Victorian Law Reform Commission

Succession Law Review- 2013

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[redacted]

Overview

1. I am a member of the Victorian Bar having signed the roll of Counsel in November 2000. Prior to that I was a solicitor and then a principal in a regional practice. During my 8 years as a solicitor, I drafted many wills. Over the last 9 years of my practice at the Bar I have practiced almost exclusively in estate litigation including validity challenges and also Family Provision applications. The area is of interest to me and I have also written and presented many papers on various aspects of it, in Victoria and Interstate. This submission contains my own views and is not made on the part of the Victorian Bar, which I assume will make a submission. I have

not been involved in any consultation process initiated by those making that submission.

2. My submission is more heavily focused on those proposals surrounding validity of wills including witnessing requirements, undue influence and testamentary capacity. I have dealt with those issues first.

3. I have then made much more limited comment on the proposals concerning Statutory wills.

4. Again, with regard to Family Provision, I have had the advantage of reading the submission of Carolyn Sparke SC in draft. I have made further comment as appropriate.

5. The only other issue I wish to comment on in passing is the proposal regarding a survivorship requirement on intestacy. There is much to recommend a survivorship requirement of some period and consistency seems to suggest 30 days. A poignant example of how the current law operates is seen in *Fraser-v-Thom*. [1] Question **I-2** should be answered "yes".

Wills Discussion Paper

Witnessing

W-1 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 provision require?
W-2 Should witnesses to the execution of a will be required to understand that the document in question is a will?

6. I submit that the witnessing requirements of the Wills Act 1997 should stay as they are.

7. The object of the suggested reforms is to ensure that will-makers are making wills with testamentary capacity and further, voluntarily. As an aside, it is not clear to me why if these duties are to be imposed upon a witness, the witness ought not also determine whether the will-maker knows and approves the contents of the relevant will. In any event, while it is obviously true that strengthening witnessing requirements "could increase the likelihood that the will-maker executes the will free of coercion or pressure" [2] a realistic quantification of this rather cautiously expressed conclusion should occur. This is because such a proposal would undoubtedly add to the complexity of making a will and probably also its cost. It must be determined whether raising the bar in this way is justified by a corresponding benefit.

8. Before dealing with the substantive suggestions, I note Fiona Burns' suggestion that will-makers of 80 years and over are particularly

vulnerable. Allowing that there is some arbitrariness in any selection of a particular age, it seems to me that it is sensible to recognise this age as carrying particular vulnerability. At the least, it is the age at which 1 in 5 persons will be dementing. [3]

9. It is submitted that in order to determine the questions relating to capacity and coercion the following requirements must be met:

(a) The witness must have a working knowledge of the various elements of testamentary capacity and how properly to investigate whether they are present in any case;

(b) The witness must have the ability to probe sufficiently to determine whether or not coercion has been applied and the Will to be executed has been made as a result of that coercion;

(c) The witness must have the time and opportunity properly to test these matters, which require time and an appropriate context to be tested;

(d) The witness must have the ability, time and opportunity properly to document the process by which they became so satisfied and the conclusions at which they arrived and to retain this documentation so as to be readily available, perhaps years later. Otherwise it is probable that any determinations made would be unable properly to be

assessed by the Court years later when the validity of the will is questioned. In short, the good work (to the extent that it exists) could well be wasted.

10. I submit that the requirements outlined above coincide completely with the function of the solicitor in the will-making process. I also submit that a solicitor performing his or her task competently would be the best person to ensure these requirements are met. I fully acknowledge that this does not always occur, but submit that the solution to that problem lies elsewhere and will later be addressed with later questions asked in the Wills Discussion Paper.

11. The solicitor's role in will-making is discussed in some detail in my papers "Testamentary Capacity, the Solicitor as Watchdog" and more inferentially "Testamentary Undue Influence, a new lease of life" (copies provided). These papers, drawing often on judicial comment such as that of Santow J (as he then was) in *Pates-v-Craig* [4] demonstrate the substantial nature of the work required to ensure that a person makes a will capably and voluntarily.

12. Given that, I suggest that it is quite unlikely that a lay person or non-lawyer would in the normal course be able to meet the requirements to which I refer above, whether as to expertise or opportunity.

13. With specific reference to the suggestions made in paragraph 2.17 of the Wills Discussion Paper, I would respectfully submit as follows.

14. **Requiring the witness to be aware they are witnessing a will.** This would of itself do nothing to meet the requirements to which I refer above. Frankly, I suspect that it is already apparent to witnesses that what they are signing is a will. It is one of the most commonly encountered legal documents.

15. **Requiring the witness to certify the will-maker's capacity and voluntariness**. The substance of this requirement is discussed above and in my submission the task required to arrive at the point at which the certification could be given would be likely to be beyond many categories of witness. A solicitor already has a duty to ensure that this (competence and voluntariness) is the case. The only question would be whether an express certification may be a stimulus or an aid to some in carrying out that duty and I acknowledge this possibility.

16. **Requiring that one witness be qualified to take Statutory Declarations or Affidavits**. This would of itself do nothing to ensure that the requirements referred to above are met. The lawyer, by training and opportunity is best suited to meeting those requirements. In respect of "opportunity", consider how likely it would be for a pharmacist at the counter, a police officer on shift, a dentist in surgery or a doctor with a full waiting room to devote the time required properly to satisfy themselves of

the necessary matters. I submit it is unrealistic to expect them to do so. I submit the tendency would be to deal with the matter summarily on the basis that the requirement for a witness to be so qualified (as one able to take declarations or affidavits) was the end result sought. In fact, the actual objective, satisfaction as to capacity and voluntariness, is very different.

17. **Requiring one of the witnesses to be a notary or an independent solicitor, with no connection to the will-maker or beneficiaries. The notary or independent solicitor would be required to assess whether there was evidence of any fraud or pressure or lack of capacity**. It is immediately apparent that the proposed obligations on the notary or independent solicitor merely duplicate the solicitor's task in the will-making process. To the argument that the solicitor drawing the will may not be able to carry out that task, I suggest there is no reason to think that a different solicitor would be more capable than the first. With respect to the issue of "independence" I submit 2 matters. First, it is clearly already a duty of a solicitor not to act in a position of conflict between beneficiaries and will-maker.[5] Second, given the matters of which the solicitor should be satisfied when advising a client to make a will, it would be of great assistance for that solicitor to be familiar with the will-maker, where possible. A previous relationship between solicitor and will-maker can provide the following advantages:

(a) A knowledge of the personality, family context and asset position of the will-maker, which is very important because of the situation specific nature of capacity [6] and also because of the clues knowledge of background may give as to whether a disposition is valid or anomalies are present.[7] Conversely, note that each solicitor (or in the case of *Schrader*, the professional "will-writer") involved in preparing the wills successfully impugned for undue influence in recent times had enjoyed no previous relationship with the will-maker. [8]

(b) An ability to note changes in demeanour and behaviour over time which would thereby increase the likelihood that aberrant behaviour, coercion or cognitive degeneration would be noticed and investigated. It is noted that dementia can often pass unobserved to the lay (non medical) person [9] and moreover, it tends to be under-diagnosed even by doctors. [10]

(c) An opportunity to have established a relationship of trust with the will-maker, which may be particularly important given the likelihood that where coercion is present, a will-maker may well be afraid and reluctant to disclose it. [11] A pre-existing relationship, continuing to the critical point of execution of the will would at least increase the likelihood that if something is amiss, the will-maker will speak more freely. Conversely, a coerced will-maker would be less likely to speak

out to someone who, as contemplated by the proposal, is a complete stranger. Moreover, it seems to me that the problematic tendency of dementing individuals to gratuitously concur with others [12] would probably compound in the presence of strangers.

18. In my respectful submission, cutting a will-maker off from a solicitor with whom they had an established relationship at any point in the will-making process may well make it less likely that the integrity of that process would be safeguarded.

19. Specifically with regard to Notaries, there are relatively few of them. This would increase the difficulty of making a will. Furthermore, noting the further expertise of Notaries, in my submission it would be far preferable to increase the expertise of lawyers in this regard, rather than to confine participation to Notaries.

20. **Requiring one of the witnesses to be a medical practitioner who provides an assessment of the will-maker's capacity and freedom of will**. I agree that where a will-maker is elderly or otherwise cognitively compromised, a medical assessment as to capacity is good practice. However, this is already recognized, if not always complied with. Moreover, in my experience, it cannot be assumed that a General Practitioner is sufficiently aware of the test to be applied. I have seen medical certificates which have obviously been based on a short

attendance and which do not address the elements of the test, even though the Australian Medical Association publishes material on the content and application of the test. I have also seen medical certificates which cite a Folstein Mini Mental State Examination (MMSE) score purportedly to demonstrate testamentary capacity, when medical specialists acknowledge that the test is merely a broad screening test for cognitive impairment and is not designed to determine testamentary capacity. [13] I have conferred with General Practitioners who have stated that the existence of dementia of itself precludes testamentary capacity, which is not correct. I have seen medical certificates in respect of the ability to make a power of attorney, referring to "testamentary capacity". The assertion in paragraph 2.54 of the Wills Discussion Paper that "…the medical practitioner is usually provided with the *Banks-v-Goodfellow* 4 part test on which to base their assessment" is one with which I cannot agree based on my own experience.

21. I tend to think that making such a witnessing requirement is too restrictive and may tend to overburden medical practitioners in cases where the only reason the assessment is occurring is to comply with the Wills Act. Such an assessment is not a brief and simple matter, even if confined to the issue of capacity.[14] Further, issues of coercion and volition are not primarily medical issues and would require substantial further time to investigate. Such a situation may lead to a dilution of time and attention available across the board, adversely affecting assessments in those

cases where there is actually a problem to be found. Knowledge of human nature also suggests that an inflexible requirement can lead to a “box ticking” or “checklist mentality”. It may be better if the matter of an assessment was left to the judgment of a competent solicitor who could filter out those transactions which did not call for it.

22. Further, the imposition of further requirements for validity must make it more likely that obstacles to actualizing testamentary wishes will increase. I note that this goes against the trend of assisting will-makers to dispose of their property as evidenced by the introduction of section 9 of the Wills Act, only 15 years ago. The comments of the now Chief Justice made while discussing the purpose of section 9 are apposite:

> …The Act was designed to loosen many of the formal requirements which hitherto prevented courts from giving effect to the testamentary intentions of deceased persons” [15]

23. I concede that section 9 would continue to exist to “save” non-complying wills. However, first, this would lead at least to increased litigation and expense and second, there remains a possibility that a formally invalid will (which would under the current law be valid) will not be admitted because of issues of proof.

24. In my opinion, it is more appropriate that the law tends to facilitate the making of valid wills rather than placing further obstacles in the way. So

far as the intention to safeguard the making of wills which are valid having regard to capacity and voluntariness is concerned, the better course is to provide improved education on will-making for both lawyers and medical practitioners and permit their informed judgment to dictate who requires medical assessment.

25. To make this a matter of formal validity seems to be going too far.

26. I would respectfully answer questions **W-1** and **W-2** "No".

Witness Beneficiary Rule

W-3 Should Victoria reintroduce the witness-beneficiary rule in the form recommended by the National Committee for Uniform Succession Laws?

27. I respectfully suggest that the advantages of reintroducing this rule identified in the Wills Discussion Paper [16] are insufficient to justify its reintroduction. The matters described in paragraphs 2.22 and 2.33 of the Wills Discussion Paper remain persuasive. Where there is an interested witness, it will of course be obvious on the face of the will and in appropriate cases stimulate further investigation as to knowledge and approval (it may constitute an element in demonstrating "suspicious circumstances") [17] or undue influence. [18] The cat would thereby be well and truly "belled".

28. It also seems that undue influence is quite easy to wield without going so far as to witness the will in question. Out of the 5 recent cases in which undue influence was successfully pleaded *Dickman-v-Holley* was the only case where the influencers witnessed a will (although note that they were not beneficiaries). All of the other cases involved wills witnessed by solicitors, professionals or their staff. Further, as an interesting aside, note that in *Brown-v-Wade*, a purported revocation was witnessed by 2 Justices of the Peace summoned specifically for the purpose, but the deceased was found to have lacked capacity at the time that occurred. [19] Clearly, that effort did not pay off.

29. The proposal of the National Committee would also increase litigation as the excluded beneficiary would have to demonstrate knowledge, approval and voluntariness. [20] I do not see any real advantage in bringing about this result.

30. I would respectfully answer question **W-3** “No”.

Prevention of Undue Influence through other changes to the will-making process

31. I agree that the best way to protect the integrity of the will-making process is to focus on the handling of the transaction by the solicitor. I tend to be against the imposition of inflexible rules and in favour of assisting solicitors

to make fully informed and independent judgments on a case by case basis. The answers to the specific questions follow.

W 4
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?

32. I would say not. Even were the assessment to be competently carried out (bearing in mind the unfamiliarity some doctors have with the relevant test), it would of itself do nothing to solve the problem of coercion. It would not be directed to that end.

33. The disadvantages appear to me to be as follows:

(a) The assessment (regarding capacity) is not directed to the problem to be prevented (overborne volition);

(b) In any event, medical practitioners are not best placed to investigate volition either by training or opportunity, solicitors are;

(c) A danger would exist that solicitors, referring will-makers off to medical practitioners for this purpose, would consider their duties in that regard reduced or discharged;

(d) It would mandate a further step in the will-making process which would cause delay and expense and may cost the opportunity to make a will in the case of the very elderly and infirm. This is not an argument for never seeking assessment as to capacity, but is an argument for

ensuring that any steps imposed are necessary in the particular circumstances, well directed and facilitate as far as possible, the ability to make a will.

W 5
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?

34. I respectfully agree with the views expressed by Santow J in *Pates-v-Craig* on this issue. It is clearly a problem as illustrated by *Petrovski-v-Nasev* [21] and most recently *Dickman-v-Holley*. [22] Solicitors ought not act in a situation of conflict of interest and duty. I do not believe that in principle, there is a complete difference between situations where the existing client asks the solicitor for the will to be prepared or the existing client is merely included as a beneficiary. In either case, the conflict would potentially operate to impede the solicitor from probing as to the basis upon which the existing client was included in the will. While it is true that the concerns of Santow J were expressed where the existing client procured the will, the concerns of White J in *Dickman* [23] could just as easily have applied had the will-maker contacted the solicitor directly.

35. However, I am mindful of some of the practical problems that a blanket requirement could present. For instance, many solicitors act for families

and successive generations within them and it would seem unnecessarily intrusive and onerous that Wills made by spouses in favour of each other or a parent in favour of a client child should attract such a requirement.

36. I note that in respect of Rule 10.2 of the Professional Conduct and Practice Rules, there is an exemption for immediate family. I also note that neither *Petrovski-v-Nasev* nor *Dickman-v-Holley* involved immediate family members exerting the influence.

37. I am in favour of a specific professional requirement not to act in such a position of conflict of interest and duty, subject to some amelioration which recognizes the realities facing solicitors who act for families.

W 6
Should guidelines be introduced for professionals who make wills in Victoria dealing with how to minimize the incidence of undue influence on older and vulnerable will-makers? If so, what should those guidelines contain?

38. I am strongly in favour of introducing guidelines to minimize the incidence of undue influence. I would go further and suggest that guidelines deal also with testamentary capacity (which in my experience and on a reading of the cases is not well understood by many legal practitioners) [24] and also issues relating to knowledge and approval (suspicious circumstances). In my view, the guidelines should be directed to the production of a valid will and not simply to avoiding one vitiating factor.

39. As to content, time precludes a detailed list in this submission. However, as a schedule, I have set out an extract from a paper I gave in 2009 which dealt with the lessons to be gleaned from *Nicholson-v-Knaggs*. Bear in mind that the schedule is an extract and refers to information given more fully earlier in the paper. Further, many of those issues are set out and explained more fully in my paper "Testamentary Capacity, the Solicitor as Watchdog". In addition, specific reference ought be made to the advent of a conflict of interest and duty where the beneficiary is an existing client. These are the kinds of issues and approaches which may be of assistance in formulating guidelines. I would be happy to further contribute in that regard.

W 7
In what other ways could the process of preparing a will by a solicitor be improved to protect vulnerable will-makers from undue influence?

40. The main improvements could be achieved by the imposition of a professional requirement directed to avoiding conflicts and the production of guidelines.

41. One further issue is related to the production of guidelines. In the majority of cases, the process will be simple and many of the problems to be addressed in the guidelines will not arise. Where they do, the

investigations and time required will mean that the will-making task is substantial. This will mean that it will cost money to complete. From my own recollection of practice as a solicitor, I believe that there is significant commercial pressure to charge relatively low fees for tasks such as wills which are perceived by members of the public as simple transactions. Clearly, this will not always be the case. Accordingly, solicitors ought to be realistic about the estimates they give to clients where these issues may require investigation.

W 8
Are any changes to the law relating to testamentary capacity necessary to improve protection for older and vulnerable will-makers?

42. In my opinion, no change to the substantive law is necessary. The test is comprehensive and assesses memory and an unfettered judgment. The test takes account of vulnerability and context. [25]

43. I repeat that guidelines should encompass issues directed to determining testamentary capacity. I also suggest that the medical profession should be invited to contribute to the contents of the guidelines and their proposed operation.

44. I wholeheartedly agree that interdisciplinary education should be encouraged. Such occasions are convened by bodies such as the *The*

Australian Centre for Capacity and Ethics and the Prevention of Exploitation of People with Disabilities. [26]

W 9
Are any changes to the law relating to knowledge and approval and suspicious circumstances necessary to improve protection for older and vulnerable will-makers?

45. No. The doctrine is sensitive to the facts of the case and has recently been relied upon [27] suggesting it is available when needed. Further, the costs principle which follows, that is, the person responsible for the creation of the suspicion and the litigation should bear the cost of investigating the transaction, has also been employed, leading to costs impositions appropriate to the individual case. [28]

W 10
Are any changes to the law concerning fraud or forgery necessary to improve protection for older and vulnerable will-makers?

46. I am not aware of any issue in relation to these pleas. They appear to arise very rarely, which I expect is because they will occur only rarely. I note that Croucher's "moral of the story" relating to Forgery on page 27 of the article referred to is that a forger is unlikely to succeed, indicating that the current law appears to operate satisfactorily.

Undue Influence

47. Paragraphs 2.64-2.71 of the Wills Discussion Paper discuss difficulties with the standard of proof required to prove this plea and correctly refer to the relative dearth of successful pleas over the 20th Century (although *Bool-v-Bool* [1940] Qd. St. Rep. 26 was an instance of a successful plea). The tenor of those paragraphs is that the difficulties undoubtedly experienced over that period may well continue in the absence of law reform, at least in States other than Victoria and Western Australia.

48. However, I submit that whatever the standard of proof is now acknowledged to be, a resurgence of the plea has been observed in the last 4 years. Examples of successful pleas are given in my paper "Undue Influence, a New Lease of Life" (copy supplied). These examples include decisions from the Supreme Court of New South Wales and the United Kingdom. In neither of those 2 latter jurisdictions has any lowering of the standard of proof been acknowledged, yet the plea has succeeded on 3 occasions.

49. An analysis of these cases demonstrates that the plea has succeeded in circumstances where there was no observed coercion, but rather, a finding on circumstantial evidence that it had occurred. Even in *Petrovski* where it appeared that Hallen As J acceded to the submission that there was direct evidence of coercion, the most direct evidence was the

deceased's reports of threats to take her to "court". Similar evidence failed to make out the plea in *Becker* [29] several years before, (although the overall relational context was quite different).

50. The point seems to be that over the last several years, practitioners have felt able to prosecute the plea and Judges have been willing to accept it. Accordingly, something of a drought has recently broken.

51. Therefore, the uncertainty as to whether the *Nicholson* test will be adopted [30] may well be irrelevant. Again, while the concern that *"If undue influence remains unnecessarily difficult to establish, there is the potential for wills to be upheld that do not represent the will-maker's true intentions"*[31], may be admitted to be valid in general, it seems that this malign potential has been reduced by recent decisions upholding the plea.

W-11 Should the equitable doctrine of undue influence for lifetime transactions be applied to wills?

52. So far as the possible adoption of the equitable doctrine in the probate context is concerned, I respectfully submit this should not occur for the following reasons.

53. First, the adoption is suggested in the context of concerns that the probate doctrine is ineffectual because of problems of proof. [32] However, the

recent history of the plea in Australia (mirrored overseas to some extent) should remove or severely reduce those concerns. Accordingly, this element of the impetus for change appears to have been undermined by recent juridical developments.

54. Second, the focus of the equitable doctrine on the "conscience of the dominant person rather than the wishes of the will-maker" [33] translates poorly into the succession context where actualization of subjective testamentary intention is the entire point of the exercise.

55. Third, I respectfully agree that the 3 disadvantages identified in paragraph 2.79 of the Wills Discussion Paper have great force. First, it is frequently the case that beneficiaries have ascendancy over the will-maker or are the repositories of the will-maker's trust and confidence precisely because they are in a relationship where one would expect them to be beneficiaries, eg, children or spouses who routinely care for an elderly will-maker. It would be a bitter irony that a presumption of undue influence should arise in those circumstances, particularly bearing in mind the onus to fall thereby on the beneficiary. Second, offensive though it is that the property of a will-maker should be improperly diverted after death, the stakes are truly higher while the vulnerable party is alive, in a position of personal need and unable to exercise property rights over assets unconscionably removed from them. Third, given the frequency of

relationships of ascendency between will-makers and their "obvious" beneficiaries, triggering a presumption of undue influence, there would often be occasion to put the beneficiary to their proof. This is notwithstanding the law's acknowledgment of the usual motivations by which people act. In these circumstances, I would suggest that litigation would be much more likely to increase.

W-12 Are there changes that could usefully be made to the doctrine of undue influence as it currently operates in the probate context?

56. A further possibility of reform is suggested which would in effect proscribe manipulative conduct short of coercion and invalidate a will thereby procured. This is suggested by Fiona Burns and echoes the lament of Rolfe J in *Brand* that he was powerless to interfere (on the basis of undue influence) in circumstances where he clearly wished to interfere. However, 2 points need to be made. First, given the recent decisions, *Brand* may well be decided differently today. The circumstances of that case involved:

- an aged testatrix who was susceptible to influence (and had a history of psychiatric illness);
- the departure from a long standing and thoroughly merited testamentary pattern in favour of a son for which there was no explanation except the new beneficiary's "influence";

- the new beneficiary's involvement to some extent with the will-making process and her lack of frankness about several matters including that involvement [34]; and
- the new beneficiary's actions which led to both abortive and successful inter vivos transactions in her favour at the expense of the will-maker and which created a context in which the terms of the will procured favoured her.

57. I suggest that given recent decisions, a Judge facing similar facts may not feel constrained to disallow the plea.

58. Second, Burns' concern was justifiably provoked by the apparent impotence of the plea, writing as she was, before *Nicholson-v-Knaggs*. [35] However, the essential problems she identified now appear to have been resolved as can be seen in the growing number of successful pleas involving circumstantial evidence and a proper accommodation of will-maker's vulnerability.

59. Moreover, although some behaviour directed to persuasion of a will-maker may seem offensive, a disposition, when voluntary, should be permitted to stand. It is up to a will-maker to decide what constitutes an acceptable reason for making testamentary gifts. It is not even for others known to them (much less the Courts) to second guess a will-maker as to whether

their volition, acknowledged to have been freely exercised, was properly stimulated and if concluding that it wasn't, rendering that exercise of volition nugatory. Free will-makers ought to have their decisions respected. Lest it be said that manipulation and persuasion which may appear short of coercion can overbear volition, it has long been acknowledged within the probate doctrine of undue influence that in the context of vulnerability, very little pressure may be sufficient to overbear the volition. In this way, vulnerability is able to be taken into account and actions with a coercive effect, no matter how superficially benign, are subject to the proscription of the current law. [36] Moreover, it can no longer be said that this acknowledgement is only theoretical and has no practical protective effect.[37]

60. There is a qualitative difference between gifts made voluntarily (even with disappointment or reluctance, perhaps common features of human relationships) and those made involuntarily. The law should respect that difference. In a commercial context it has been said that the law seeks to avoid the reproach that it is the destroyer of bargains and this principle has also been called upon in the context of family litigation. [38] A fortiori should the law seek to avoid the reproach that it seeks to widen legal avenues to overturn voluntary testamentary dispositions.

61. I would respectfully answer questions **W-11** and **W-12** "No".

Statutory Wills

62. I submit that the current Victorian law and practice is satisfactory. In particular, the guiding principle is appropriately framed and I share the concerns expressed about the National Committee's framing of the guiding principle. [39] I do not have a strong view on the proposed changes in regard to the representation of the incapacitated person. I do not believe that there is any good reason to remove the applications from the Supreme Court. I would expect that the nature of the application would attract the retention of Counsel even if the application was heard in VCAT. I submit that costs ought to be left to the discretion of the trial judge as they now are.

63. I believe that there is merit in the suggestion of Rick Wells of Counsel that an application could be made posthumously.

Family Provision Discussion Paper

FP-1 What factors affect a decision to settle a Family Provision application rather than proceeding to court hearing?

64. In my experience, almost all such claims resolve at the point of mediation. This occasion provides the parties with a focal point at which to consider the further cost, time and mental energy that they will be required to invest to carry the litigation to its somewhat unpredictable conclusion.

65. **Uncertainty:** As President Kirby (as he then was) observed over 20 years ago, Family Provision litigation, being fundamentally discretionary, is inherently uncertain as to outcome. The discretionary nature of the jurisdiction is appropriate and probably inevitable. However, the corollary is that it requires appropriately qualified advice and means that parties are left with a greater range of outcomes that may be the case in commercial litigation. In my experience, this plays some part in the decision to settle.

66. **Costs**: Neither plaintiff nor defendant appear to particularly wish to continue incurring further legal costs. That issue is particularly emphasized for defendants by the advice regularly given that probably, the estate will bear its own costs win lose or draw. I comment further on this aspect of the issue of costs below.

67. **Time and mental energy**: All practitioners know that there are non-financial costs to litigation. [40] These are particularly pointed in Family Provision litigation where the trigger for the litigation has been the death of a loved one. In my experience, both plaintiffs and defendants have been keen to resolve the proceeding at litigation simply to have it all over and done with. This does not occur always, but very often. This also occurs even where the merits of the case would justify a continuation to trial, which can be somewhat professionally frustrating. However, my experience over12 years practice at the Bar is that this is very often the main consideration articulated by clients in settling at mediation. A

subsidiary consideration is sometimes a reluctance to go over old emotional territory in evidence and be cross examined on such matters, regardless of the veracity of the witness and strength of the evidence to be given.

68. Overall, although specific features of Family Provision law play some part in the tendency to settle, my impression is that the strongest incentive to settle is the wish that parties have to avoid a hearing in order to get on with their lives.

FP-2 Is the current limitation period satisfactory?

69. Yes. The period (taking into account the time it takes to obtain probate or letters of administration) allows sufficient time for advice and consideration. Section 99 ameliorates any failure to bring an application on time and is relatively infrequently used when considering the number of applications made on time. The current scheme works well.

70. In particular, I would not support a change using the date of death as a trigger for the commencement. A grant is advertised and notice of an application can be obtained. Using the date of a grant ensures that the appropriate defendant is in place and identified at the time the proceeding commences.

FP 3- To what extent does the current law allow applications to make claims that are not genuine?

FP-9 and 10- what is the purpose of the family provision law? Is it limited to keeping family members from dependence upon the State or is it wider?

FP-11 to FP-14 Should eligibility be limited?

FP-15 to FP-16- Should dependence become a requirement? Should there be a requirement to demonstrate financial need?

71. I am in broad agreement with Carolyn Sparke SC on the issue of opportunistic claims. I agree that "try-on" claims, (which it seems to me are made), take up a relatively modest proportion of the total claims made although they gain some notoriety. On the other hand, claims which are unusual, but which have succeeded, may well have appeared as "try-on" claims to those defending them. [41] Overall, given that claims have been successfully established in the context of relationships which would never have qualified the applicant under the previous law, it seems inappropriate to cut off the prospect that similar claims may succeed in the future, in an attempt to weed out apparently unworthy claims (bearing in mind the difficulty in discerning unworthiness short of a trial). I agree that the stage of costs is the appropriate stage to address this issue.

72. Further, some unusual claims do fail at trial, with published reasons assisting the legal profession by providing examples of where the courts will not reward unmeritorious claims. [42]

73. It follows that I do not think eligibility should be limited by way of relationship as in the New South Wales model.

74. In terms of the National Committee's approach, I see no advantage in adopting this model which appears in effect to be very similar to the current model.

75. Nor do I believe eligibility should be limited by way of dependence or some demonstration of financial need over and above what the law presently requires. Dependence is not always present (even as a past fact) where the Courts have determined a responsibility to provide exists.[43] It may be a usual feature of such cases, but the entire thrust of the amendments as to eligibility in 1997 was to determine such eligibility by an "instinctive synthesis" of all relevant factors, not setting one factor as paramount.

76. Financial need is already a requirement to be established. It is a "relative concept." [44] The law has always recognized this relativity and it is submitted that examining a financial position at the commencement of a claim in isolation from the other factors which the Courts have and must take into account, would run the risk of actually restricting eligibility. For example, a sound financial position which may suggest a claim should not succeed can be counterbalanced by exemplary care and devotion, leading

to a successful claim. [45] One factor should not become paramount. All factors should be balanced to arrive at a just result.

77. The purpose of the jurisdiction appears always to have been wider than protecting dependents from indigence. Advancement, as distinct from maintenance, has always been an object of the various legislative schemes, even if not expressly stated. [46] Many Courts, including the High Court on one of the last occasions Family Provision law was considered there, have noted that advancement covers much more ground than a mere sufficiency of means upon which to live. [47] "Advancement" is considered a "large word". [48] Concepts of what is "proper" are subject to change over time. [49] I do not see any necessity to narrow the purpose of the scheme in these circumstances. I submit that the current purpose of the law is wider than that stated in FP-9 and should remain so.

FP-4- Does section 97 (7) deter opportunistic applicants from making family provision claims?

78. In my opinion, not to date. The test of "frivolously, vexatiously or with no reasonable prospect of success" is clearly a relatively high one to satisfy. The only case in which I am aware it has been successfully relied on by a defendant is *Re:Carn*. [50] I am aware of 2 other cases in which costs were ordered against an unsuccessful plaintiff, but no written reasons were given and even if section 97 (7) was relied on, the failure to publish

reasons meant that the lesson was much more limited in scope than it might have been and the deterrent effect largely lost.

79. That said, *Re: Carn* illustrates a practical application of the section against an applicant in the original class of persons who were entitled to apply for provision. It has been repeatedly referred to in negotiations. Other decisions (outlined in published reasons) may emphasise the effect of the section further. Time will tell whether the section will loom larger in the calculations of claimants with marginal claims than it has done to date.

FP-5- Does the power of the court to summarily dismiss claims deter opportunistic applicants from making family provision claims?

80. Not to date. My paper reviewing the applications made to date (copy supplied) illustrates that out of 7 cases, only 2 applications succeeded. Moreover, these 2 applications were decided by the same Associate Judge. The claims which were permitted to continue included claims made by a sister, [51] a niece, [52] a husband (who brought a claim against the estate of his second wife and had substantial assets of his own), [53] family friends and business co-proprietors of the deceased [54] and a granddaughter. [55]

81. A further application decided after that paper failed but written reasons were not published on the internet.

82. In light of the history established so far (bearing in mind I was involved in 4 of these cases, failing twice to dismiss the claims and succeeding twice in preventing claims from being dismissed) my approach is not to bring these applications for reasons of cost, delay and the encouragement a failure to summarily dismiss a claim may give to a marginal plaintiff.

83. However, I do not believe that there should be any change to the law or the procedure relating to these applications. They are sometimes successful and perhaps it is to be expected that discretionary applications are not often amenable to such applications.

Costs

FP-6 Are costs orders in family provision cases impacting unfairly on estates?

Discussion of FP-17 to FP-21

84. I agree with much of what is said by Carolyn Sparke SC by way of background on this issue.

85. In terms of the amounts charged, I agree with Carolyn Sparke SC that questions of excessive charging can be resolved if the parties wish, at taxation. Until that occurs, although there are often suspicions, it cannot definitively be said when it has occurred. The nature of solicitor/client

costs are that much “internal” work (between solicitor and client) is included which would not be on the ordinary party/party basis. Short of taxation, it is impossible for other parties to know what has occurred and should be charged for in this regard.

86. In relation to issues of “proportionality”, family provision litigation can be inherently expensive. Involving as it does an assessment of the “nature and duration” of a relationship and contributions, often over many decades, historical detail assumes a particular importance. This increases the scope of instructions and evidence. This can be equally true even where the estate is small. I recall one particular brief where it was necessary to examine many property transactions (and contributions made therein) which occurred between various siblings and their parents over decades. Documentation also existed and had to be examined. Explanations of those transactions had to be given. In that case, the affidavit material was far more extensive than usual but not more extensive than necessary. This has a necessary effect on the impact of costs on the estate as a whole.

87. In terms of costs orders in family provision litigation, I submit the following.

88. Although it is judicially recognized that section 97 (7) does not limit the circumstances under which orders can be made for unsuccessful plaintiffs

to pay estate costs, [56] anecdotally, it appears that there is a reasonably widely held belief that such orders are confined to cases which are brought frivolously, vexatiously or with no real prospect of success, which is a relatively high test to satisfy.

89. If that belief is widely held, the terms of the section itself may serve to encourage litigation with a substantial degree of speculation on the basis that it can be undertaken “no win, no fee” with a low probability of any cost penalty being applied, so there would be minimal financial risk to the claimant and considerable commercial pressure on the estate.

90. Over the last 2 years there have been 2 very significant published decisions on costs in this area. [57]

91. While in the past it has been the usual situation that unsuccessful plaintiffs have simply borne their own costs, there is now a tendency toward applying general costs principles. With respect I agree with the comments of Gardiner As J in *Re:Carn (No.2)* [58] and Whelan J in *Webb-v-Ryan (No.2)* [59] in this regard. It seems to me that this tendency is an appropriate corollary to the paradigm shift in eligibility introduced in the 1998 amendments.

92. For this reason, I would not endorse an approach which would restrict or countermand this tendency, such as it is.

93. Although there is an appeal in a legislatively stated presumption that an unsuccessful plaintiff should not get their costs out of the estate unless the Court otherwise orders, it would be unfortunate if that was interpreted as a presumption that inhibited the Court from ordering that an unsuccessful plaintiff pay the estate's costs in an appropriate case.

94. However, it is true that family provision litigation has features which ill suit it to general costs orders across the board and therefore the essential legislative position that the costs order be "just", is very appropriate.

95. Part of the difficulty is educative. Because much of the history of family provision litigation (and costs practice) occurred in the context of claims by persons who were of necessity close relatives (at least in Victoria), there is a danger of an expectation that costs practices adopted in that context will continue to apply to the very different eligibility context we now inhabit. It seems that this is not the judicial view, but there have been relatively few published decisions to make this clear.

96. In my submission, legislative change could emphasise this changed environment without adversely affecting the ability of Judges to make just orders.

97. I make the following suggestions:

(a) Costs be covered in a stand-alone section of the Administration and Probate Act, rather than being part of a wider section dealing with the Courts' power to order;

(b) The substance of section 97 (7) be repealed. This would not remove the Court's power to make such orders under those circumstances but would remove any misconception that it exists to confine such costs orders to those circumstances;

(c) The section dealing with costs could state that that the court may make such order as is just but enumerate possibilities to include:

(1) An order that each party bear their own costs;

(2) An order that the estate pay the costs of a plaintiff whether successful or unsuccessful, on any basis and to any extent;

(3) An order that a plaintiff pay the costs of an estate on any basis and to any extent.

98. Judges have, on recent occasions, made a wide range of orders to meet the justice of the case. [60] If the legislative options were clearly wide, it would serve to remind practitioners (and some litigants who examine legislation and case law online) of the width of outcomes that could occur under the rubric of a "just" order as to costs.

99. Costs can have a significant impact on estates in family provision litigation, although the proposition that costs in this area are higher than in other areas of practice appears dubious. Orders at trial have ameliorated that to some degree and the publication of reasons will continue, in my opinion, to ameliorate that further as they accumulate and are brought to the attention of the profession. At the point of mediation, it is true that costs as claimed are usually paid, but I refer to my previous comments about the motivations for settling cases. Essentially, agreeing costs as claimed appears to be a price the executors (and beneficiaries) are willing to pay to have the matter resolved at that point. In that sense, it is not unfair as the option of submitting an offer of compromise (restricting costs to taxed costs) is available to executors.

100. The answer to **FP-17** should be “no”. There should be no restriction on the power of the Court to make a just order in all the circumstances. Failure in a family provision claim can occur on an exercise of discretion even in circumstances where a finding is made that the provision made was inadequate. In those circumstances, there are grounds for saying that the costs ought be paid for the estate. [61]

101. In relation to **FP-18**, there should not be a starting point of loser pays, for reasons peculiar to family provision litigation discussed above. I am less averse to a starting point of unsuccessful applicants bearing their own

costs, although it seems to me that is just reflecting the practice over many years and again, it would be unfortunate if it was interpreted as presumption that the estate ought also bear its own costs and which discouraged judges from ordering unsuccessful plaintiffs to pay the estate's costs if appropriate.

102. I believe we are at a point where the effect of recent decisions has yet to fully filter through to the consciousness of many practitioners. I think it is premature to introduce legislative presumptions or starting points.

103. In relation to **FP-19**, in my experience, solicitor/client costs in County Court proceedings do not seem to be any less than in Supreme Court proceedings. I am not surprised by this as I do not believe that there is a material difference in the work and responsibility involved.

104. In relation to **FP-20**, mediation is easily the most effective way of limiting the overall costs. Preparation and trial costs are a significant component of the overall costs of taking a proceeding to judgment. Resolution at mediation (I would estimate a 90% success rate) clearly removes these further costs.

105. In respect of County Court practice, in my experience judicial conferences are a relatively ineffective substitute for private mediation. In my experience, the judges have taken a rather more "hands off" approach

than a private mediator. This can deprive the parties of an independent "circuit breaker" at a difficult point in negotiations. Further, it is more common, in my experience, to find solicitors appearing on these occasions whereas mediations are more often attended with Counsel. In my experience, there can be more of a reluctance to reach a settlement in these case conferences. To the extent that these reduce costs, in my opinion, they do so at the expense of reducing the value of the opportunity to settle a case.

106. The use of position papers rather than affidavits probably do save some costs at the margin. However, I agree with the observations of Carolyn Sparke SC that in order to produce a worthwhile position paper, full instructions need to be taken which always takes some time. I am not convinced that the saving here is substantial. Moreover, the generalized nature of position papers do not properly allow assessments of supporting material and credit to occur, as would affidavits where the parties' colours are nailed to the mast.

107. I cannot identify any additional measures which would reduce costs. Taxation is available for those who wish to extend the litigation beyond a notional settlement (payment plus costs to be taxed). However, as indicated, many clients are prepared to deal on the basis of agreed costs to save time and to obtain certainty. They should not be deprived of that opportunity.

FP-7- To what extent do people deal with their assets during their life in order to minimize the property that is in their estate and frustrate the operation of family provision laws? What are some examples of this?

FB-8-should people be entitled to deal with their assets during their lifetime to minimize the property that is in their estate?

108. So far as question **FP-7** is concerned, the nature of my practice precludes any real involvement in estate planning issues. I do not have any real idea of the extent of this practice save that it seems to come up in reported cases from time to time and that the occasional client (taken through the Family Provision hoops in respect of another's estate) expresses an intention to offload assets to a trust to avoid the same problem arising in respect of their estate. Whether they do, I do not know.

109. In respect of **FP-8**, I strongly believe that people should have the entitlement to exercise their property rights while they are alive, even if the effect would be to limit the extent of their estate upon their death. Private property rights are already significantly encroached upon at the point of death by the existence of Family Provision legislation. Given that testamentary dispositions are actually gifts, the law ought not reach back into the lifetime of the testator to further interfere with property rights. If people are prepared to compromise their own enjoyment of property rights by alienation inter vivos, they should be free to do so.

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18 April 2013

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Schedule

Possible issues for consideration in any Guidelines for will-making

Direct instructions

1. Take instructions from the will-maker directly, not through a conduit or intermediary.

2. This may need to be handled delicately as assistance such as passing on messages, interpreting correspondence and accompanying the will-maker to consultations may appear most convenient to the elderly. However an intermediary:

    (a) removes an opportunity to interact with the will-maker and observe them in the giving of instructions;

    (b) removes an opportunity immediately to question the will-maker and have them demonstrate understanding of instructions;

    (c) may suggest to the Court that messages were being run by reason of the will-maker's inability to deal with such matters themselves ([331], [656-7]) or because the "conduit" was attempting to exercise undue influence ([520], [526-9], [540-554]). [62]

Cross check second hand instructions before incorporating them

3. If some instructions are received through a conduit, do not even incorporate them in any draft Will until such time as they have been confirmed with the will-maker.

Investigations

4. When the instructions are being sought, bear in mind the issues of apparent capacity and assent, the effect of medication, activities of daily living, Administration Orders, hospitalisations etc.

5. Bear in mind that in some cases it may be necessary to engage with the will-maker's doctor in the way suggested by Associate Professor Peisah.

Doctor's certificates

6. Ensure that any certificate requested from a doctor sets out the elements of the test so that there will be no doubt that the doctor has addressed each of them. Advert to those elements in the letter of instruction enclosing the certificate. Remember that the letter of instruction will also be called for in evidence in the event of a challenge.

Address the test with the will-maker

7. Address each element of the test for capacity. Ask the client's understanding as to what a will is; what their assets are and roughly how much they are worth; who they wish to leave things to and why; whether there is anyone who would have an expectation of benefiting but who will not take, and why. Ask open ended questions and leave them to demonstrate their understanding by an answer that is in their own words and has not been prompted or suggested.

8. Beware deceptive appearances. Bear in mind medical opinion that dementia (of some kind) affects 1 in 20 people over the age of 65 and 1 in 5 over the age of 80 years (at [364]).

9. With an elderly will-maker it is therefore necessary to look a bit below the surface of someone who presents well, as dementia can be masked, ([384]);

> *It is possible to mask or deny many elements over a period of time. And one can interview patients and have a number of yes responses which if one assesses in any greater depth can actually be found not to be based on any understanding. The patients may easily be led and give the impression of knowing what they're doing and behav[e] appropriately.*

10. **"Noddy" syndrome**: With an elderly will-maker who apparently assents to what is put to them, care must also be taken to ensure that actual understanding, rather than mere compliance is demonstrated. This has been charmingly dubbed "the Noddy syndrome" and was described at [382]:

Dr Lloyd drew attention to the syndrome of "gratuitous concurrence" in elderly patients, which he described as the "Noddy syndrome". This may arise where an elderly person will agree with questions put to him or her in order to placate, comply with, or ingratiate themselves with a person in authority, in this case the lawyer conducting the interview. It may also occur when the elderly person seeks out of embarrassment to mask their incapacity to understand what to the lawyer appears to be a simple concept, or simply to avoid causing what is perceived by the testator to be a problem.

11. The answer "Yes" is insufficient to demonstrate understanding.

Previous wills

12. Obtain copies of previous wills. These will demonstrate whether any pattern of disposition is being departed from, which departure should prompt a request for an explanation. They may also disclose "significant others" not mentioned in the current instructions.

Probe for reasons

13. A failure to inquire as to reasons for changes to dispositions was also one factor in why the propounders of the last will in *Nicholson* failed to uphold it, [664].

14. Vickery J noted the apparent lack of a "rational basis" for the deceased to have reduced (or removed) certain specific bequests. He said, at [644]:

Overall, the reductions in monetary gifts from the 1999 Will to the 2001 Will amounted to a total of $140,000. However, [the solicitor], who took the

instructions for the 2001 Will, prepared the final document and oversaw its execution, could not recall making any enquiry of Betty Dyke as to the reason or reasons for the significant changes to the bequests. No explanation for the reductions appears in the evidence.

Corroborate

15. Look out for any opportunity to corroborate instructions with family members, friends, doctors, accountants or others (as is appropriate in the given case).

16. Bearing in mind that the effects of dementia can be masked, statements which are the product of delusion may not appear so and correct detail of assets and beneficiaries will not usually be known to the practitioner, it can be of great value to test the information provided in instructions.

17. This can raise difficult issues of client management and confidentiality. Moreover, advising family members of what is occurring can itself be undesirable. However, corroboration of instructions is the surest way to be satisfied that the will-maker's apparent knowledge and insight is true knowledge and true insight.

Keep proper records

18. Judges are not omniscient. A judge has never observed the relevant events, but must attempt to reconstruct them from the admissible evidence. A Judge

doesn't have access to what happened, but only to admissible evidence of what happened. A detailed contemporary documentary record of those events is vital in that process. Bear in mind that the propounder of the will bears the onus of proof. Against that background, the importance of documenting the events assumes even greater proportions. It is possible that even if adequate inquiries as to capacity are made and appropriately answered, but not documented, the propounder's onus will not be discharged.

19. Vickery J found that Betty Dyke retained capacity at the time of the penultimate Will but did not have capacity at the time of the last Will, a mere 16 months later.

20. The solicitor who prepared the penultimate will took good detailed notes of the process. In particular, on the occasion when the will instructions were largely finalized, the solicitor quizzed the deceased about what she was leaving to whom and why. He wrote down her answers verbatim as she spoke. This information was relied upon quite heavily by the propounder's expert and also by Vickery J in the judgment.

21. By way of contrast, in relation to the process surrounding the last will Vickery J said, at [625] that the recollection of that particular solicitor was "poor" and her notes taken were "sparse". Two file notes were made, each in relation to a separate attendance the first, discussing the Will and the second, executing

it. The first contained 66 words, the second 53, which is about 4 typed lines. Handwritten notes had been made at the actual attendance but destroyed when each “final” note was produced shortly afterwards, as was the practice of the solicitor. Each note stated that the attendance had been on the deceased and one of the residuary beneficiaries, even though she gave evidence that this only meant that the beneficiary had arrived with the deceased having driven her to the solicitor’s office. Vickery J observed, at [628]:

> *The notes made on 22 December 2000 and on 12 January 2001 provide the only written record of what transpired on those occasions. The notes, such as they were, provided a plainly an inadequate record of the will making process involving the elderly person in this case. Indeed, they barely meet the description of a record.*

22. With regard to knowledge and approval, the solicitor who prepared the last will gave evidence that she read the Will aloud to the deceased. This was supported by the other witness to the Will. However, a secretary in the firm (who witnessed the second codicil 3 weeks before) gave evidence that it was normal practice in that firm for the will-maker to read the will to themselves, [651-4]. Vickery J said at [654]:

> *A fuller note recording precisely what occurred during the will signing process of 12 January 2001 would have resolved the apparent conflict in the evidence. In the absence of an appropriate record, I am unable to safely arrive at any conclusion as to which procedure was adopted on this occasion: that is, whether the completed 2001 Will was read out aloud by [the solicitor], or whether Betty Dyke read it over to herself before she signed it.*

23. The propounder bears the onus of proof. As soon as a doubt as to validity is raised, contemporary records will be crucial. Ensure that they are made and are sufficiently detailed to carry the will across the line.

Endnotes

[1] [2010] VSC 626.

[2] Paragraph 2.17 Wills Discussion Paper.

[3] *Nicholson-v-Knaggs* [2009] VSC 64 at [364].

[4] NSWSC 28 August 1995, Santow J.

[5] *Dickman-v-Holley* [2013] NSWSC 18 [165] White J having previously cited Santow J (as he then was) in *Pates-v-Craig* on this issue.

[6] An increase in situational complexity imposes further burdens on the cognitive resources of the will-maker, for instance, it may be more difficult to weigh the valid but competing claims of a second spouse and children of the first marriage than to have only one object of testamentary bounty. See Shulman et al *Assessment of Testamentary Capacity and Undue Influence*, American Journal of Psychiatry 164:5 (May 2007) 722 at 723; Peisah, O'Neill, Macnab and Verspaandonk, "Capacity and Dementia, a Guide for Medical Practitioners in Victoria", published by AUSTRALIAN CENTRE for CAPACITY and ETHICS and the PREVENTION of EXPLOITATION of PEOPLE WITH DISABILITIES (ACCEPD).

[7] For an example in the context of testamentary capacity, see *Flynn-v-Roccisano* [2004] VSC 346 where the solicitor was completely unaware that the testatrix had a child and in the context of undue influence, see *Dickman-v-Holley* where the solicitor who produced the impugned wills was completely unaware of the inclusion of the successful challenger in previous wills and was thereby unable to direct appropriate questions as to why the dispositions were changing, at [48].

[8] *Nicholson-v-Knaggs* [2009] VSC 64, (although it must be said that the solicitor preparing the impugned will did a thorough and in my view, exemplary job in familiarising himself with the testatrix's situation and obtaining reasons for her proposed dispositions); *Brown-v-Wade* [2010] WASC 367; *Petrovski-v-Nasev* [2011] NSWSC 1275; *Dickman-v-Holley* [2013] NSWSC 18; *Schrader-v-Schrader* [2013] EWHC 466 (Ch).

[9] See for instance the summation of the evidence of Associate Professor Peisah and Dr John Lloyd accepted by Vickery J in *Nicholson-v-Knaggs* [2009] VSC 64 at [365, 382-5].

[10] My own discussions with Specialist Medical Practitioners indicate that dementing illnesses are under-diagnosed by General Practitioners.

[11] See for instance the comments of Mann J in *Schrader-v-Schrader* [2013] EWHC 466 (Ch) at [97 (x)], “I do not think that Miss Marks' attempt to ascertain whether there was pressure on her, the fruits of which are recorded on her instruction form, are a particularly strong contra-indication in this case. If the usual more subtle form of undue influence is being applied, its victim would hardly be likely to answer "Yes" to the question.”

[12] Dr John Lloyd charmingly described this as the “Noddy Syndrome”, see *Nicholson-v-Knaggs* at [382] and [679].

[13] Note that the test is insensitive to executive dysfunction (disruption of the abilities involved in planning and judgment) and accordingly, a high score may not be indicative of testamentary capacity, although a low score would suggest that capacity is unlikely to exist.

[14] See *Nicholson-v-Knaggs* at [391] citing Peisah and Brodaty (footnote).

[15] *Re: McComb [1999] 3 VR 485, Warren J [46].*

[16] Paragraph 2.32.

[17] *Robertson-v-Smith* [1998] 4 VR 165 at 173.

[18] Involvement in the will-making process in general being a common theme in successful pleas, see *Nicholson-v-Knaggs*, *Brown-v-Wade*, *Petrovski-v-Nasev*, *Dickman-v-Holley*, *Schrader-v-Schrader.*

[19] *Brown-v-Wade* [2010] WASC 367at [349-353].

[20] Paragraph 2.30.

[21] At [28 (n)].

[22] At [165].

[23] At [165].

[24] In this regard, see *Dickman* at [44,48-9] regarding the solicitor’s “own test” he had devised to assess capacity.

[25] See the finding of White J in *Dickman* at [160] that because of the pressure placed upon the testatrix by others, she was unable to weigh the competing claims upon her estate (thereby failing

the third element of the test). It is clear that had the pressure not been applied, White J was satisfied she would have been cognitively able to satisfy that limb.

[26] ACCEPD is convening 2 training days for medical practitioners in Melbourne in April 2013 at which presentations will be given by psychiatrists, neuropsychologists and myself.

[27] *Nicholson-v-Knaggs* [2009] VSC 64 where the last will and codicil were found not to have been made with knowledge and approval employing this doctrine, see [675-690]; *Trust Company of Australia-v-Daulizio* [2003] VSC 358 where the existence of suspicious circumstances led to a full and thorough examination of the righteousness of the transaction, even though it was found to be valid.

[28] In *Nicholson-v-Knaggs*, the imposition of the costs burden was more restricted than in *Daulizio*.

[29] *Becker* –v-*Public Trustee of NSW* [2006] NSWSC 743 at [61], [74] and [83].

[30] Paragraph 2.71 Wills Discussion Paper.

[31] Paragraph 2.73 Wills Discussion Paper.

[32] Paragraph 2.78 Wills Discussion Paper describes the first advantage of adopting the equitable model in terms of increased efficacy.

[33] Adverted to in paragraph 2.77 3rd dot point.

[34] See *Schrader-v-Schrader* [2013] EWHC 466 (Ch) for similar behaviour constituting evidence of undue influence.

[35] The first trend Burns identifies in the modern treatment of the doctrine is the "very few" successful cases because of the difficulties of proof (Burns, *Elders and Testamentary Undue Influence in Australia* (2005) UNSWLJ 156 at 157). Further, she suggests from the case law to that date that the vulnerability of the will-maker was not adequately accommodated (Burns at 156 and especially 176).

[36] For a chronologically diverse sample of cases, see *Wingrove-v-Wingrove* (1885) 11 PD 81, *Bool-v-Bool* [1940] Qd. St. Rep. 26 per Webb CJ at 36; *Petrovski-v-Nasev* [2011] NSWSC 1275 at [276]. For a particularly striking instance of finding conduct coercive, see *Carey-v-Norton* [1998] 1 NZLR 661.

[37] The will-maker's vulnerability is a recurring theme in most of the recent cases where the plea was successful.

[38] *Hillas and Co. Ltd-v-Arcos Ltd* [1932] All ER Rep. 494 at 499 cited by Harper J (as he then was) in *Armstrong & Ors-v Sloan & Ors* [2002] VSC 229 at [49-50].

[39] Paragraphs 3.34 and 3.35 Wills Discussion Paper.

[40] Unsurprisingly, these have received judicial recognition, see *Studer-v-Boettcher* [2000] NSWCA 263 [53] per Fitzgerald JA.

[41] See for instance, *Marshall-v-Spillane* [2001] VSC 371 (brother's claim); *Iwasivka-v-State Trustees Ltd* [2005] VSC 323 (niece-by-marriage claim); *Unger-v-Sanchez* [2009] VSC 541 (friend and carer's claim); *Whitehead-v-State Trustees Ltd* [2011] VSC 424 (friend's claim).

[42] See *Lee-v-Hearn* (2002) 7 VR 595, *Schmidt-v-Watkins* [2002] VSC 273, *Armstrong-v-Sloan* [2002] VSC 229, *Sanderson-v-Bradley* [2004] VSC 231; *Petersen-v-Micevski* [2007] VSC 280 *Markovska-v-Kocevska* [2005] VSC 319, *Mahfoud-v-Accoui* (a claim by a niece by marriage which was dismissed by Judge McInerney on 20 December 2012, [2012] CCV 2160).

[43] *Unger-v-Sanchez* [2009] VSC 541.

[44] *Collicoat-v-MacMillan* [1999] 3 VR 803.

[45] *Goodman-v-Windeyer* (1980) 144 CLR 490 at 497-498, relied upon by Kaye J in *Unger-v-Sanchez* [2009] VSC 541.

[46] *Anderson-v-Teboneras* [1990] VR 527 at 537, per Ormiston J (as he then was) recently adopted by Zammit As J in *Storey-v-Semmens* [2011] VSC 305 at [58].

[47] *Vigolo-v-Bostin* (2005) 221 CLR 191 at [115] per Callinan and Heydon JJ.

[48] Ford and Lee *Principles of the Law of Trusts*, [12,670].

[49] *Vigolo-v-Bostin* at [25] per Gleeson CJ.

[50] [2011] VSC 275 at [47-8]; *Corbett* was decided before the advent of the section. *Webb-v-Ryan* (No.2) [2012] VSC 431 involved a costs order made by reason of previous correspondence "without prejudice save as to costs".

[51] *Wollensack-v-Leone* [2011] VSC 324.

[52] *Colville-v-Edmunds* [2012] VSC 85.

[53] *Estate of Polley* (application withdrawn during the running).

[54] *Webb-v-Ryan*, [2011] VSC 461 which claim was later dismissed at trial [2012] VSC 377 and costs awarded against the plaintiffs, see [2012] VSC 431.

[55] *Storey-v-Semmens* [2011] VSC 305.

[56] *Re: Bull* (No.2) [2006] VSC 226, *Webb-v-Ryan* (No.2) [2012] VSC 431 at [28].

[57] *Re: Carn* (No. 2) [2011] VSC 275 and *Webb-v-Ryan* (No. 2) [2012] VSC 431.

[58] [2011] VSC 275 at [27-30].

[59] [2012] VSC 431 at [35-38].

[60] Apart from the usual solicitor/client costs orders in favour of successful plaintiffs and the "bear own" results for unsuccessful plaintiffs, a successful plaintiff got costs only on a party/party basis in *Blair-v-Blair* [2002] VSC 125; costs (for the plaintiff and the executor) were capped in *Cangia-v-Cangia* [2008] VSC 556, an unsuccessful plaintiff appears to have received costs from the estate in *Bruce-v-Matthews* [2011] VSC 185 and the unsuccessful plaintiffs paid the executor's costs on a special basis in *Webb-v-Ryan* (No.2) [2012] VSC 431.

[61] See *Bruce-v-Matthews* [2011] VSC 185 at [50].

[62] References here and following are to paragraphs in *Nicholson-v-Knaggs* [2009] VSC 64.