaesthetic medical procedure within the last 7 days; (e) where a person is receiving drug therapy involving opiate or other medication that affects their thinking processes; (f) where a person who has been a patient within the meaning of the *Mental Health Act 1986*; and (g) where a person is under the control, care or custody of the Secretary to the Department of Justice or a member of the police force.

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

There are few disadvantages in the above considered circumstances. They are the cost and the potential for delay in the process and the possibility that new Wills will not be prepared and executed in time prior to death, or not made at all resulting in intestacy or a Will not reflecting the deceased's current intentions

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?

Yes. Solicitors must decline to act but must also ensure independent advice. If there is pre-existing influence that is undue, then it may be detected by the person providing the independent advice.

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?

Yes. Examples should be given. These should include how to take instructions from the testator alone; who should pay for the work; how persons subjected to undue influence may present; what to ask when there is an instruction to exclude a person from a Will or include a person; instructions about asking questions about prior transactions such as gifts or transfers at undervalue and then what to do; "alarm bell' transactions such as the revocation of a Will and Power of Attorney in favour of one person and the making of a Will and Power of Attorney in favour of another; reference to independent advisors; the effect of power imbalances within families including those in whom the testator reposes trust; particular cultural issues; when not to permit a person to interpret for a person giving instructions; when a medical practitioner should be consulted; when the testator's financial advisors should be consulted.

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?

Signed written instructions. In limited cases, the creation under legislation of a "visitor" who can be asked by the solicitor to meet with the testator. The visitor can be a person with medical or legal qualifications and could be the testator's medical practitioner.

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?

Yes. There should be a statutory definition of testamentary capacity. Those involved in a Will making process including lawyers and medical practitioners will be able to refer to it and focus upon it.

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?

Yes. What is required is guidance to those involved in a Will making process to know what to look for to ensure that the requirement of knowledge and approval is established and that suspicious circumstances are avoided. The Registrar of Probates in the first instance and the Court upon reference by him; or when a Caveat is lodged, readily ascertain when "solemn proof" is required. That level of knowledge and experience should be to the extent practicable transposed into laws that protect 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?

Current laws generally cover the field but the anecdotal experience is that compared to offences such as obtaining property or financial advantage by deception or attempts to commit these offences charged in the commercial context, little is known about charges arising in the context of undue influence relating to Wills or in relation to estates. In order to ensure that there is protection for older and vulnerable will-makers consideration should be given to specific criminal laws dealing with relevant conduct. These may be: (a) dishonestly making a false statement to a lawyer making a Will for a person with a view to gain from the estate of the person or for another person to gain; (b) dishonestly making a false statement to a person making a Will with a view to gain from the estate of the person or for another person to gain (c) making a threat to a person intending to make a Will with a view to gain; (d) engaging in conduct endangering the health of a person with a view to gain from the estate of the person or for another person to gain; (e) dishonestly engaging in conduct with a view to preventing a person having access to legal advice in relation to the making or revocation of a Will. Other examples may be readily framed to cover relevant conduct.

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

Consideration should be given to adopting parts of the equitable doctrine. The relevant focus should be still be upon the time at which instructions are given and at the time of making the Will but the Will doctrine should be extended to include other circumstances prior to that and some of the equitable categories of presumed influence. The equitable doctrines have developed differently although there are similarities. A significant difference is that a Will transaction is one in which there is usually limited or no consideration. There is no justification to place all Will transactions in defined categories in which equity 'presumes' influence and requires the executor effectively on behalf of all donee/beneficiaries to displace an onus to establish why the transaction should not be set aside or relevantly (if this doctrine were applied), why the Will should not be admitted to probate. There is scope to adopt some of the equitable categories (doctor/patient as a plain example) or where, if the evidence establishes influence that is prima facie 'undue', the executor should then bear an onus to establish why the Will should not be admitted to probate or adopting equitable discretion, that it not be admitted to probate 'except on terms.' These terms may be that the influencer takes nothing and that the Court otherwise admits the Will to probate. This may be useful where there is no penultimate Will and the Court wanted to 'lean against' the resulting intestacy.

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

The onus of proof in a "solemn proof" proceeding must remain the same. There is scope to adopt some equitable categories where prima facie 'undue' the executor should bear an onus to establish the Will should not be admitted to probate or adopting equitable discretion, that it not be admitted to probate 'except on terms.'

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?

No. The restrictive interpretation of the original test and the amendment of the guiding principle to its current form have been effective. There is no justification for making a Will that *might* be one that *would* have been made by the proposed will-maker if he or she had capacity. The Victorian test should remain. 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 is more likely to give reasonable certainty than a speculative approach.

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)?

The entitlement to appear should be preserved but the Court should be able to give effect to that by having the power to order separate representation. In the Family Courts independent representation for minors is an accepted procedure in cases that affect their lives. So it should be in the case of the incapacitated person. The Court should have the power to make these orders in order to prevent there being a separate VCAT Guardianship List application being required.

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?

(a) Remove reference to the two-stage application process for statutory wills from the *Wills Act 1997 (Vic).*

Yes. The application should be determined at the one hearing. One hearing can determine an unmeritorious application, but in the case of meritorious applications, there is no need for two and the costs are higher.

(b) Have applications for statutory wills heard in the Guardianship List of the Victorian Civil and Administrative Tribunal rather than in the Supreme Court.

No. With respect a possible disadvantage is that, unlike Supreme Court judges, VCAT members do not have opportunity to develop expertise in succession law in its various presentations, despite them dealing with cases often focused upon capacity issues.

(c) Encourage judges to decide unopposed statutory will applications on the papers without a hearing in open court.

No. The law must be seen to be done in these cases.

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

No.

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?

No. Despite there being some difficulties arising as to the exercise of discretion in such cases, the current costs principles that have developed are appropriate. The question of whether a person is disinterested may become relevant if the interested person is a beneficiary, but the separation in time between the making of the Will by the Court and the death is not a justification to treat the applicants differently.

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?

Yes. The 'intention approach' should be chosen.

For example:

(a) Should the *Wills Act 1997 (Vic)* provide a presumption against ademption?

No.

(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?

This is likely to achieve a just outcome. The 'intention approach' should be preferred as it is evidence based. Relevant evidence in this regard could also obviate the need to be make an application under Part IV of the *Administration Act 1958* or be adduced in such an application.

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?

It will decrease the time and cost if all parties agree on the outcome. If there is a dispute, then there is likely to be an increase in each. There is some potential for applications under Part IV of the *Administration Act 1958.*

(b) the fairness of the outcome? A fairer outcome is likely to be promoted. The issues considered by Hargrave J in *Simpson v Cunning* [2011] VSC 466 (22 September 2011), in which His Honour recommended law reform supports the need for fair outcomes created by legislative change.

W20. Acts by administrators appointed to the Victorian Civil and Administrative Tribunal

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

None were known.

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?

Yes. There is no sound reason why a sale by an administrator, appointed to fill a gap where there is no enduring power of attorney, should lead to a different result than a sale by an attorney in like circumstances. In either case, there has been an authorised sale of the relevant asset without the knowledge of a deceased who lacked testamentary capacity. Compare *Simpson v Cunning [2011] VSC 466 (22 September 2011),* per Hargrave J [42].

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)?

It should be the same interest if that can be achieved but if not, then 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?

The exception should apply to any actions by the donee of the power. It is often difficult to pinpoint the date upon which capacity was lost.

(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?

Those that apply to a trustee. To keep a separate account and record; and in addition, any which are the subject of an order of a Court or VCAT.

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?

Yes.

If so, should access depend upon proof of the will-maker's lack of capacity?

Yes. Unless capacity is lost there is no justification for the donee to hold the Will. It is a private document.

DEBTS

Solvent estates

D1. Should the current Victorian order of application of assets for payment of debts in solvent estates be simplified according to the National Committee proposal?

Yes. The current order of application in Victoria should be changed in line with the proposal of the National Committee.

D2. Should a provision be introduced into the *Administration and Probate Act 1958 (Vic)* that specifies that all assets are to be applied rateably?

Yes. This is well supported.

Charged or mortgaged property

D3. Are there any significant difficulties with the operation of section 40 of the *Administration and Probate Act 1958 (Vic)?*

None were known

If so:

(a) should the provision be abolished as in the Northern Territory?

No.

(b) should the provision be modified to require a sufficient connection between the debt and the property upon which it is charged?

No.

D4. Should section 40 of the *Administration and Probate Act 1958 (Vic)* set out what will be, as well as what will not be, sufficient to constitute contrary intention?

No. The assessment should be on a case by case basis.

D5. In the context of section 40 of the *Administration and Probate Act 1958 (Vic)*, should expression of contrary intention be by will only?

The evidence should not be limited to the Will. This is justifiable despite the evidence going outside the Will. It is justified because the Will was made at a fixed point in time.

Insolvent estates

D6. How could the two current schemes of administration— part I of the second schedule to the *Administration and Probate Act 1958 (Vic)* and the *Bankruptcy Act 1966 (Cth)* operate more efficiently and effectively?

There should be clarification in the Victorian Act of which assets are by virtue of the *Bankruptcy Act 1966 (Cth)* available to pay the debts of the estate and which are excluded. The question of the payment of the costs of the trustee should be the subject of clear legislative direction. The terminology should be applicable to deceased estates.

D7. Should the *Administration and Probate Act 1958 (Vic)* define 'insolvent'?

Yes.

D8. Should the *Administration and Probate Act 1958 (Vic)* be expressed to bind the Crown, or alternatively, should there be express abolition of the priority of Crown debts?

It should be clarified that it binds the Crown.

D. 9 Should clause 2 of part I of the second schedule to the *Administration and Probate Act 1958 (Vic)* be amended to import the rules of bankruptcy in force 'at the time of death'?

No. The substantive laws that apply should be those at the time of death but the procedural rules should not be limited in this way.

SMALL ESTATES

Definition of a small estate

SE1. Should the current figures in the *Administration and Probate Act 1958 (Vic)* determining what is a small estate be raised? If so, what should they be raised to, and how should they be determined?

They should be raised to not exceeding $150,000. There is no justification for having a two tiered system based upon a higher amount where the only people entitled to share in the distribution of property are the children), partner and/or sole surviving parent of the deceased person.

SE2 In determining what is a 'small estate':

(a) should the dual threshold of values, based on the identity of the beneficiaries, be retained?

No. This is not justified.

(b) should the value be set by the *Administration and Probate Act 1958 (Vic)*, or be moved to subordinate legislation?

It should be moved to subordinate legislation. Regulations setting out the figure in regulations are easily revised (as in the case of penalty units) and statutory rules (including regulations) are subject to an automatic 'sunset clause', revoking the rules ten years after their enactment, which would promote more frequent updates to the figures.

SE3. Is there a better way to define which estates should have access to the simpler processes relating to small estates? For example, by reference to certain asset profiles?

No. Determination of asset profiles is too cumbersome. It may lead to there being the potential for unexpected discrimination.

Assistance in obtaining a grant of representation

SE4. Should the Supreme Court Probate Registry retain responsibility for providing assistance in obtaining grants of representation in relation to small estates?

Yes but only if there is resourcing appropriate to the demand.

SE5. Could formal assistance through the Supreme Court Probate Registry be replaced by the provision of clearer, more comprehensive, court-generated information?

No. It may be supplemented but not replaced. Formal assistance is likely to provide more relevant information in a complex area often given to persons who are suffering grief and unable to absorb large amounts of Court generated information.

SE6. Would the introduction of a sliding fee scale, perhaps with a nil fee for grants of representation for small estates, encourage people to seek grants of representation in small estates?

No. The anecdotal experience is that people apply for grants of representation in small estates because they have found that to achieve a particular outcome, they require a grant.

Elections to administer

SE7. What should be the value that determines the size of estates that can be administered under an election to administer?

$100,000.

SE8. Should the second threshold, above which an application for a full grant must be made, be retained? How should such a figure be expressed (for example, as a percentage of the initial figure or as a static figure)?

The safety net figure should be a percentage of the initial figure.

SE9. Should the threshold figures for elections to administer refer to the net or gross value of the estate?

They should refer to the gross value as the net value (at the time of application) may vary from the actual net value which may even be higher.

SE10. Should legal practitioners be permitted to file elections to administer? What would be the advantages of such a change?

Yes. It may be more cost effective. There should a fair and competitive market.

Should elections to administer require the filing party to file the will with the Court?

Yes. Those with a potential interest in an estate are most likely to begin any search with the Probate Registry. Further, filing the will would allow a level of scrutiny by the Registry, and potentially avoid elections going ahead where wills are defective.

SE11. Should advertisements giving notice of intention to file an election to administer be moved from newspapers onto the Supreme Court website?

Yes. The Probate Online Advertising System ("POAS") is well suited to promoting the advertisement of the notice of intention.

SE12. Should notice requirements in relation to an election to administer be abandoned altogether?

No. The costs saving is minimal compared to the risk that the rights of those with a potential interest in the estate will be prejudiced.

SE13. Should elections to administer be subject to stricter procedural safeguards? Are there other improvements that could be made?

No.

SE14. Do elections to administer, in their current form, serve a valuable function for small estates? If not, should elections to administer be abolished?

The small number of applications suggests that elections to administer, in their current form do not serve a valuable function. The reason why there are such a small number of applications is not clear. It may be that the deemed grant procedures open in some circumstances explain the low numbers but that is likely to be only part of the explanation. In such circumstances they should not be abolished at this time.

Deemed grants

SE15. What should be the value that determines the size of estates that can be administered under a deemed grant?

$150,000.

SE16. Should there be a second threshold above which an application for a full grant should be made, as with elections to administer? If so, how should such a figure be expressed (for example, as a percentage of the initial figure or as a static figure)?

Yes. It should be a percentage of the initial figure.

SE17. Should threshold figures for deemed grants refer to the net or gross value of the estate?

They should refer to the gross value as the net value (at the time of application) may vary from the actual net value which may even be higher.

Should legal practitioners be permitted to advertise for deemed grants? What benefits might this change produce?

Yes. It may be more cost effective to do many applications. A fair and competitive market may promote costs savings.

SE 18. Should deemed grants have more stringent procedural safeguards (for example, a requirement to file wills and inventories, and to search for caveats or prior grants)?

Yes. There should be a requirement to file the will and inventory. Those with a potential interest in an estate are most likely to begin any search with the Probate Registry. Further, filing the will would allow a level of scrutiny by the Registry, and potentially avoid elections going ahead where wills are defective. The requirement of an inventory will assist those who search to cross check the estate as sworn with the estate as known by them which will may lead them to challenge whether the deemed grant procedure is appropriate or available.

SE19. Do deemed grants, in their current form, serve a valuable function?

They serve a function in relation to State Trustees service provision and remove the need to use the section 11A election procedure. That has value.

Informal administration

SE20. Should section 32 of the *Administration and Probate Act 1958 (Vic)* be expanded to a provision of more general application, in line with the recommendation of the National Committee?

Yes. It is appropriate to include such provisions in the relevant Victorian legislation dealing with estate laws.

SE21. Should it be possible to transfer real property without a formal grant, as in Queensland? If so, in what circumstances?

Yes in cases where the estate is an estate of $150,000 including the real property. In Victoria applications under Part IV of the *Administration and Probate Act 1958* can only be commenced after there is a grant. If transfers of real property in excess of $150,000 were able to be made without a grant then problems may arise if at a later time a grant is made for the purposes of the being an application under Part IV and the property has been sold. The risk of the property not being recoverable augurs against the Queensland model being adopted save in cases where the estate is small.

SE22. Should section 33 of the *Administration and Probate Act 1958 (Vic)* be amended in line with the recommendation of the National Committee?

Yes. The legislation should generally work towards, rather than against, the protection and general support of informal administrators. The extension of the protection is well justified.

SE23. Should the Victorian provision be modified to limit an informal administrator's liability not only in relation to payments made, but also in relation to any other act that might properly have been done by a personal representative to whom a grant has been made?

Yes. The extension of the protection is well justified.

SE24. How else could the role of informal administrators be better clarified?

By court generated information which refers to the limitations of liability and protection afforded by law.

SE25. Would a process of administration by statutory declaration be a worthwhile addition to the mechanisms designed to facilitate the administration of small estates?

Yes. There is propensity for such a scheme to provide increased confidence for the party releasing funds, and a level of certainty for the declarant.

SE26. Are there further safeguards that would be necessary or desirable if this proposal were implemented?

Yes. These should include: (a) compliance with notice requirements for advertisement on the Supreme Court POAS website; (b) notices being required to be served under s 33 of the *Trustee Act 1958 (Vic)* calling for claims; and (c) conduct specific offences for anyone knowingly making a false declaration under these provisions.

27 March 2013

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