THE LAW SOCIETY
OF NEW SOUTH WALES

VLRC Succession Laws review: Debts
Elder Law & Succession Committee comments

Solvent estates

D1 Should the current Victorian order of application of assets for payment of debts in solvent estates be simplified according to the National Committee proposal?

The Elder Law and Succession Committee of the Law Society of NSW (ELSC) notes that in having regard to the apparent retreat from uniformity by other states, NSW has not implemented the fourth tranche of the Uniform Succession Law reform agenda in relation to the administration of deceased estates.

In saying that, the ELSC's view is that this is a question of will drafting. Generally, the ELSC favours retaining the effect of Locke King's Act. The residuary estate should be charged first with payment of debts as a primary source before resort is had to specific gifts.

D2 Should a provision be introduced into the *Administration and Probate Act 1958* (Vic) that specifies that all assets are to be applied rateably?

No, please see answer to D1.

Charged or mortgaged property

D3 Are there any significant difficulties with the operation of section 40 of the *Administration and Probate Act 1958* (Vic)?
If so:
(a) should the provision be abolished as in the Northern Territory?
(b) should the provision be modified to require a sufficient connection between the debt and the property upon which it's charged?

The ELSC notes that issues can arise where the assets used as a guarantee have little connection with the debt charged (for example, where a person's house is the security for the business). In the ELSC's view, this can be dealt with by careful drafting.

THE LAW SOCIETY
OF NEW SOUTH WALES

VLRC Succession Laws review: Wills
Elder Law & Succession Committee comments

Witnessing wills and undue influence

Requirements for witnessing a will

W1 Should there be special witnessing provisions in respect of certain will-makers? If so, who should those will-makers be and what should the special witnessing provisions require?

No. The view of the Elder Law and Succession Committee of the Law Society of NSW (ELSC) is that all persons over the age of 18 have the right to make a will. The real issue is whether they have the capacity to do so.

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

In the ELSC's view, while witnesses should be told that the document is a will, it is not necessary for witnesses to know the content. The ELSC favours a consistent national approach on this issue.

The witness-beneficiary rule

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

Yes, but the ELSC does not believe this should be done with retrospective effect, as existing wills which have been witnessed by a beneficiary should not be affected by the reintroduction of the rule.

Prevention of undue influence through other changes to the will-making process

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?

No. The ELSC notes that will instructions are often taken in circumstances of emergency, and in its view, requirements that slow the process down will do more harm than good.

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?

The ELSC notes that the requirements of the conduct rules in relation to conflicts of interest are applicable in this situation.

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?

The ELSC's view is that this is a difficult area to deal with by guidelines, noting that there needs to be a distinction between influence which is permitted, and undue influence. It is important to avoid imposing inappropriate impediments to will making.

W7 In what other ways could the process of preparing a will by a solicitor be improved to protect vulnerable will-makers from undue influence?

The ELSC's view is that this is a matter for education.

Determining whether a will reflects the will-maker's true intentions

W8 Are any changes to the law relating to testamentary capacity necessary to improve protection for older and vulnerable will-makers?

No. The ELSC notes that will instructions are often taken in circumstances of emergency, and in its view, requirements that slow the process down will do more harm than good.

W9 Are any changes to the law relating to knowledge and approval and suspicious circumstances necessary to improve protection for older and vulnerable will-makers?

No. The ELSC notes that will instructions are often taken in circumstances of emergency, and in its view, requirements that slow the process down will do more harm than good.

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

No. The ELSC notes that will instructions are often taken in circumstances of emergency, and in its view, requirements that slow the process down can do more harm than good.

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

No.

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

The ELSC's view is that each matter depends on its own circumstances and the common law sets out the appropriate doctrines.

Statutory wills

Determining the intentions of the incapacitated person

W13 Should Victoria adopt the National Committee's recommended guiding principle for authorising a statutory will or retain the current principle?

Please see responses to the questions specifically directed at the Law Society of NSW.

Involvement of the incapacitated person in the hearing

W14 Should the *Wills Act 1997* (Vic) concerning statutory wills specify that the court may order separate representation for the incapacitated person (rather than stating that the incapacitated person is entitled to appear on the application)?

Please see responses to the questions specifically directed at the Law Society of NSW.

Accessibility of the statutory will process

W15 How can the statutory will procedure be made more accessible? In particular, would any of the following reforms be desirable?

(a) Remove reference to the two-stage application process for statutory wills from the *Wills Act 1997* (Vic).

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

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

The ELSC's view is that the application procedure for statutory wills should remain with the Supreme Court. However, if the application is unopposed, judges could deal with the application on the papers.

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

The ELSC's view is that the wording should be identical in every State.

Determining who pays for the application

W17 Should the *Wills Act 1997* (Vic) include costs provisions specific to statutory will applications? If so, what should the costs provisions provide? Should the legislation distinguish between interested and disinterested applicants?

Answered in the questions directed specifically at the Law Society of NSW.

Ademption

The ademption rule

W18 Should the ademption rule be changed to one based on the will-maker's intentions? If so, in what way? For example:

(a) Should the *Wills Act 1997* (Vic) provide a presumption against ademption?

(b) Should the *Wills Act 1997* (Vic) provide a presumption in favour of ademption that would allow a beneficiary of a specific gift to present evidence that the will-maker would not have intended ademption?

In the ELSC's view, this would entail the introduction of a subjective rather than an objective test. The ELSC would therefore not support a change to this effect. The ELSC notes that there are provisions in the *Powers of Attorney Act 2003* (NSW) concerning ademption by attorneys.

In relation to the question of tracing where shares are involved, the ELSC recommends that solicitors refer to the saving clause set out in *Hutley's Australian Wills Precedents* in relation to shares in public companies. This clause deals with mergers and changes of company name.

W19 What effect, if any, would changing the ademption rule to one based on the will-maker's intentions have on:

(a) the cost and time involved in administering an estate?

(b) the fairness of the outcome?

Not applicable given answer to W18.

Acts by administrators appointed to the Victorian Civil and Administrative Tribunal

W20 Have you experienced any difficulties with the operation of section 53 of the *Guardianship and Administration Act 1986* (Vic)?

The ELSC is not able to comment on the Victorian experience. However, the ELSC notes that ss 22 and 23 of the *Powers of Attorney Act 2003* (NSW) and s 83 of the *NSW Trustee and Guardian Act 2009* (NSW) provide for this situation and operate effectively to save an entitlement for a beneficiary of specific property which has been disposed of by an attorney or financial manager.

Acts by persons holding an enduring power of attorney

W21 Should an exception to the ademption rule be included in legislation for actions of persons holding an enduring power of attorney, as well as administrators? If so:

(a) Should a beneficiary of an otherwise adeemed gift be entitled to:
- the same interest they would have had in the property if it had not been sold (section 53 of the *Guardianship and Administration Act 1986* (Vic)), or
- an order to ensure that no beneficiary gains a disproportionate advantage or suffers a disproportionate disadvantage (South Australia and New South Wales), or
- an appropriate order for compensation from the estate (Queensland)?

(b) Should the exception apply to any actions by the donee of the power, or only those actions taken after the donor of the power has lost capacity?

(c) In the present context, what special accounting obligations should the donee of the power of attorney have in relation to proceeds of the transaction?

In this respect, the ELSC recommends consideration of s 22 and s 23 of *Powers of Attorney Act 2003* (NSW).

Access to a person's will for anti-ademption purposes

W22 Should a person acting under an enduring power of attorney be able to access a person's will in the same way as an administrator? If so, should access depend upon proof of the will-maker's lack of capacity?

No, but the ELSC does recommend that instructions be taken at the time of making the will or power of attorney as to whether access to the will by the attorney is authorised, and that solicitors advise the attorney whether there is any potential for ademption should certain assets be sold.

THE LAW SOCIETY
OF NEW SOUTH WALES

VLRC Succession Laws review: Small Estates
Elder Law & Succession Committee comments

Definition of a small estate

SE1 Should the current figures in the *Administration and Probate Act 1958* (Vic) determining what is a small estate be raised? If so, what should they be raised to, and how should they be determined?

The Elder Law and Succession Committee of the Law Society of NSW (ELSC) notes generally that removing formality from the process creates greater possibility of misuse.

The ELSC notes also that that in having regard to the apparent retreat from uniformity by other states, NSW has not implemented the fourth tranche of the Uniform Succession Law reform agenda in relation to the administration of deceased estates.

SE2 In determining what is a 'small estate':

(a) should the dual threshold of values, based on the identity of the beneficiaries, be retained?

(b) should the value be set by the *Administration and Probate Act 1958* (Vic), or be moved to subordinate legislation?

No comment provided.

SE3 Is there a better way to define which estates should have access to the simpler processes relating to small estates? For example, by reference to certain asset profiles?

No comment provided.

Assistance in obtaining a grant of representation

SE4 Should the Supreme Court Probate Registry retain responsibility for providing assistance in obtaining grants of representation in relation to small estates?

In the ELSC's view, this is a matter for individual Registries.

SE5 Could formal assistance through the Supreme Court Probate Registry be replaced by the provision of clearer, more comprehensive, court-generated information?

The ELSC's view is that this is a matter for individual Registries.

SE6 Would the introduction of a sliding fee scale, perhaps with a nil fee for grants of representation for small estates, encourage people to seek grants of representation in small estates?

The ELSC notes that the probate filing fee in NSW is regulated in accordance with the gross value of the estate.

Elections to administer

SE7 What should be the value that determines the size of estates that can be administered under an election to administer?

In the ELSC's view, there should not be an election to administer by anyone other than NSW Trustee and Guardian or, in the case of Victoria, State Trustees.

SE8 Should the second threshold, above which an application for a full grant must be made, be retained? How should such a figure be expressed (for example, as a percentage of the initial figure or as a static figure)?

Not applicable given the response to SE7.

SE9 Should the threshold figures for elections to administer refer to the net or gross value of the estate?

Not applicable given the response to SE7.

SE10 Should legal practitioners be permitted to file elections to administer? What would be the advantages of such a change?

The ELSC does not agree that there should be an election to administer by anyone other than NSW Trustee and Guardian or State Trustees.

SE11 Should elections to administer require the filing party to file the will with the Court?

As noted above, the ELSC does not agree that there should be an election to administer by anyone other than NSW Trustee and Guardian or State Trustees. The ELSC further notes that the original will must be filed in all circumstances.

SE12 Should advertisements giving notice of intention to file an election to administer be moved from newspapers onto the Supreme Court website?

No comment provided.

SE13 Should notice requirements in relation to an election to administer be abandoned altogether?

Please see response to SE7.

SE14 Should elections to administer be subject to stricter procedural safeguards? Are there other improvements that could be made?

Please see response to SE7.

SE15 Do elections to administer, in their current form, serve a valuable function for small estates? If not, should elections to administer be abolished?

Please see response to SE7.

Deemed grants

SE16 What should be the value that determines the size of estates that can be administered under a deemed grant?

In relation to the section on deemed grants, the ELSC wishes to note only its view that deemed grants should not be an option for executors other than the NSW Trustee and Guardian or State Trustees. Otherwise, no comment is provided in this section.

SE17 Should there be a second threshold above which an application for a full grant should be made, as with elections to administer? If so, how should such a figure be expressed (For example, as a percentage of the initial figure, or as a static figure)?

No comment provided.

SE18 Should threshold figures for deemed grants refer to the net or gross value of the estate?

No comment provided.

SE19 Should legal practitioners be permitted to advertise for deemed grants? What benefits might this change produce?

No comment provided.

SE20 Should deemed grants have more stringent procedural safeguards (for example, a requirement to file wills and inventories, and to search for caveats or prior grants)?

No comment provided.

SE21 Do deemed grants, in their current form, serve a valuable function?

No comment provided.

Informal administration

SE22 Should section 32 of the *Administration and Probate Act 1958* (Vic) be expanded to a provision of more general application, in line with the recommendation of the National Committee?

Due to the lack of safeguards and protections without a formal grant the ELSC is of the view that informal administration should not be encouraged generally, and should not be permitted where there is an interest in real property to be dealt with.

SE23 Should it be possible to transfer real property without a formal grant, as in Queensland? If so, in what circumstances?

The ELSC's view is that it should not be permissible to transfer real property without a formal grant.

SE24 Should section 33 of the *Administration and Probate Act 1958* (Vic) be amended in line with the recommendation of the National Committee?

No comment provided.

SE25 Should the Victorian provision be modified to limit an informal administrator's liability not only in relation to payments made, but also in relation to any other act that might properly have been done by a personal representative to whom a grant has been made?

No comment provided.

SE26 How else could the role of informal administrators be better clarified?

No comment provided.

SE27 Would a process of administration by statutory declaration be a worthwhile addition to the mechanisms designed to facilitate the administration of small estates?

No comment provided.

SE28 Are there further safeguards that would be necessary or desirable if this proposal were implemented?

No comment provided.

THE LAW SOCIETY
OF NEW SOUTH WALES

VLRC Succession Laws review: Intestacy
Elder Law & Succession Committee comments

Defining and setting a limit on next of kin

I1 Should Victoria set a limit on next of kin at children of the deceased person's aunts and uncles (the deceased person's first cousins), as recommended by the National Committee?

Yes. Although, the Elder Law and Succession Committee of the Law Society of NSW (ELSC) notes that the English position is different, and next of kin can extend to children of the deceased person's first cousins.

Survivorship

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

Yes. The ELSC is in favour of a nationally consistent position.

Entitlements of the deceased person's partner or partners

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

Yes. The ELSC is in favour of a nationally consistent position.

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?

Yes. The ELSC is in favour of a nationally consistent position.

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?

Yes. The ELSC is in favour of a nationally consistent position. In the absence of an agreement or order, the NSW legislation provides for distribution 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?

The ELSC is in favour of a nationally consistent position, and its view is that this proposition may result in a situation where there may not be enough in the estate to provide for all.

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

I7 Should the right of the deceased person's partner to elect to acquire an interest in the shared home be extended to other property in the estate, as proposed by the National Committee?

Yes. The ELSC is in favour of a nationally consistent position.

Entitlements of the deceased person's children or issue

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

Yes. The ELSC is in favour of a nationally consistent position.

Per stirpes or *per capita* distribution

I9 Should Victoria:

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

The ELSC's view is that *per capita* distribution should be abolished in all cases, with a view to achieving a nationally consistent position.

Taking benefits into account

I10 Should Victoria abolish the hotchpot rule, as recommended by the National Committee?

Yes. The ELSC is in favour of a nationally consistent position.

I11 Alternatively, should Victoria retain and amend its hotchpot provision:

a) To replace references to advancement and settlement with more modern, simplified terminology?
b) To extend it beyond the deceased person's children and their representatives? If hotchpot were extended beyond children of the deceased person, should it apply to the deceased person's partner and/or all next of kin?

Not applicable, in light to answer of I10.

I12 If Victoria were to abolish the requirement to take benefits received during the deceased person's life into account (hotchpot), should it also abolish the requirement to take into account benefits received under a will on partial intestacy?

Not applicable, in light to answer of I10.

I13 If hotchpot is retained and extended beyond children of the deceased person, should the current requirement to take into account benefits received under the deceased person's will on partial intestacy also be extended beyond children of the deceased person?

Not applicable, in light to answer of I10.

Indigenous intestate estates

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

The ELSC is unable to comment.

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

The ELSC is unable to comment as it has little or no experience with dealing with Indigenous estates in the manner formulated in the *Succession Act 2006* (NSW).

THE LAW SOCIETY
OF NEW SOUTH WALES

VLRC Succession Laws review: Family Provision
Elder Law & Succession Committee comments

Factors affecting settlement of family provision claims

FP1 What factors affect a decision to settle a family provision application rather than proceeding to a court hearing?

In the view of the Elder Law and Succession Committee of the Law Society of NSW (ELSC), the following factors will affect a decision to settle or to proceed to a hearing:

- **Shortening of time available for mediation**
- **Compulsory mediation**
- **Who is eligible to make a claim**
- **Costs**

Time limits and extension of time

FP2 Is the current period within which an application for family provision can be made in Victoria (six months from the grant of representation):

a) Satisfactory?
b) Too short?
c) Too long?

The ELSC's view is that national uniformity is preferred.

In NSW, the period within which an application for family provision can be made is 12 months from the date of death.

The ELSC notes its view that the time should run from the date of death as this provides greater certainty.

Opportunistic claims

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

The ELSC is not able to comment. However, it notes its view that in NSW, step-children who may not have been part of the household at any time should be eligible to make a family provision claim, subject to establishing factors warranting the making of the application. The ELSC notes that the Queensland provision for the eligibility of step-children is a good example.

FP4 Does section 97(7) of the *Administration and Probate Act 1958* (Vic), which permits the court to order an unsuccessful applicant to pay their own costs and the costs of the defendant personal representative, deter opportunistic applicants from making family provision claims?

While the ELSC is unable to comment in relation to the Victorian legislation, in NSW, costs orders are made.

The ELSC's view is that plaintiffs should be educated to counteract the idea that family provision applications are a "free for all." Testators should be properly advised at the time of making wills of the effect on families of disentitlement without an adequate explanation to the person disentitled. Further, the ELSC deplores advice given on a "no win no fee" basis.

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

In NSW, there are very few successful applications for summary dismissal. The ELSC notes only one recent example in a matter where there was no eligible applicant, and no assets.

Excessive costs

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

The ELSC's view is that the fact that someone has a successful family provision claim (that is, where there is an eligible person for whom provision should have been made) is the fault of the will-maker and his or her advisor, and it is therefore appropriate for costs to be payable out of the estate.

Transactions during the deceased person's lifetime that reduce the size of the estate

FP7 To what extent do people deal with their assets during their life in order to minimise the property that is in their estate and frustrate the operation of family provision laws? What are some examples of this?

The ELSC is aware that in Victoria, it is common financial planning practice to reduce the size of the estate during the testator's lifetime through mechanisms such as superannuation, inter vivos trusts, testamentary trusts, joint tenancies (holding assets with the beneficiary) and actual transfers.

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

The ELSC notes that its view on this issue is a philosophical one, which is that proper provision should be made for all parties. The ELSC's view is further that people should not be entitled to deal with their assets in this way for the sole purpose of avoiding family provision claims. The ELSC notes also the danger of conflicts of interest at the time of rearrangement of their assets, and the fact that circumstances may change after assets have been dealt with.

The ELSC prefers the NSW approach of notional estate, as it allows distributed assets to be clawed back into an estate in the time period provided for a family provision application. The ELSC's view is that if one subscribes to the concept of family provision, then the concept of notional estate must follow.

Reviewing the purpose of family provision laws

FP9 Should the purpose of family provision legislation be to protect dependants and prevent them from becoming dependent on the state?

The ELSC's view is that this should be one of the purposes of family provision legislation, but should not be the only purpose.

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

The ELSC's view is that wider purpose of family provision legislation should be to ensure that adequate and equitable provision has been made in all circumstances, consistent with the decision of *Singer v Berghouse* (1994) 181 CLR 201.

Limiting eligibility to make a family provision application

FP11 Should Victoria implement the National Committee's proposed approach to eligibility to apply for family provision?

No comment provided.

FP12 Should Victoria limit eligibility to make a family provision application in the same way that NSW has?

Yes, provided that the categories of eligibility include step-children as discussed in the response to FP3.

FP13 If Victoria were to adopt the NSW approach:

a) Are the categories recognised in NSW sufficient or should others be included?

b) Should applications be certain categories of applicant be further limited? If so:

- What should the nature of such further limitation be? For example, should the limitation be a requirement to show 'factors warranting the making of the application', as in NSW, or some other test, such as 'exceptional circumstances' or 'special circumstances'?
- To which categories of applicants should the additional limitation apply?

Please see response to FP12

FP14 Should Victoria retain its current 'responsibility' criterion for eligibility to make a family provision application, but require applicants to have been dependent on the deceased person? If so, should 'dependence' be limited to financial dependence?

The ELSC prefers the NSW approach of having established categories of eligibility. In its view, this approach affords greater certainty. Dependence can be both financial and non-financial.

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

No.

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

The ELSC prefers the NSW approach of having established categories of eligibility, with the addition of step-children as a further category of eligibility. The ELSC recommends a consideration of the factors set out in section 60 of the *Succession Act 2006* (NSW), noting that need is one of the factors in determining whether proper provision has been made.

Amending costs rules and principles

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

The ELSC's view is that individual cases should be dealt with on their own merits. For example, even with a deserving applicant, the estate may not be large enough to provide for costs.

FP18 Should one of the following costs rules apply, as a starting point, when an applicant is unsuccessful in family provision proceedings?

a) 'Loser pays, costs following the event' – that is, both parties' costs are borne by the unsuccessful applicant as in other civil proceedings.
b) 'No order as to costs' – the applicant bears the burden of their own costs.

There are no presumptions provided for in NSW. Generally, an unsuccessful applicant bears his or her own costs, and sometimes the costs of the estate in the case of a spurious claim.

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

In NSW, the District Court has jurisdiction, however it is not used because of the existence of mediation, and a specialised family provision list in the Supreme Court. In the ELSC's experience this has led to more predictable outcomes.

FP20 What measures are working well to reduce costs in family provision proceedings in the County Court and the Supreme Court?

The ELSC is not able to comment, but notes that in NSW, the Supreme Court is working through amended Equity Practice Note 7 with the aim of quicker and simpler resolution of family provision matters, and the containment of costs.

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

The ELSC notes that in NSW, judges have the power to cap costs where appropriate. However, the ELSC would be loath to recommend the compulsory capping of costs.

THE LAW SOCIETY OF NEW SOUTH WALES

VLRC Succession Laws review: Executors
Elder Law & Succession Committee comments

Court review of costs and commission charged by executors

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

(a) should the scope of the power be limited to commission. Or should it extend to disbursements, fees and any other amounts?
(b) should the Court be able to conduct a review on its own initiative or should it be able to do so only on the application of a person interested in the estate?
(c) should there be an exemption from review if the will-maker was advised to seek independent advice or the legal practitioner who prepared the will complied with rule 10 of the *Professional Conduct and Practice Rules 2005*?
(d) should there be a time limit within which an application for review should be made?
(e) should the Court be able to order costs against the applicant if the application is frivolous, vexatious or has no prospect of success?
(f) should the Court be required in normal circumstances to order the executor to pay the costs of the application if the amount is reduced by more than 10 percent?
(g) should the same provisions apply to review of amounts charged by administrators, individual trustees and State Trustees?

(a) The NSW Supreme Court has this power when passing accounts, and it has this discretion when scrutinising any fees. The view of the Elder Law and Succession Committee of the Law Society of NSW (ELSC) is that the power should not just be limited to commission.
(b) The experience of the ELSC is that there has been reluctance on the part of the Court to expend time and expertise in passing accounts.
(c) No.
(d) Yes.
(e) No – it is a beneficiary's right.
(f) No – it is not a formal costs assessment process.
(g) Yes. There have been instances where the former Public Trustee in NSW has been ordered to reduce its commission.

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

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

The ELSC's view is that where the estate is non-contentious, this point is moot. Certainly where litigation is involved, solicitor executors should be required to instruct another legal practice to act.

E3 How could existing rules for ensuring that will-makers are fully informed about the possible costs to the estate of appointing a legal practitioner executor be improved? Should a will that appoints a legal practitioner executor have to be witnessed by an independent witness?

The ELSC notes that this is a conduct matter, and Rule 11 of the *Professional Conduct and Practice Rules 1995* (NSW) would apply. The ELSC's view is that if Rule 11 is understood and followed, it would be an appropriate safeguard. The ELSC's view is that this is a matter for the drafters of the Australian Conduct Rules under the National Legal Profession Reform.

In relation to the second sub-question, the ELSC notes that although solicitors' costs are saved when there is an independent witness, its preferred approach is that this should not be a practice that is mandated. From a practical perspective, the ELSC notes that an independent witness requirement can cause difficulties in regional areas where there may only be one legal practice in that town or area.

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

The ELSC notes that this is a matter for Victoria. Generally, the ELSC favours addressing this issue by professional conduct rules rather than by legislation.

E5 Should legal practitioner executors be required to disclose to beneficiaries the basis on which they charge the estate for their executorial and legal work? If so, should the requirement be set out in legislation or in professional rules?

The ELSC's view is that disclosure should be made to residuary beneficiaries. Generally, the ELSC favours addressing this issue by professional conduct rules rather than by legislation.

E6 Should the common law concerning the minimum information that should be disclosed to beneficiaries when they are being asked to consent to the payment of commission be set out in legislation?

The ELSC would not support setting out this information in the legislation. The ELSC notes that in NSW, the manner of calculation of commission is set out in the commentaries on NSW Succession Law. The rules have been applied in a number of commission cases and in the ELSC's view, adequate commentary exists to provide a proper understanding of the principles.

E7 Should legal practitioner executors be entitled to charge an hourly rate for executorial services, rather than being able to claim a percentage of the estate or its income, for commission? Should Victoria adopt the model provision proposed by the National Committee for Uniform Succession Laws?

The ELSC notes that in NSW, an hourly rate is considered when the Court calculates commission; but not at the solicitor's normal charge-out rate. Unlike trustee companies, the percentage is not set out in legislation but is at the discretion of the Registrar or the Court. The ELSC's view is that commission should be referable to the work done for executorial duties. However, it notes that sometimes if there is a professional charging clause, it is taken up in the commission.

D4 Should section 40 of the *Administration and Probate Act 1958* (Vic) set out what will be, as well as what will not be, sufficient to constitute contrary intention?

No, this should not be prescriptive.

D5 In the context of section 40 of the *Administration and Probate Act 1958* (Vic), should expression of contrary intention be by will only?

Yes.

Insolvent estates

D6 How could the two current schemes of administration – part 1 of the second schedule to the *Administration and Probate Act 1958* (Vic) and the *Bankruptcy Act 1966* (Cth) – operate more efficiently and effectively?

In the ELSC's experience, the two schemes do not pose too many problems and no great injustice has arisen from this.

D7 Should the *Administration and Probate Act 1958* (Vic) define 'insolvent'?

The ELSC sees no need for this definition.

D8 Should the *Administration and Probate Act 1958* (Vic) be expressed to bind the Crown, or alternatively, should there be express abolition of the priority of Crown debts?

The ELSC notes that this would affect other Federal issues including income tax.

D9 Should clause 2 of part 1 of the second schedule to the *Administration and Probate Act 1958* (Vic) be amended to import the rules of bankruptcy in force 'at the time of death'?

No comment provided.