SUCCESSION LAWS

Submission to the Victorian Law Reform Commission - Intestacy and Wills

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SENIORS RIGHTS VICTORIA

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INTRODUCTION

Seniors Rights Victoria (SRV) is a specialist legal and advocacy service providing information, support, advice, legal casework and education to older Victorians. SRV works particularly in the area of elder abuse.

Most older Victorians lead healthy and active lives. They enjoy strong and supportive relationships with family, friends and carers and rightfully maintain the freedom and independence to make all of life's decisions. Yet age can often be accompanied by conditions which result in vulnerability and that vulnerability is sometimes exploited.

Elder abuse is mistreatment of an older person that is committed by someone with whom the older person has a relationship of trust such as a partner, family member, friend or carer.

Seniors Rights Victoria seeks to prevent elder abuse from occurring by offering free legal advice and information as well a range of law reform, educational and advocacy activities. We are committed to safeguarding the rights, dignity and independence of older Victorians.

SENIORS RIGHTS VICTORIA POSITION

While many family members may believe they have the best of intentions, they often override the older testator's wishes believing they know what is best for them. In our society there is discrimination, intentional or otherwise against older people. They are often treated, as if they had lost any independent thought. Ageism adversely impacts on older people and is based on a negative stereotype of age. SRV believes that this is an important issue. The rights of older people must be, to make decisions free of either pressure from possibly well-meaning relatives, or actual duress.

SRV welcomes the opportunity to respond to particular sections of the consultation papers on Wills and Intestacy, as we believe any new legislation should be strengthened to provide better protection to older Victorians who may be vulnerable to exploitation by relatives and or carers. In our experience there is a growing trend for younger family members to have a parent's assets transferred to them during their lifetime believing they have a more compelling need for the assets. This seeking of an early or increased inheritance extends to Wills being made that favour, usually one family member's interest, over the interest and wishes of the testator.

While it is said that the family can seek to rectify this after the death of the testator, SRV believes that this does not take account of the fact that the testator's views and wishes are being discounted during their lifetime. The preferable situation would be that there are safeguards built into the Act which would minimize this risk, without making the requirements too onerous for all other will makers.

SRV recognizes that it is preferable for people to make decisions about their assets and to have a valid Will. We are concerned that the drafting of Wills from Will kits without advice, puts the testator

at a disadvantage. If witnesses are unaware of the requirements for the testator to have capacity, it is clear that use of a kit is an opportunity to prepare a Will as the beneficiary wishes and for the testator to sign regardless of capacity or real understanding of who will benefit. SRV supports better education around the use of professionals to draft Wills and the benefits to be gained.

SRV'S RESPONSE TO SELECTED QUESTIONS ON INTESTACY AND WILLS.

INTESTACY

Question 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?

SRV supports the National Committee's recommendation for a uniform nationwide approach particularly in relation to having greater certainty when property is owned in more than one jurisdiction which is becoming more common.

Question I2

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)?

SRV supports the introduction of a survivorship requirement in line with the Wills Act 1997 for intestacy matters.

Questions I3 & I4

I3 Should Victoria increase the partner's statutory legacy to $350,000 adjusted to reflect changes to the Consumer Price Index as proposed by the National Committee?

I4 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?

It is common for clients seen by SRV to be in a domestic or marital relationship but for the home to only be in one name. This may be because it is a cultural norm, or because the parties have entered into a second marriage and have not taken steps to transfer assets into joint names.

From SRV's perspective, the current legislative position sets up the family for potential dispute and inadequate provision for the surviving partner in the event of an intestacy. We consider that the proposed changes do not adequately address this.

For most of our clients, the home is the major or even the only asset. Where the deceased partner did not have a Will, the surviving partner will be left to negotiate with the children as to the distribution of the estate.

For an older person, there could be a imbalance in their negotiating power, compared to that of the children for many reasons, such as health factors, language and cultural barriers, and isolation. Where the older person is not able to negotiate to remain in the property, their share of the estate under intestacy may be too little for them to acquire alternative accommodation and too great for them to be entitled to subsidised accommodation. The alternative would be impermanent accommodation options, such as private rental, typically unsuitable for the lifestyle of older people and too expensive for most age pensioners.

For example, it is conceivable that the following scenario could eventuate:

Deceased husband owns the family home in his sole name as he has always managed the finances of the family. He has no other assets. He passes away without a Will. The house is worth $550,000. Even under the proposed changes, his widow will only receive the first $350,000 of the value and half of the remaining $200,000 value, leaving her with $450,000 worth of interest, or a 9/11 share as a tenant in common. The remaining two shares go to their two children.
Even if the children do not seek to have the property sold to realise their interest and the widow can remain in the home, in our experience having more than one family member on title can precipitate a family dispute. These disputes often are about children wanting their share before their parent is deceased, or they wish to mortgage the property. Where children are on title they see they have a right to make decisions about what will happen with the property.

Older spouses with limited assets are usually reliant on the Aged Pension therefore there is no financial ability to buy out a child's or children's interest.

We submit that it is unlikely that this outcome would be in line with what the deceased would have wished. In the absence of any evidence to the contrary, it seems unrealistic to assume just because they didn't make a Will, they intended their children to take a share of the home. For most lawyers practising in the Wills area, the most common scenario for Will makers is that husbands and wives leave the home to their spouse, unless there are other more complex factors that influence their decision, which would be discussed with their lawyer.

Where it can be established that the property (or interest in property) owned by the deceased in his or her sole name, was the principal place of residence for the couple at the date of death of the deceased, we submit that this property or interest should be transferred wholly to the surviving partner.

Recommendation:
Our proposal is that where the deceased was the sole proprietor on title, of the principal place of residence, and they resided in the property with their spouse or domestic partner in

a bona fide domestic relationship, this property should pass to the surviving spouse or domestic partner in total, in lieu of the statutory legacy.

Where the deceased did not own any real property in their name, we agree that the statutory legacy should be adjusted to $350,000, and that half the balance of the estate after the property or statutory legacy is deducted pass to the surviving partner.

Questions I5 and I6

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; or
(c) equally between the parties?

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 of the remainder?

Where there are multiple partners, with either issue or no issue, we would agree with the recommendation of the National Committee, as these situations are usually complex and without agreement may need a decision of the appropriate Court.

We also agree that the statutory legacy amount should fall under the Regulations rather than the Act so that it may be updated in line with CPI, increases in property values, or due to other factors that can influence property values, such as a major recession.

WITNESSING WILLS AND UNDUE INFLUENCE

Question 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?

SRV supports the implementation of stricter witnessing requirements for Wills. However, we consider that restricting those to certain groups of Will-makers to be discriminatory and against the principles of Victorian human rights legislation. Any assumption that older Will-makers need additional legislative protection is ageist. A Will-maker may be more susceptible to abuse for any number of reasons. Age in and of itself does not determine that a person will be more vulnerable to undue influence.

We consider that the current witnessing requirements do not adequately protect Will-makers of all ages and circumstances.

We support the suggestion that the witnessing requirements be brought into line with the requirements for witnessing an enduring power of attorney (financial).

The *Instruments Act 1958*, s.125 Who can be a witness?
S125 states that a witness cannot be: the donor, the attorney, only one of the witnesses can be a relative of the donor or the appointed attorney and one of the witnesses must be a person authorised by law to witness the signing of a statutory declaration. The Wills Act should include a similar clause excluding the following as witnesses:

a) the testator
b) the executor(s),
c) beneficiaries; and
c) allowing for only one of the witnesses to be a relative of the testator,
d) the requirement that at least one of the witnesses must be a person authorised to witness statutory declarations.

We acknowledge that requiring at least one witness of a Will be authorised to witness statutory declarations adds an additional burden, however, we do not consider this to be particularly onerous. We do believe that requiring a witness with a professional qualification may assist in preventing undue influence in at least some of the cases. This would not affect Wills made by legal practitioners so will not add any extra cost or convenience burden. For homemade Wills it provides that there be some distance at least between the making of the Will and the signing before a truly independent witness and would provide an opportunity to indicate it is not what the testator really wanted.

Since the introduction of stricter witnessing requirements for Enduring Powers of Attorney in Victoria in 2003, SRV is not aware that this has caused any delay or hardship to older persons or the general community. Our experience is that there is better understanding of the rights and responsibilities for attorneys, which has provided better protection to our clients.

Recommendation
That at least one of the witnesses be authorised to witness Statutory Declarations, that only one relative can witness and that it is preferable that the testator or the executor do not witness.

Question W2

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

We believe that the witnesses should also be required to know that they are witnessing a Will, and sign to say that they believe that the testator signed the Will voluntarily and freely and appeared to have the necessary capacity to sign the document, also similar to the requirements for enduring powers of attorney.

Question W3

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

SRV agrees that the witness-beneficiary rule should be reintroduced. We consider that allowing a beneficiary to witness, only increases the opportunity for undue influence in the execution of a Will. If the rule is introduced, it should be allowed that Wills that have been witnessed by a beneficiary go before the Registrar of Probate, to allow a Grant to be made for homemade wills, made in good faith.

Question 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?

SRV does not agree that there should be a professional requirement that lawyers obtain a medical assessment. We consider this requirement to be potentially ageist. Also, the nature of assessment varies from professional to professional, and it would be difficult to set the standard of such an assessment. In seeking an assessment would a General Practitioner's assessment suffice, or should a geriatrician's report be sought? The additional costs for these reports could discourage potential Will-makers. This also penalises those people who choose to see a lawyer to make their Will. It does not address the capacity issue for the many people who draft their own Wills with the help of friends and family, who often have no understanding or acceptance that their relative or friend is slipping into dementia and therefore would not see the need to obtain such an assessment.

Instead, the guidelines suggested under Question W6 could provide a guide to lawyers about when assessments would be advisable and of what standard, and also how to conduct a legal assessment of capacity. We also refer the Commission to SRV's guide for lawyers called "Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse" and the guidelines contained therein for lawyers in ascertaining the testamentary capacity of their clients.

Questions W5 & W6

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?

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?

SRV supports the implementation of guidelines suggested under Question W6 for lawyers.

Lawyers who take instructions from Will-makers are well placed to assist vulnerable people who are at risk of abuse in making their Will. Unfortunately, at SRV we have come across many clients who have made Wills in the past under what we would consider to be undue influence that does not appear to have been detected by the person taking instructions and drafting the Will.

Some solicitors allow family members to be present when the Will instructions are given, and we know of others who have gone so far as to take the instructions from the family member completely.

As an example, we looked into referring a client of ours to a reputable firm in his local area to have his Will done. The client is hearing impaired and immobile, so instructions would have to be taken from him at home. The firm was not able to offer a home visit for the purposes of the instructions, but instead suggested that they take instructions from a relative of the Will-maker over the phone and then only visit the client to sign the Will. We expressed our concerns about such a practice to the firm and made a referral to a lawyer prepared to visit the client in his home to take instructions.

We again refer to our guide "Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse". In the guide, we cover issues around recognising financial abuse and the duties of practitioners. We ask lawyers to keep in mind the following considerations:

- Being clear on who the client is.
- Recognising that you cannot properly protect the older person's interest if you are also acting for their family member.
- Interviewing the client on their own, at least initially, and only talking to third parties where the client has instructed you to do so.
- Only taking instructions from the client.
- Investigating whether the client is acting of their own free will.
- Identifying any potential conflict and disempowerment of the client.

In the guide we also encourage solicitors to seek instructions about any inter vivos gifts, advancements and loans, and remind them that a testator must have knowledge and approval of the contents of their Will (see also our response to Question W9 below).

We support the proposal under Question W5 that solicitors should decline to act **and** 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.

In order for guidelines to be effective, they would need to be accompanied by an awareness and education campaign for Victorian lawyers.

Alternately, as proposed under Question W5, the guidelines could be in the form of professional requirements.

Question W8

Are there any changes to the law relating to testamentary capacity necessary to improve protection for older and vulnerable Will-makers?

We consider that in line with the guidance provided in the Instruments Act 1958 for the preparation of enduring powers of attorney, the Wills Act should also stipulate what considerations must have been demonstrated by a Will-maker before signing their Will. This could be based on the test for testamentary capacity, namely that the testator must demonstrate a sound understanding of their assets and liabilities, consideration of all potential beneficiaries and the nature and effect of the disposition of assets.

Question 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?

We again raise concerns as to discrimination arising out of labelling older people as vulnerable Will-makers. Vulnerability does not arise out of age alone, but rather from factors such as health issues and isolation.

Also, SRV does not support any legislative scheme to enforce reporting of suspected abuse.

However, we believe that this review provides an opportunity to give better guidance to solicitors who take instructions from Will-makers in detecting and dealing with abuse and reiterate our support for the production of guidelines under Question W6. The guidelines could include a recommendation to solicitors as to the maintaining of the Will file and notes and letters of advice to demonstrate the Will-maker's knowledge and understanding of their Will.

Question W11

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

SRV supports the adoption of the equitable doctrine of undue influence in lifetime transactions particularly so that the burden of proof be placed on the defendant. This may act as a better deterrent against the exercise of undue influence. Placing the burden of proof on the Plaintiff creates a situation where any evidence is likely to be less than objective, often based on suspicion only or self-interested rivalry between siblings.

Question W14

Should the provisions of 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)?*

SRV supports the proposal that the Court may order separate representation given that it might increase the participation of the incapacitated person in statutory wills litigation.

JURISDICTION

SRV would also like to note its support of the suggestion that the Victorian Civil and Administrative Tribunal be granted jurisdiction to hear disputes about Wills. Our client base would be more likely to take disputed matters to the Tribunal, because of its less formal atmosphere, the issues of cost, when compared to taking matters to the higher State Courts.

If you would like to discuss the matters raised in this submission further, please contact Carolyn Stuart, Principal Lawyer or Anita Koochew, Lawyer of Seniors Rights Victoria.