ASSOCIATION OF INDEPENDENT RETIREES (A.I.R.) LIMITED
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VICTORIA DIVISION
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Response to the Victorian Law Reform Commission Consultation Papers formed by conversations with retirees and members of the branches in Victoria Division.

Contact:

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SUCCESSION LAWS

Introduction

Your writer has not attempted a comprehensive report but has looked at certain aspects that jumped out at her as she read. These notes are from the perspective of an Independent Retiree who lives in a regional area and who knows little about Succession Laws. She has attempted to talk to as many retirees as possible and it is from their comments and her experience that the introduction is composed and the responses compiled.

1. Unanimously and spontaneously retirees said that they wanted no changing or challenging to their wills. One woman said "The making of a will today was not worth the paper it was written on. Why pay to make a will when ultimately my wishes will be changed?"
2. Discovered was that public knowledge of Succession Laws was extremely limited or just did not exist. Moreover the general public were not interested in reading about the current issues in the Consultation papers and preferred to play croquet, organise events, and deal with their own concerns. Nor were they interested in providing case studies.
3. As there is so much uncertainty about costs and/or outcomes most retirees were prepared to accept what was gifted to them in a will.
4. One retiree wanted two executors to withstand the articulateness and fluency of the presiding solicitor.
5. A minority of people appeared greedy and some as executors were prepared to forestall settlement as a payback from some past issue or others were prepared to challenge until the last cent of the inheritance was expended on costs as in "Bleak House".
6. Individual greediness is disrupting the cohesiveness of some families as members dispute the fairness or otherwise of the disbursement.
7. One small group wanted provision in the will to cover their care and circumstances of looking after them should they slip into dementia.
8. There was some concern about the probability of sperm donor children challenging wills.
9. [redacted]
10. Overall your writer agrees to the general adoption of the National Committee's laws and standards to accommodate the mobility of people.
11. The Memorandum Paper on debt was reviewed by the Bendigo branch.

Linda M Martin 28th March 2013

SUCCESSION LAWS – WILLS

GENERAL: Recommendations

1. Delete "older" as this is discriminatory against the alert senior. "Vulnerable" is inclusive and would include those retirees who are vulnerable.

2. Have better public communications by making available to the retiree sector information about will-making similar to that included in these Succession Laws Consultation Papers.

3. In will-making, consider longevity and recommend provision in wills for retirees outliving all their heirs and hence include the deceased wishes for say specific charities.

4. Longevity may require long periods in care with high expenses thus consuming estates so the size of estates may be diminishing.

5. Include the National Committee's recommendations to cater for the trend towards a more mobile population and especially along State borders.

Response to questions:

W1 - No

W2 – Yes – To note the date and that a witness had witnessed the will of the person. This may help when searching for wills and recognising which was the last will.

W3 – Yes; No

W4 - (a) Not age. (b) Assessment may be skewed to suit the interests of certain people.

W5 – Yes

W6 – Yes. Guidelines

W7 - ?

W8 – No

W9 – No

W10 – Sometimes no amount of protection will reduce the deviousness of the determined especially in this "lottery" focussed society.

W11 - ?

W12 - ?

W13 – Adopt National Committee's recommendations

W14 – Arrange separate representation

W15 - ?

W16 - ?

W17 – Yes. ? Yes

W18 – Yes. (a) Yes (b) Yes

W19 – Maybe more expensive and require more time but to increase the fairness of the outcome is most important.

W20 – No

W21 – (a) Yes, Same interest or compensation (b) Both (c) Complete disclosure of accounts.

I was left a special sugar basin of emotional and inspirational importance. The executor couldn't find the basin so he replaced it with a glass basin from the supermarket which he gave to me. Fortunately for me, the Will-maker had previously given the basin to me. I assured the Executor that I had the special one. In my mind, I question how frequently does this happen and with more expensive items/property/paintings and even equities.

W22 – Yes. Yes, proof to be required to avoid manipulation from the early reading.

SUCCESSION LAWS – FAMILY PROVISION

Overall question: Will the National Disability Scheme (NDS) create double dipping or eliminate the need for Family Provisions?

Generally Independent Retirees have the philosophy of promoting self-reliance, initiative, and independence and therefore think that by providing for a "nanny" situation lessens the will of individuals to strive. Family Provisions may create and arouse jealousies among siblings whereas the siblings may have been the greatest support group for the person before Family Provisions. This person may be seen to now not need the family support or so much family support.

Generally Victoria Division recommends that the National Committee's (NC) proposals be used.

Response to questions:

FP1 – Cost and time

FP2 – (a) Satisfaction

FP3 – Applicants need to pay the costs

FP$ - Yes

FP4 – Yes

FP5 – Yes

FP6 – Yes

FP7 - No examples

FP8 - Yes NDS may be available to some and not others.

FP9 – No

FP10 – Quality of life to make living purposeful

FP11 – Yes

FP12 – NC

FP13 – (a) NC

FP14 – Yes Limited to financial dependence.

FP15 – All people need to be encouraged to aim for independence and a purposeful life

FP16 – NC

FP17 – Yes

FP18 – (a) Yes (b) Refer to (a)

FP21 – Eliminate Family Provisions

SUCCESSION LAWS – INTESTACY

We generally recommend the National Committee's Intestacy recommendations

Random longevity is increasing the scope

Response to questions:

I1 – Yes NC

I2 – Yes NC

I3 – Yes NC

I4 – Yes NC

15 – Yes NC

16 – Yes

I7 - Yes NC

I8 - Yes NC

19 – (b) Yes

I10 - Yes NC

I11 – No

I12 – Yes

113 – Yes

I14 - ??

I15 - ??

SUCCESSION LAWS – EXECUTORS

Generally unnamed potential beneficiaries diminish the size of the size of the Estates by appealing and Executors may use delaying tactics and excessive charging as a payback.

Response to questions:

E1 - Yes (a) Everything and anything (b) The Court on its own initiative.

NB The monies of the estate are at greatest risk to excessive charging and abuse when the deceased has no dependants and no relatives. This is to the extent that a Solicitor beneficiary with a set commission returned the body to the deceased home country (Europe) for burial overseas and took his wife too at the cost (Economy class) of the estate (This was not mentioned in the will.)

(c) - No

(d) - No

(e) – Yes; strong discouragement to such actions and claims. Dissuades omitted potential beneficiaries from raiding the estate according to the current lottery mentality of society.

(f) – Yes

(g) – Yes

E2 – Yes. General public have little knowledge of the Law and are like putty in the hands of legal/solicitor Executors.

E3 – Two dated tables with costs clearly presented at least two weeks prior to signing of the will, both to be signed. One remains with the Solicitor, one is retained by/with the will-maker's papers. Although the witnesses don't read the will, independent witnesses' signatures cannot be replaced. More as a joke, a solicitor asked me if I had letters from the deceased implying a fabrication of a new will (of course the required signature was on the will so therefore letters were not needed.)

E4 - ?

E5 – Yes – In a typed-written table; whichever is the least expensive and most enduring. Set out in the professional rules.

E6 – Information should be set out and disclosed but perhaps in the Professional Rules.

E7 – A fringe/crook solicitor legal practitioner perhaps would just increase the number of hours to equal the commission. Adopt the National Committee's model for uniform Succession Laws especially considering the increasing migratory nature of people.

Memorandum

Succession Laws – Debts

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

This question relates to how 'debts' of the estate are paid, and from which particular assets the burden of the debt are to come from. The major criticism of the current Victorian system is that it is too open to litigation.

The proposal put forward by the National Committee is designed to primarily ensure consistency across the states, and to reduce the risk of litigation. The proposed order being as follows;-

1. Property specifically appropriated or given by will (either by a specific or general description) for the payment of debts; and property charged by will with, or given by will (either by a specific or general description) subject to a charge for, the payment of debts.
2. Property comprising the residuary estate of the deceased person and property in relation to which a disposition in the deceased's will operates as the exercise of a general power of appointment.
3. Property specifically given by will, including property specifically appointed under a general power of appointment, and any legacy charged on property given or appointed.

My answer to this question would be Yes. The proposed order is clear and logical. In the first instance debt is to be paid or assigned as specifically directed under Will. I.*e. I Give my property at Y to X Subject to my mortgage to Bendigo Bank.* In the second instance debt is paid from the residual estate and then thirdly (if applicable) debt is paid from the assets to which the debt is attached.

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

Rateability is the process in which debt is applied to specific assets of an estate. In Victoria rateability already exists, however it is currently only applies to certain classes of assets as

opposed to all assets. The proposed change would ensure that in Victoria rateability is applicable to all assets. Thus in my view this would be only a minor change in Victoria.

Question: Are there any significant difficulties with the operation of section 40 of the Administration and Probate Act 1958 (Vic)?
If so:
(a) should the provision be abolished as in the Northern Territory?

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

There are some difficulties with Section 40 as it stands. Generally its arguable that a Testator intended for a property to be gifted to a person subject to a mortgage for example. However the picture can become unclear if the said property is also for example used as collateral for another loan, in which case the Testator's intention becomes unclear and arguable.

In my view Section 40 serves a purpose and therefore should not be abolished, but I would also agree that an amendment to ensure a sufficient connection between the debt and the property is required.

Question: 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?

In my view it would reduce litigation if the Act clearly set out what would be sufficient to constitute contrary intention. If the Act did not specifically deal with this then the litigation would follow and the Court would need to determine the answer. Thus the more acceptable view would be to have the parliament at least set the parameters, which would hopefully reduce litigation. On the other hand 'contrary intention' would need to be considered and determined by a court, and it's most likely not practical to try and encompass this in legislation.

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

A contrary intention should indeed be limited to the will itself. Whilst outside evidence may be called upon to determine a particular matter, and therefore has its place, the will is the key document and it should be determined from the will itself whether or not a contrary intention exists.

Question: 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?

The schemes of administration are similar but not the same. If the goal was for them to be more efficient and effect, then a simplistic answer would be to ensure that as far as possible they mirror each other. But due consideration would need to be given as they are certain specifics in the *Administration and Probate Act 1958* (Vic) that would need to be maintained.

Question: Should the Administration and Probate Act 1958 (Vic) define 'insolvent'?

Yes. In the context of administration of estates.

Question: 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?

In my view the Act should bind the Crown. This would then ensure consistency between the Federal Bankruptcy Act and the Victorian Administration and Probate Act.

Question: 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'?

Yes. After review I have adopted an approach of consistency between the two acts as far as practical. This would be a practical change to ensure that the rules which applied to an estate at a certain time are clear.

SUCCESSION LAWS – SMALL ESTATES

Response to questions:

SE1 – Yes

SE2 – (b) Probate Act

SE3 – Asset profiles although at some stage there does have to be a cut-off point.

SE4 – Preferably SE5

SE5 – Yes

SE6 – Yes

SE7 - $50,000

SE8 – Static figure

SE9 – Net

SE10 – Efficiency

SE11 – Yes

SE12 – Both

SE13 – No

SE14 - Strict as is

SE15 – Yes; No.

SE16 – Static figure

SE17 – A static figure

SE18 – Net (when known)

SE19 – Yes – more efficient but maybe more expensive

SE20 – Yes

SE21 - ??

SE22 - In line with NC

SE23 – NC (or if an active business property which may deteriorate or lose its value.)

SE24 – Yes NC

SE25 – Yes

SE26 – Yes

SE27 – Yes

SE28 – Yes, especially when the deceased is the very last person in the family line

W 1 - Witnessing provisions. The Witness should agree not to interfere with the person making the particular WILL or comment on OTHER WITNESSES present WHO MAY HAVE ALREADY SIGNED IT..

No comments or changes should be mentioned. EACH WITNESS SHOULD BE TOLD OF THE CURRENT REGULATIONS IN PRESENT LAWS. EACH WITNESS SHOULD BE SHOWN WHERE TO SIGN BY THE WILL- MAKER.

W 2. Yes. If the person witnessing a will is mentioned in the Will; perhaps it should also mean that a particular person should not be a witness; or told the reason their assistance is not required.

No witness should listen to the reading of the will before signing same.

A solicitor's Secretary should be allowed to witness wills as they often type them and know the names etc. . OF THE CLIENTS being assisted on the signing date.

A Notary or former Notarial person could be a suitable witness.

No witness should comment WITH SOLICITOR, will-maker, AND HIS CLIENT until after the WITNESSES HAVE SIGNED THE WILL AND ALL PERSONS HAVE LEFT THE ROOM.

I presume that sometimes a witness is known to the person making the will.

W.9 THE PERSON MAKING THE WILL SHOULD HAVE MET WITH THE WILL-MAKER (SOLICITOR/ETC) BEFORE THE WILL IS READY FOR SIGNATURES.

2.19 If a Will is secret who holds the details of when it is drawn up and if the senior is ill afterwards and needed medical assistance; when **she or he used a cross** instead of a signature at the time of the proposed signing?

Do witnesses count in this type of problem and are they necessary?

W10 - Doctrine of "Undue influence" still needs to be easier to understand for seniors.

W 11 - YES.

W 12 - UNDERSTANDING THE DOCTRINE OF STATUTORY WILLS IN VICTORIA. Powers of Attorney: and Will-makers ....

Independent advisers should be available by Courts and Legal offices to assist when there is suspicion of Probate and pre-will making and

these persons could be independent advisers in the making of THE ORIGINAL WILL.

w 18 -THE ADEMPTION RULE NEEDS FURTHER INVESTIGATION AND UNDERSTANDING BY PEOPLE MAKING WILLS.

THE BOOKLET IS EXCELLENT TO INFORM PEOPLE AT PRESENT AND MAKE THEM MORE CAREFUL WHEN SEEKING Assistance to making their wills.