



**Victorian Law Reform Commission
Succession Law**

SUBMISSION BY THE SUPREME COURT OF VICTORIA

April 2013

OVERVIEW

The Supreme Court Probate and Administration Jurisdiction

Probate is a specialist jurisdiction within the Supreme Court which is able to be managed very efficiently as a result of the specialist expertise of the staff of the Probate Office and the judges managing the specialist list.

In 2011/2012 financial year there were 18,588 grants of probate made by the Court. The number of grants has increased by 15% since 2006-7 and is likely to continue to increase as a reflection of population levels. The overwhelming majority of these matters are completed without the need for a court hearing.

A team of nine specialist staff headed by the Registrar of Probates process applications as well as answering inquiries and maintaining court files and databases. The examination of probate applications calls for individuals with an intimate knowledge of the law of wills, succession and the administration of deceased estates. Quite often decisions involving important legal and equitable rights have to be made. Commonly, determinations in proceedings are made with respect to the validity and revocation of informal testamentary documents, entitlements in intestate succession, testamentary capacity, revival and republication of wills, presumption of death, and a myriad of associated matters.

The Supreme Court has pioneered the use of online systems in the probate jurisdiction for both the advertising of applications and searchable indexes. These have reduced time and costs for parties. Assistance is provided to members of the public in the form of online information and answers to frequently asked questions, telephone and over the counter assistance.

The Registrar also provides under Part II of the *Administration and Probate Act 1958* a service in relation to small estates. The Registrar in these matters effectively provides a legal aid service preparing the necessary

documentation to obtain a grant of probate in such matters. Through co-operation between the Melbourne probate registry and registrars in regional Magistrates' Courts the service is made available throughout Victoria.

It is estimated that less than 1% of probate matters require any court appearance and, of those that do, most are applications for limited grants which are dealt with expeditiously. In 2011 the Court created the Probate List for those probate matters requiring hearing. The Registrar of Probates works closely with the Judge in charge of the Probate List, sitting in on hearings and assisting in the smooth running of the list. This new specialist list has been warmly received by the profession.

The exclusive jurisdiction of the Supreme Court in relation to general probate matters allows the necessary specialist expertise to be provided to the public in a very efficient manner.

Family provision matters are separate to the general probate jurisdiction and are managed in a specialist list. Procedures in these matters have been developed with the objective of minimising costs and encouraging early resolution through mediation.

WILLS

Statutory Wills

The Consultation Paper asks how the statutory will procedure can be made more accessible.

The first point to note is that neither the preparation nor the determination of these applications is a simple matter. Legal representation of the applicant is therefore desirable. As with many areas of the law costs, represent a barrier to access.

The costs involved in these matters are primarily those of a lawyer representing the applicant and will generally be the subject of a costs agreement over which neither the Court nor the legislature has control.

It is important that assumptions are not made that a change of jurisdiction will alter the amounts charged by lawyers to their clients. Nor should it be assumed that because a matter is in the Supreme Court a barrister is required to appear, or that the appearance by a barrister will necessarily cost the client more than the attendance of a solicitor, in the Supreme Court or another jurisdiction.

If it is accepted that legal representation in applications for the making of a statutory will is desirable, the most effective means to improve accessibility is to increasing the availability of legal representation through legal aid, community legal service assistance or pro bono assistance.

The consultation paper refers to the procedure in New South Wales to determine these matters on the papers saving the applicant the cost of an appearance. The extent to which this improve the accessibility of the process would depend on the extent the cost saving brought the overall cost within the reach of more people as there would remain the cost of preparing the application. Presumably this would also apply only to uncontested applications

There is also a concern that determinations on the papers may not be sufficient to enable the Court to satisfy itself that the criteria are met and all relevant interests have been protected.

If it is determined that procedures should be adapted to allow for greater participation by the incapacitated person it may be difficult to reconcile this with an on the papers procedure.

There is one aspect of cost within government control- the fee for the commencement of proceedings in the Supreme Court. That fee can be waived by the Prothonotary in circumstances of financial hardship¹, however if it was considered that, as a matter of policy, the commencement fee should not apply in the context of these applications, an amendment could be made to the *Supreme Court (Fees) Regulations 2012*. The impact on revenue collection would be minimal, but individual applicants would save in the region of \$1,000.

FAMILY PROVISION

Background

There were 489 Part IV claims filed in the Supreme Court in the 2011/2012 financial year.

In all claims an initial directions hearing is held before an associate judge and the steps to be taken in the proceeding determined according to the circumstances of the individual case. Mediation is ordered routinely as one of these steps. Where the estate is small and therefore the desirability of minimising costs acute, the Court may order that the mediation be conducted by an Associate Judge or Judicial Registrar. This is subject to Court resources.

In the period 1 February 2012 to 1 February 2013, 89 mediations were conducted by an Associate Judge or Judicial Registrar in Part IV claims. The estate value in these matters was usually in the order of \$300,000 to \$400,000, but was sometimes less. The proceeding was resolved in 91% of these mediations.

¹ *Supreme Court Act 1986* s 129(3)

The vast majority of Part IV claims settle prior to trial. While it is not possible to provide exact figures, such figures as are available support the anecdotal experience that very few matters proceed to trial.

Costs

In the experience of the Court the costs regime that pertains in Part IV cases does not adequately deter opportunistic claims and significantly affects settlement.

As set out in the VLRC consultation paper, although the Court has power to make a range of costs orders, the costs discretion is affected by s 97(7) and the usual rule that costs follow the event (unless there is reason for a different order) does not apply.

The decision of Associate Justice Gardiner in *Re Carn; Moerth v Moerth* (No 2) has clarified that the starting point for an unsuccessful plaintiff is not an award of costs in their favour. However, an unsuccessful plaintiff will not have costs awarded against them simply because they were unsuccessful. In *Webb & Ors v Ryan & Anor*² Whelan J held that in the circumstances of that case costs should follow the event and the unsuccessful plaintiff were ordered to pay the defendant's costs even though the matter did not come within s 97(7).

Where a costs order is made to a successful plaintiff it will generally be ordered to be paid from the estate, ordinarily on a solicitor and client basis. From 1 April 2013 the bases for taxation in the Supreme Court will be amended to introduce a two tiered system of the standard basis (all costs reasonably incurred and of reasonable amount equating to the current solicitor and client basis) and indemnity basis.³ Therefore the standard order for costs in all cases will be equivalent to the usual basis for costs in these matters. This aspect of the award of costs in family provisions matters will therefore be less significant in the future in comparison to other matters.

The availability of a fund from which costs orders can be met means that no win/no fee agreements with a success uplift are common for plaintiffs. The uplift can be substantial (up to 25% is permitted). These agreements are permitted by the *Legal Profession Act 2004*, and are designed to facilitate access to justice by providing solicitors with an incentive to take matters on without a guarantee they will be able to recover their costs. In the context of ordinary litigation the uplift is not generally recoverable from the other side. Where costs are awarded on an indemnity basis on the basis of the retainer or costs agreement the uplift may be recovered. In the context of family provisions matters, while even an award for costs on a solicitor client basis will not allow recovery of the uplift on a taxation, the existence of the uplift becomes a factor in settlement negotiations. Frequently, settlements will be reached on the

² [2012] VSC 431

³ *Supreme Court (Chapter I New Scale of Costs and Other Costs Amendments) Rules 2012*

basis of payment of an agreed costs figure that will include the uplift or an "all in" settlement sum.

The plaintiff's costs will often be substantially more than the defendant's, because they include the uplift. The additional costs can influence the settlement sum a plaintiff is willing to accept.

The costs regime, coupled with the discretionary nature of the jurisdiction and settlement practices, means that there is not the usual disincentive to a plaintiff bringing an opportunistic or weak claim.

In smaller estates it is not uncommon for the defendant executor's costs at mediation (where the steps to date are only receipt of the proceedings, attendance at directions hearing, position paper and attendance at mediation) still to be in the order of \$8,000-\$12,500 and the plaintiff's costs (including the uplift) in the order of \$20,000-\$30,000. In an estate of \$250,000-\$300,000, there is a significant incentive for the defendant executor to settle, to preserve as much of the estate for the beneficiaries as possible, even if the claim is weak. Determination of Part IV claims is highly discretionary, and so a defendant can rarely be entirely confident of success.

The other aspect to be considered is that fact that the usual disincentive to a defendant opposing a meritorious claim does not necessarily exist in family provisions matters. While a defendant executor who has an interest in the estate has an incentive to prevent diminution of the estate through legal costs, a defendant executor with no interest in the estate will not. Their costs will be met by the estate almost universally, and they may adopt the position that they are under an obligation to defend the will. Accordingly, the usual factors of personal liability for costs and ability to make a personal decision are not applicable. In the Court's experience, defendants who are not also beneficiaries can on occasion unreasonably resist meritorious claims.

Where affidavits have been ordered, the costs of the parties at mediation are increased, sometimes substantially. If the matter does not settle, and proceeds to trial, then the costs are very considerable.

In larger estates, the costs of one party at the point of mediation will often be stated to be in the region of \$50,000.

In *Re Carn; Moerth v Moerth* Gardiner AsJ commented that the costs of the two applications under Part IV heard at a three day trial amounted to approximately a quarter of the estate assets (which in his previous reasons he indicated consisted of one parcel of real estate valued at approximately \$750,000). In one Part IV matter heard at trial before Lansdowne AsJ, which concerned three applications by sisters in respect of their late father's estate, being the balance of proceeds of sale of his home in the order of \$900,000, the plaintiffs' combined legal costs exceeded \$300,000 (i.e. constituted 35% of the estate, and were only \$50,000 less than the amount awarded to them).

Measures to contain costs

The Court has introduced various measures to try to contain the costs.

One approach is not to order affidavits prior to mediation and instead requiring parties to file short position papers. As noted above orders for mediation and judicial mediation are made and if unsuccessful the proceeding may be ordered to an early trial to proceed by way of viva voce evidence.

Where affidavits are not ordered and evidence is to be given viva voce there is still the costs involved with preparing a proof of evidence. However, it is considered this approach can still reduce costs by avoiding the cost of lengthy affidavits including irrelevant material.

The orders in individual cases may be specifically crafted to the nature of the case at hand and a combination of orders may be made to ensure sufficient information is available to enable an informed mediation to proceed or a trial without unnecessary costs being incurred in the preparation of material. For example, affidavits as to the content of the estate will be ordered with all other issues to be the subject of position papers or, if the matter is proceeding to trial, outlines of opening may be ordered with viva voce evidence.

These techniques contain costs to some degree, but the costs can still be substantial. In some matters the Court has found that despite the practice of not ordering affidavits a party will file affidavits before the matter has had its first directions hearing. A practice note may be required to ensure that such steps are not taken before the directions hearing to reduce the likelihood of unnecessary costs being incurred.

The *Civil Procedure Act 2010* now contains explicit mechanisms for controlling costs, which the Court can employ. Sections 65A, 65B and 65C allow the Court to require the parties to exchange details as to costs and to cap costs. Section 24 imposes an obligation on the parties to ensure costs are reasonable and proportionate and section 19 requires that lawyers and parties must not take any step unless the person reasonably believes that the step is necessary to facilitate the resolution or determination of the proceeding.

The Court has been employing the cost provisions as part of the management of family provisions matters and reminding parties and their lawyers of their obligations.

Potential avenues for reform

One option would be to apply the usual rules as to costs to Part IV claims. In *Webb & Ors v Ryan & Anor (Costs)*⁴ Whelan J made the following observation

... it seems to me that the tendency to move towards the application of general costs principles, whilst recognising the special characteristics of

⁴ [2012] VSC 431

family provision cases where they are relevant, is a sound and sensible approach. It reflects the changes made in 1997 which significantly broaden the range of potential claimants, it recognises the pressures to settle placed on executors if claimants do not see themselves as at risk on costs if they fail, and it recognises that when costs on unsuccessful claims do not follow the event they are in effect borne by the beneficiaries. It is always necessary to take account of all of the relevant circumstances, including the special features of family provision cases where those features are relevant, and to determine what is just in each case. But it is also important, particularly when one is dealing with claims by non-family members, to bear in mind the observation of Giles JA in *Jvancich* that often the justice of the case "is not remote from costs following the event". (citation omitted)

Applying general cost principles would mean, in most cases, that costs follow the event. The advantage would be that plaintiffs would be required to more rigorously test their case before issue, because of the likelihood of an adverse costs order if unsuccessful.

Some protection would still be required for defendant executors, because of their obligation to, reasonably, defend the will, and to be guided by adult beneficiaries. Defendant executors could, for example, continue to be indemnified by the estate unless they act unreasonably. A prudent executor could then protect him or herself by obtaining appropriate legal advice and then instructions, and, if necessary, indemnity, from adult beneficiaries.

Whatever approach is adopted it needs to be kept in mind that in only a limited number of matters will the issue of cost be judicially determined. As noted above the majority of matters settle with cost recovery determined by the agreement of the parties. Cost rules influence settlement and create a system of incentives and disincentives but the direct impact of court orders is limited. The decision in *Re Carn; Moerth v Moerth (No.2)* and *Webb & Ors v Ryan & Anor (Costs)* have had an impact in discouraging unmeritorious claims, but the effectiveness of the threat of adverse costs orders in unmeritorious claims is only effective if the defendant is prepared to bear the risk that resisting the unmeritorious claim will not ultimately cost more than the claim itself.

Scrutiny of costs between client and solicitor is another area that needs to be considered. Prior to amendments to the *Legal Profession Act 2004* in 2007 a person interested in any property out of which a trustee, executor or administrator who is liable to pay legal costs has paid, or is entitled to pay, those costs was entitled to apply to the Supreme Court for review of the costs charged.⁵ The 2007 amendments⁶ introduced new definitions of client and third party payers in the context of the cost review provisions which did not include those with an interest in an estate. The Supreme Court of Queensland

⁵ *Legal Profession Act 2004* s 3.4.38 (as enacted)

⁶ Introduced by the *Legal Profession Amendment Act 2007*

in a decision on equivalent sections of the *Legal Profession Act 2007* (Qld) held that a beneficiary does not have standing to seek review of costs under these provisions.⁷

The Commission may wish to consider whether this is a matter that should also be considered in the broader context of the costs regime in family provision matters.

Notional Estate

There are a number of cases which have come before the Court in which there is evidence of uncommercial transactions during the lifetime of a testator, often very close to the end of their life. Some arise in circumstances that warrant careful investigation. They may come before the Court as applications to set aside transactions by reason of undue influence, unconscionability or lack of capacity or in other ways.

In *Wood v McLean*⁸ proceedings were brought by the plaintiffs to set aside an *inter vivos* transfer of property by the deceased in circumstances where they had also made application under Part IV. In that case Sifris J granted summary dismissal of the application to set aside the *inter vivos* transaction on the grounds that the plaintiff's lacked standing to bring the proceedings, the Part IV claim being insufficient grounds.

In *Mataska v Browne*⁹ the plaintiff brought an application for a limited grant of letters of administration and that the defendant be passed over as the executor of the estate of the deceased. The application was made so that the plaintiff could then challenge an *inter vivos* transaction by the deceased by which the defendant received title to property that would otherwise have formed the bulk of the deceased estate. The plaintiff had a prima facie case for a Part IV claim. In that case McMillan J granted the application finding that the plaintiff had the reasonable possibility of an interest in the estate and sufficient standing to seek the limited grant. The circumstances were found by Her Honour to demonstrate that there should be care investigation as to whether the *inter vivos* transaction should form part of the estate, an exercise that would not be undertaken by the defendant as the beneficiary of the transaction. Her Honour also noted that "it is moreover sensible that the determination of the composition of the estate should precede the question of whether the plaintiff has received adequate compensation from it."¹⁰

These cases are relevant to the consideration of whether the unconscionable interest and undue influence are sufficient to allow a family provision claimant to challenge uncommercial *inter vivos* transactions.

⁷ *Amos v Ian K Fry & Company* [2010] QCA 131

⁸ (2010) 31 VR 12

⁹ [2013] VSC 62

¹⁰ *Ibid*, [54]

On balance, the law ought not to detract from the general proposition that persons are able to deal with their property as they wish. However, if there is evidence in Victoria of persons entering into artificial arrangements designed to avoid their moral obligation to make adequate provision for the proper maintenance and support of their dependants there may be cause to act.

If it is the policy of the legislation to enforce the moral obligation to support dependants then there is the potential under Victorian law as it stands to avoid such obligations.

The matter has been addressed in other jurisdictions with the introduction of "claw back" provisions such as s 23 *Family Provision Act 1982* (NSW).

These provisions have the potential to allow issues which might otherwise manifest in other forms of proceeding to be dealt with in the context of a family provision claim.

The Commission may also wish to consider whether the existence of such provisions may operate as a deterrent to undue influence and unconscionable dealings with the elderly in later years in the same way as family provision laws may operate as a deterrent to undue influence in the making of wills.

INTESTACY

Statutory legacy

Legislation in each Australian jurisdiction determines the manner in which the estate of a deceased person is distributed when, or to the extent that, the deceased fails to make a will. For the most part, this legislation follows a similar pattern. All make provision for a statutory legacy. At present in Victoria, the surviving partner of an intestate who is also survived by a child or children is entitled to the deceased's personal chattels and, if his or her residuary estate is worth less than \$100,000, to the whole of that estate. If worth more than \$100,000, then the surviving partner is entitled to \$100,000 together with the interest on that amount calculated at the statutory rate and together with one third of the balance of the estate: *Administration and Probate Act 1958*, s 51(2).

The above provisions were originally intended to ensure that the matrimonial home (if any) was preserved for the surviving partner. With the increase in the value of real property, the "legacy" is now quite inadequate and would need to be substantially increased to preserve the intention of the provisions.

It is desirable that the legislation provide for future increases to keep pace with the value of real property without the need for further statutory amendment. This could be done by regulation or a statutory formula linked to the consumer price index or if possible another ABS published index more closely related to property values.

EXECUTORS

Review of Commissions

In the Court's experience, there continue to be significant cause for concern about excessive commissions and expenses of executors. The difficulty is not in relation to solicitors alone but also other professional advisors. The Court is reinforced in this view by the matters set out in the consultation paper.

It is considered important that there be a mechanism by which the Court can review commissions and expenses and make appropriate orders to reduce excessive commissions which solicitor/executors may be authorised by a will to charge, or reduce excessive disbursements for which executors seek reimbursement.

The Court favours the introduction of the a provision along the lines of the lines of the model Administration and Estates Bill prepared by the National Committee unless there is a demonstrated policy reason to depart from the model Bill. A review of the experience in NSW may inform this consideration.

SMALL ESTATES

Assistance by the Registrar

The service provided by the Registrar under Part II of the *Administration and Probate Act 1958* in relation to small estates is akin to a legal aid service preparing the necessary documentation to obtain a grant of probate in such matters. Through co-operation between the Melbourne probate registry and registrars in regional Magistrates' Courts the service is made available throughout Victoria.

The service is limited to straightforward uncontentious matters as the Registrar would otherwise be called upon to make determinations in relation to an application prepared by his office. As noted in the paper the number of matters where assistance is provided has decreased over time. This may be reflective of the static threshold definition of a small estate.

The threshold question is whether it remains appropriate for this service to be provided within the registry.

The next question of importance to be considered is the need for resources to support the recommended approach.

If the function remains with the registry and the monetary definition of a small estate is increased then additional resources will be required within registry to meet increased demand on an ongoing basis.

If the preferred approach is to develop more comprehensive online information, form and guides, then resources will be required to develop these materials and keep them up to date.

The Probate Office operates with a limited number of staff with staffing levels reducing over time. In 1993 the office had 14 staff dedicated to probate matters at which time there were 14,751 applications filed. In 2012 there were 9 staff processing over 19,000 applications. Increases in overall demand over time has been managed by innovation in procedures leading to greater efficiency.

Demand in the area of small estates has decreased as a result of inflationary creep, with fewer matters falling within the definition of small estates. If that demand increases staffing levels will need to be reviewed.

Elections

The current procedures under section 79 of the *Administration and Probate Act 1958* and section 11A of the *Trustee Companies Act 1984* are considered unsatisfactory from the perspective of the Registrar of Probates.

Section 79 "deems" State Trustees to be taken to have been granted probate of the will or administration of an estate upon the expiry of 14 days after publication of an advertisement. In testate estates there is no legal requirement for State Trustees to file in court the will of the deceased or an inventory of assets. Searches for caveats, deposited wills and prior wills are not required. Indeed, the filing of a caveat would not prevent the deeming of a grant.

The lack of any requirement to file with the court compromises the integrity of court's register of grants which are searchable online. Practitioners and members of the public searching the register cannot have the same level of confidence that no grant has been made where a deemed grant is not recorded. Ultimately, this might lead to probate being granted twice in the same estate.

Section 11A of the *Trustee Companies Act 1984* is broader in scope and applies to all Trustee Companies. Pursuant to the section the filing of an election, in the office of the Registrar, by a Trustee Company is taken to be the grant of administration or probate. Although there is a requirement to file the papers in such cases, as probate has been deemed granted, there is no examination by the court of the validity of the will of the deceased. It is the experience of the Registrar that this lack of scrutiny has led to many cases of doubtful, even informal wills, being "deemed" as granted.

The Registrar of Probates

Historically the Registrar of Probates has been an eminent specialist in probate and administration law. The present registrar upholds this tradition and is a highly skilled specialist lawyer.

The Registrar deals with many matters which in years gone by would have been dealt with by a Judge. The Registrar was given significant new powers by s 9(5) of the *Wills Act 1997* in relation to informal wills. The introduction of de facto/domestic partner legislation has also required the Registrar to make determinations regarding the status of relationships upon intestacy, determinations which in the context of separation would be made by a Family Court Judge or Federal Magistrate.

In 2011 the office of Judicial Registrar was introduced in the Supreme Court. Initially two Judicial Registrars were appointed and designated as Registrar of the Court of Appeal and Judicial Registrar in the Costs Court reflecting their expertise in their respective fields. Most recently a Judicial Registrar has also been appointed and allocated to applications in the Funds in Court jurisdiction.

The office of Registrar of Probates is one requiring a commensurate level of skill and which is called upon to exercise an equivalent level of delegated judicial power, but is at present a Public Service appointment.

The establishment of the office as one to be filled by a Judicial Registrar would have several beneficial outcomes. It would recognise the expertise required for the role. It would increase the independence of a role that exercises considerable delegated judicial power. It would also enable the Court to delegated to the Registrar a greater range of judicial functions.

There are a number of existing models within the Court that utilise the ability to allocate matters to an appropriate level of judicial officer while retaining the benefits of specialisation. The Costs Court provides a centralised specialist jurisdiction, but ensures matters are dealt with at the appropriate level by allocating cases between Cost Registrars, a Judicial Registrar and an Associate Judge.

The introduction of a Judicial Registrar of Probates would introduce that same flexibility to the Probate jurisdiction without the disadvantages of removing some classes of matter to another jurisdiction.

Technology and Innovation

The Supreme Court has pioneered the use of online systems in the probate jurisdiction for both the advertising of applications and searchable indexes. These have reduced time and costs for parties.

The Probate Online Advertising System (POAS) was introduced in 2009. Prior to the introduction of this system parties were required to place advertisements in daily newspapers. The fee charged for advertising on the POAS system is currently \$40.10 which is considerably less than the costs of commercial advertising (\$100-\$300) reducing the costs for parties.

The system was developed by the Court using funds granted by the Attorney-General under a Revenue Retention Scheme for Court Fees.

Following the success of POAS the Court is in the early stages of an e-enablement project for probate applications. The aim of the project is to create a system for online lodgement and processing of probate applications.

The project will enable a near-paperless process with online accessibility. It will aim to reduce costs for applicants and provide efficiencies for the Court in the processing of applications, file maintenance and archiving. The requirement to file the original will is to be retained to ensure the appropriate level of scrutiny is maintained.

The Court is in the process of seeking funds to take this project forward and achieve this significant innovation.