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The Victorian Law Reform Commission's review of Succession Laws:

Executors
Wills
Family Provision
Intestacy

Submission by
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Rigby Cooke Lawyers ("RCL") provides this submission as a legal services provider in the area of Wills & Estates; including drafting of wills and powers of attorney through to grants of probate estate administration and estate litigation.

Succession Laws - 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 hearing?

RCL believes factors affecting a decision to settle a family provision application are the expense of continuing family provision proceedings beyond mediation stage and also the difficulty in many cases of being able to predict, with any certainty, what the court would do. Family provision applications are determined at the discretion of the particular judge and cannot be confidently predicted in many cases. There may be 50 judges and 50 different decisions and none of them would be wrong.

Time limits and extensions of time

FP2 Is the current period within which an application for family provision can be made in Victoria (6 months from grant of representation):
(a) Satisfactory?
(b) Too short?
(c) Too long?

RCL believes that the current period within which an application for family provision can be made in Victoria is satisfactory.

Opportunistic claims

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

RCL is of the view that due to the uncertainty in predicting a court's decision and the likelihood that costs of the applicant in family provision claims will be allowed on mediation, opportunistic claims exist.

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 applications from making family provision claims?

RCL believes that section 97(7) of the *Administration and Probate Act 1958* (Vic) does not to deter parties bringing family provision claims because in order to have costs awarded, the parties are required to go court.

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

RCL believes that the Courts are very reluctant to summarily dismiss claims and in the past have very rarely done so, and that this does not act as a deterrent for vexatious litigants.

Excessive costs

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

RCL believes that family provision cases can unfairly impact estates, for instance, where a claimant who has sought further provision from the estate has failed in a family provision claim, the estate is unfairly impacted where the estate ultimately pays for the costs of those proceedings even though the claimant received no more from the estate.

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?

In the experience of RCL assisting clients with estate planning, in order to avoid a Part IV claim being made against their estate some client will deliberately have most of their assets in a superannuation fund, held in joint names with their spouse or hold assets in a family trust.

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

RCL considers that people should be entitled to deal with their assets during their lifetime.

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?

Should not be limited to dependants, for example, the moral duty owed to an adult whose life has been permanently affected by abuse as a child.

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

No comment.

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?

RCL does not support the National Committee's proposed eligibility approach.

FP 12 Should Victoria limit eligibility to make family provision application in the same way that NSW has?

Changing or limiting the class to mirror NSW provisions would add no value to our family provision laws.

FP 13 If Victoria were to adopt the NSW approach:
(a) Are the categories recognised in NSW sufficient or should others be included?
(b) Should applications by certain categories of applicant be further limited? If so:
i. What should the nature of such further limitation be?
ii. To which categories of applicant should the additional limitation apply?

No comment.

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?

RCL does not believe that dependence on the testator should be limited to financial dependence. Furthermore, if dependence were limited to financial dependence, this would effectively revert to the limited class of claimants Victoria had prior to the legislative changes which was unsatisfactory.

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

RCL believes that this may be the case.

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

RCL believes that Victoria should retain the responsibility criterion for eligibility. However, although demonstrating financial need is an important factor it should not be a mandatory requirement and nor determinative in itself.

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

RCL supports the view that there should be a legislative presumption that an unsuccessful applicant will not receive their costs out of the estate.

FP18 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
(b) 'no order as to costs' – the applicant bears the burden of their own costs

RCL supports option a., this is consistent with costs orders made by courts in other civil litigious matters.

FP19 Are family provision proceedings generally less costly in the county court than in the Supreme Court?

RCL is of the view that the costs of proceedings in the County Court are not dramatically cheaper than in the Supreme Court.

FP20 What measures are working well to reduce costs in family provision proceedings in the county court and the supreme court?

RCL believes that the measure that works well in the County Court are providing submission papers rather than affidavits.

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

RCL believes that the process in the County Court is complex and simplifying the procedures in the County Court would assist in reducing costs.

Succession laws: Wills

Requirements to 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?

RCL supports there being special witnessing provisions in respect of all will makers. Given the likely introduction of international wills in Australia, this might be an opportunity for our laws to become consistent with international wills requirements. At least one witness should be a solicitor or a person authorised to take affidavits. This requirement should be regardless of the age and vulnerability of the will-maker. Requiring an elderly person's will to be witnessed by a medical practitioner is unnecessary as it is already considered good practice to require a medical certificate from an elderly will-maker on the day of executing the will. Already medical practitioners are reluctant to witness wills, it therefore could be difficult and cumbersome for every elderly person to find a medical practitioner to witness their will.

Furthermore, the witnessing requirements for enduring powers of attorney in Victoria have become more stringent because of negative experiences; more stringent witnessing requirements should also be imposed for wills. This may assist where a will is determined invalid and an application is made to recognise an informal will.

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

RCL believes that the witnesses of a will should be required to understand that the document they are witnessing is a will.

The witness-beneficiary rule

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

RCL supports the witness-beneficiary rule being re-introduced. If a beneficiary to a will acts a witness, the beneficiary should be automatically removed as a beneficiary. Many lawyers continue to act on this principle as part of their good practice repertoire to minimise the risk of undue influence. It will also bring uniformity across many Australian jurisdictions.

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?
(a) If so, in what circumstances should the requirement apply (such as where a will-maker is over a particular age)?
(b) If not, what disadvantages would there be in such a requirement?

RCL believes that introducing a professional requirement that solicitors obtain a medical capacity assessment for their clients prior to drafting a will, will not necessarily prevent undue influence. It will just confirm the person's ability to prepare a will. Undue influence can occur even where the will-maker's capacity is not at issue. A person's vulnerability is not dependent upon testamentary capacity. A general requirement of obtaining a medical assessment should apply to will-makers aged 80 and above and for other will-makers

who in the opinion of the solicitor present with vulnerabilities such as a will-maker who is ill. Imposing such a requirement would not create a disadvantage. Indeed, good practice dictates that medical assessments are prudent in the case of certain will-makers. The only negative aspect of this requirement is the inconvenience to clients, particularly where capacity is not at issue.

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?

RCL believes that a professional requirement is not required. Solicitors should exercise their professional judgement in conducting themselves ethically in such situations. If there is a concern of undue influence, then the solicitor at that point in time should refer the third party client to another solicitor for independent advice.

However, where there is no suspicion of undue influence and the referral is based on good faith, then as long as the solicitor receives instructions directly from the third party client, independently of the existing client, then no issue of conflict arises, whether the existing client is a beneficiary or not.

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?

RCL supports the recommendation that there should be guidelines for professionals who make wills in Victoria dealing with how to minimise the incidence of undue influence on older and vulnerable will-makers. The guidelines should include a checklist of characteristics to be observed by the solicitor in relation to a vulnerable client at risk of undue influence. The guidelines should also contain suggested steps a solicitor should take when presented with a vulnerable client.

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?

RCL believes that ways in which a solicitor can improve the protection of vulnerable clients in the will-making process include:

- Checking prior wills to ascertain whether there has been a significant change in the disposition of assets such as leaving out certain beneficiaries;

- Inquiring about personal relationships with family and friends during the first interview. This can also be done discretely through the aid of a detailed instruction form which gathers personal information or casual conversation. This process may reveal relationship dynamics which may alert the solicitor to potential undue influence; and

- Arranging for a client who is aged 80 and over (or such other persons the solicitor deems necessary) to obtain a doctor's certificate as to testamentary capacity;

- Requiring the consulting doctor conducting the assessment of the client's capacity to address a checklist of factors to comment on rather than providing a one line statement which is not sufficiently informative;

- Interview and take instructions from the client independently of family members or friends; and

- Where there is a concern of undue influence, ask a client on multiple occasions what their testamentary wishes are to ascertain consistency.

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?

RCL believes that compulsory medical reports should be introduced to improve the protection of vulnerable will makers. This can be achieved by either a statutory test or a prescribed assessment form for medical practitioners. This test or form should be compulsory for those will-makers aged 80 years and over and for such other vulnerable persons the acting solicitor deems necessary.

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?

No comment.

W10 Are any changes to the law concerning fraud or forgery necessary to improve protection for older and vulnerable will-makers?

No comment.

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

RCL believes that the current principle of undue influence in relation to Wills is difficult to establish as there must be a finding of 'actual coercion'.

Undue influence should be established on the basis that it is more probable than not that the content of the will does not represent the independent wishes of the testator.

RCL agrees with the recommendation that the equitable doctrine of undue influence should be applied to wills.

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

In line with judicial comment made by Vickery J (Nicholson v Knaggs):
- The ability to examine of all evidence including circumstantial evidence.
- That decisions are determined on grounds of probability rather than actual coercion.

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?

RCL does not support the National Committee's recommended guiding principle for authorising a statutory will as the test in Victoria is wider than other states as it includes scope for subsequent incapacity and persons who may never have had capacity. RCL believes that there should be no change to the Victorian position as the test allows for either subjective or objective evidence giving the authorisation of statutory wills wider operation.

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)?

RCL supports the NSW approach. The *Wills Act 1997* (Vic) should specify the court's power to order separate representation of the incapacitated person (rather than merely stating that the incapacitated person is entitled to appear on the application). The NSW approach enhances procedural fairness.

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).

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

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

RCL believes that to make the statutory will procedure more accessible, the two stage process in the *Wills Act 1997* (Vic) should be removed and further that the judges have the power to decide unopposed statutory will applications in chambers. RCL is of the view that it would be inappropriate for VCAT members in the Guardian List to hear statutory will applications on the basis that they are not equipped with the requisite experience and knowledge.

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

No comment.

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?

The *Wills Act 1997* (Vic) should include costs provisions specific to statutory will applications. The legislation should distinguish between interested and disinterested parties as the latter will not be able to recover costs from the deceased's estate.

Succession Laws: Intestacy

Defining and setting a limit on next of kin

I1 **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?**

RCL believes that by setting a limit on the next of kin will remove the onerous task of identifying and locating distant relatives who may not have had anything to do with the deceased. Provision could be made for undistributed estates to form part of a charitable fund.

Survivorship

I2 Should Victoria introduce a survivorship requirement of 30 days for consistency with the national committee's recommendation approach, the law in NSW and Tasmania and the position under the *Wills Act 1997* (Vic)?

RCL supports the survivorship requirement as it is consistent with partial intestacy requirements as well as the way in which will-makers draft their wills.

Entitlements of the deceased person's partner or partners

I3 Should Victoria increase the partner's statutory legacy to $350,000 adjusted to reflect changes in CPI as proposed by the national committee?

RCL supports an increase to the partner's statutory legacy however, believes that the amount should be increased to a percentage amount such as 5% or $150,000 whichever is the greater, as this would take into account the size of the deceased's estate.

The recommendation of $350,000 is excessive especially for small estates.

I4 Should Victoria increase the partner's share of the remainder of the estate from 1/3 to 1/2 as proposed by the National Committee?

RCL supports the recommendation by the National Committee. An increase in the amount received by the partner is more consistent with the way individuals draft their will. Furthermore, where the estate consists of a property which the deceased and the partner lived in, for instance, the increase in the amount available to the partner may provide greater resources to enable the surviving partner to purchase the family home.

RCL questions where there should be an increase in both the legacy portion of the estate for a spouse, particularly for those with blended families.

I5 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**
(c) **Equally between the parties**

RCL does not support this recommendation.

RCL believes that it would be onerous on the parties to require them to enter into an agreement. Failure to reach agreement may give rise to litigation. In addition, a distribution order may increase costs of the estate requiring the parties to go to court.

RCL believes that equal division between parties may result in an unfair distribution. For example, where the deceased and the spouse, have separated but not divorced, and entered into a property settlement. Dividing the estate equally between the parties in these circumstances may give rise to an unfair distribution.

I6 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 on remainder?

RCL believes that where a property settlement has occurred between the deceased and the estranged spouse yet the parties are not yet divorced, this should disentitle the estranged spouse from receiving further provision from the deceased's estate. A statutory legacy should be paid to the current partner of the deceased.

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

I7 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?

RCL supports the National Committee's recommendation. If, for instance, the deceased and the partner were running a business together, this would enable the surviving spouse the opportunity to acquire the business so that he/she could continue to run the business and generate future income.

Entitlements of the deceased person's children or issue

I8 Should Victoria adopt the approach to entitlements of the deceased person's children on intestacy recommended by the national committee?

RCL does not support the National Committee's recommendation.

Per stirpes or per capita distribution

I9 Should Victoria:

(a) **Retain per capita distribution and extend its operation so than it applies at each generation to both lineal and collateral relatives when all members of the preceding generation are the deceased, or**
(b) **Abolish per capita distribution and apply per stirpes distribution in all cases?**

RCL supports option (b). This is consistent with many individual's testamentary intentions as evidenced in many Wills.

Taking benefits into account

I10 Should Victoria abolish the hotchpot rule as recommended by the national committee?

RCL supports the recommendation by the National Committee to abolish the hotchpot rule.

I11 Alternately 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 next of kin?

RCL believes that if the hotchpot rule is retained, it should be extended to next of kin.

I12 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?

RCL believes that gifts received under a will on partial intestacy should not be taken into account.

I13 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?

RCL believes that the hotchpot rule should be extended beyond children. For example, where the deceased had children from a previous marriage, prepared a will providing gifts to his intended wife and then marries, the gifts to the wife remain and the wife will also receive a further $100,000 plus 1/3 of the estate. This may give rise to an unintended result by the person.

Indigenous intestate estates

I14 Are any statistics available about intestacy of indigenous people in Victoria?

No comment.

I15 Are there more flexible provisions needed in Victoria for the distribution of indigenous intestate estates? If so, what form should those provisions take?

No comment.

Succession Laws: Executors

Court review of costs and commission charged by executors

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

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

RCL is of the view that the Supreme Court should have power to review amounts charged or proposed to be charged by executors regardless of their profession. (This brings Victoria in line with the NSW position).

The scope of the power to review amounts charged by executors should be limited to commission. Disbursements, professional fees and other administrative costs are covered by a cost agreement which already provides transparency. The Legal Services Commissioner can deal with complaints from beneficiaries about fees and costs charged to the estate. Disbursements are often in the nature of fees set by government bodies or third parties which can be beyond the control of an executor and therefore, in practice, it would be a difficult task for any court to establish the reasonableness of such expenses.

(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?

RCL supports the recommendation that the Supreme Court should conduct a review of commission charged only upon the application of an interested person. Beneficiaries are already are entitled to ask for details of costs, fees and to obtain a statement in taxable form. The Court should not take on the role of a commission watchdog, taking action in its own right but rather to resolve disputes as they arise. This would be the most efficient use of public resources and discourages vexatious applicants.

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

RCL believes that there should be an exemption. Applicants should not have a right of review where there is evidence that the will maker received legal advice on the impact of commission clauses and the option of appointing someone who did not charge commission. Compliance with rule 10 of the *Professional Conduct and Practice Rules 2005* should be an exemption from review.

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

RCL believes that a review should be subject to a period limitation. The LIV suggests a time limit of 3 months from the date the beneficiary was notified of the commission charged. RCL supports the recommendation by the LIV. By having a period limitation in which to make applications, litigation may be minimised together with the risk of the estates assets evaporating in further legal costs. Furthermore, it may also reduce vexatious applications for review.

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

RCL supports this recommendation. The Court should have this power to protect the assets of the estate and to not prolong the administration of the estate unnecessarily. It also prevents the ineffective use of Court resources.

(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?

RCL believes that an executor is entitled to charge commission where a valid will provides for such a charge. Ethical questions are raised where there is a concern that commission is charged excessively, notwithstanding the provision contained in the Will. It may bring into question where an executor charges more commission than what is provided by the will. In these circumstances, where the commission is reduced by more than 10 per cent, the Court should have power to order the legal practitioner executor to pay costs of the application. An order in the form of a penalty would serve as a reminder that executors must not breach their fiduciary duties for personal gain.

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

RCL believes that all persons who act in the role of executor should be treated equally. The role of an executor is the same no matter who takes on that role.

Special rules for legal practitioners who act as executors and also carry out legal work on behalf of the estate

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

RCL believes that legal practitioner executors should not be required to instruct another law practice to act in relation to an estate for the purpose of avoiding a conflict of interest. The reasons supporting this position include:

- Liaising with a solicitor of another firm would result in a doubling up of legal fees;
- The process of administering the estate would be drawn out as communications pass through more people. Executors and beneficiaries will need to be informed about progress made in their matters;
- The whole point of a will-maker appointing a particular legal practitioner executor is that the legal practitioner is trusted by the will-maker and has knowledge of the will-maker's legal/financial circumstances.
- It is common practice that legal practitioner executors delegate probate and administration work to colleagues in the area and supervise the progress of the matter.

RCL believes that there should be no change to the current position.

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?

RCL believes that requiring a will that appoints a legal practitioner executor makes the process unnecessarily difficult. In the view of RCL, rule 10 should be given statutory force. The current requirement for witnesses does not require the witness to know that they are signing a will nor to read the will; RCL questions whether an independent witness will result in the willmaker being fully informed.

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

As for E3.

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?

RCL believes that legal practitioner executors should be required to disclose to beneficiaries the basis on which they charge the estate as it creates transparency for the matter and also takes pressure off the executor. It is the belief of RCL that if this approach is taken, beneficiaries will be less likely to suspect dishonest practice by the legal practitioner and applications for review will be less likely.

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?

RCL agrees with this recommendation.

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?

RCL is of the view that legal practitioner executors should be entitled to charge an hourly rate for legal and non-legal executorial work, rather than a percentage of the estate for its commission, as the percentage approach could result in ‘double dipping’ from the estate.

RCL does not support the recommendation made by the National Committee for Uniform Succession Laws.

We support the LIV's proposal.

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