Submission

on

Succession Law

to the

Victorian Law Reform Commission

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1. Introduction

In March 2012 the Attorney-General of Victoria, the Hon Robert Clark asked the Victorian Law Reform Commission to review a number of matters relating to succession law and to report on options for legislative or other reform.

In December 2012 the Commission released a number of consultation papers and invited public submissions which are due by 28 March 2013. The Commission is due to report by 1 September 2013.

2. Intestacy

Division 6 of part I of the *Administration and Probate Act 1958* (Vic) establishes a statutory scheme for the distribution of property on intestacy in Victoria.

The Commission poses a number of questions in its consultation paper on intestacy about possible changes to this scheme.[1]

2.1 Limiting next of kin (Question I1)

Unlike other States, the law on intestacy in Victoria does not provide any limits on how far removed next of kin may be to be entitled to inherit on intestacy in the absence of nearer kin. The effect of imposing a limit, say to first cousins excluding great nieces and nephews, would be to increase (perhaps by 5% of all intestacies where there are next of kin[2]) the cases in which ownership of the estate goes to the State as *bona vacantia*.

This is an undesirable outcome. The State should only be the beneficiary of intestacy if no possible next of kin can be found.

With average life expectancy increasing many people will have great (or even great-great-) nieces and nephews. If a person does die without surviving direct issue (children, grandchildren, great-grandchildren) then such relatives are appropriate beneficiaries of an intestate estate.

Recommendation 1:

There should be no limit placed on the degree of next of kin who can inherit on intestacy.

2.2 Survivorship (Question I2)

The consultation paper discusses a discrepancy between the provision for a survivorship of 30 days in the *Wills Act 1997* and the lack of such a provision for intestacy.[3] For consistency a survivorship of 30 days should be introduced in relation to intestacy.

Recommendation 2:

For consistency with the provision in the* Wills Act 1997 *a survivorship of 30 days should be introduced in relation to intestacy.

2.3 Survived by "multiple" partners

Section 51A of the *Administration and Probate Act 1958* currently provides for a sliding scale for assigning the partner's share of an intestate estate in the event of a deceased leaving both a spouse (or registered partner) and an unregistered domestic partner. The share assigned to the unregistered domestic partner depends on the length of continuous cohabitation with the deceased immediately prior to the death of the deceased: less than 2 years – no share unless there is a child under 18; 2-4 years – one-third; 4-5 years – half; 5-6 years – two thirds; 6 or more years – entirety.

This provision fails to give due regard to the nature of marriage. Here we are dealing with a marriage which has not been formally ended by divorce.

Marriage by law in Australia is "*the union of a man and a woman to the exclusion of all others, voluntarily entered into for life*".[4]

Until a marriage is legally and formally ended by divorce, the law, including the law of Victoria, should give full recognition to the implications of the nature of marriage as a union "*to the exclusion of all others*".

In the case of intestacy in particular, where the deceased has made no will then the law should favour the lawful spouse regardless of the length of the adulterous relationship between the deceased and a third party.

Recommendation 3:

The share allocated on intestacy to a surviving partner should always, where there is a surviving spouse, be assigned in its entirety to the spouse.

3. Family provision

In Victoria prior to 1998, only the widow, widower and children of a deceased person could make a family provision application to vary the distribution of an estate that would otherwise be effected by a will or by the rules of intestacy.

Since 1998, Part IV of the *Administration and Probate Act 1958* (Vic) provides for the Court to "*order that provision be made out of the estate of a deceased person for the proper maintenance and support of a person for whom the deceased had responsibility to make provision*".

The law dealing with family provision is based on the notion that there are just reasons for interfering with the general principle that a person (the 'testator') should be free to determine how their property is distributed on their death by making a will (or 'testament') that sets out their intentions.

The consultation paper on family provision canvasses evidence – or at least suggestions – that the broad approach to who may make a claim for family provision has led to opportunistic claims which may lead to unnecessary reduction of the estate by expenditure on legal costs in contesting such claims. [5]

The notion of family provision should be reinstated to its original meaning of ensuring that a surviving spouse or children who are not properly and adequately provided for by either a will or by the rules of intestacy have the opportunity to seek a remedy from the Court.

The obligation to provide for a spouse arises from the very nature of marriage as "*the union of a man and a woman to the exclusion of all others, voluntarily entered into for life*".

The obligation to provide for children arises from the nature of becoming a parent – bringing a child into existence by an act of conception or taking on parental responsibility by an act of adoption or a similar act.

This obligation applies at least during a child's minority and perhaps for a further period of time to assist them to obtain an education or training sufficient to become independent. In the case of a child with significant disabilities or other special needs the obligation may be ongoing into the child's adulthood.

In these two cases it is proper for the Court to correct a failure by a testator, whether by inadvertence or ill-will, to make adequate provision for his or her family.

Domestic partners and other relationships of dependence lack a foundation in the fundamental structure of the family based on marriage, natural parenthood or adoption. The State has no basis on which to interfere with the freedom of the testator to continue or not to continue to provide after his or her death for such *ad hoc* dependents.

Recommendation 4:

Claims for family provision should be limited to:

- ***spouses,***
- ***children under the age of majority,***
- ***adult children of the deceased who were undergoing education or training at the time of the deceased's death and who were dependent on the deceased,***
- ***adult children who by reason of disability or other special circumstances were dependent on the deceased at the time of his or her death.***

4. Effect of divorce on a will

Although it is not directly addressed in the terms of reference or the consultation papers it is opportune for the Commission to consider recommending the repeal of s14 of the *Wills Act 1997*.

This section provides for the effect of divorce on a will.

Subsection (1) provides that the divorce of a testator revokes any provisions in a current will that would benefit the former spouse.

Subsection (2) provides that: "*This section does not apply to any disposition, appointment or grant, if it appears that the testator did not want the disposition, appointment or grant to be revoked upon the ending of the marriage.*"

This is confusing and ill-thought out law.

It is open to any testator at any time to revoke a will and to make a new one. If a testator has not taken the step of actively revoking a will on divorce then the law should presume that he or she did not intend to do so rather than, as the current provision does, adopt as a default presumption that he or she did intend to do so.

If the testator remarries before dying, the remarriage would automatically revoke the will. This provision addresses the situation where the testator has not remarried.

Consider a will that left the entire estate to the testator's spouse and made no provision for its distribution in the event of the spouse predeceasing the testator. If the testator and spouse were divorced but the testator did not make a new will before dying then, under the current s14 of the Wills Act 1997, the testator would have died intestate. This is not a desirable outcome.

Recommendation 5:

Section 14 of the* Wills Act 1997 *should be repealed.

5. Endnotes

1 Victorian Law Reform Commission, *Succession laws: Consultation Paper: Intestacy*, 2012, http://www.lawreform.vic.gov.au/sites/default/files/Succession%20Laws_Consultation%20Paper_Intestacy_0.pdf

2 *Ibid.*, at 2.28, p 28.

3 *Ibid.*, p 23

4 *Marriage Act 1961* (Cth), section 5.

5 Victorian Law Reform Commission, *Succession Laws: Consultation Paper: Family Provision*, 2012, pp. 25-28: http://www.lawreform.vic.gov.au/sites/default/files/Succession%20Laws_Consultation%20Paper_Family%20Provision.pdf