VICTORIAN LAW REFORM COMMISSION

REVIEW OF SUCCESSION LAWS

Submission by Liz Burton

Thank you for the opportunity to comment to the Law Reform Commission and for the detailed and methodical information provided in the various consultation papers. They provided an excellent resource for the preparation of submissions from members of the public.

1. COST RULES IN SUCCESSION PROCEEDINGS

1.1 Referral to Supreme Court

It is noted that almost all cases involving estate litigation are heard by the Supreme Court while some are considered by the County Court. The high costs involved in referral to the Supreme Court and to some extent, the County Court, may significantly deplete the available assets of the estate and suggests that smaller estates, for example those under $500,000, be considered by the Victorian Civil and Administrative Tribunal (VCAT). Such differentiation is warranted on the grounds that referral of a dispute to a court that depletes or fully consumes the resources of the estate is self defeating and is in need of review and reform.

Additionally, the types of disputes that can arise over estates as outlined in the Commission's paper on 'Costs rules in succession proceedings' appear to be suitable for consideration by VCAT and such disputes can take the pressure off the Supreme Court and allow it to focus on more substantive legal issues.

1.2 Recommendations

That the Commission give consideration to referring to VCAT:
(a) disputes involving smaller estates, for example those under $500,000; and
(b) the types of disputes that can arise over estates as outlined in the Commission's paper on 'Costs rules in succession proceedings'.

1.3 Cost orders regarding family provision

It is noted that the general rule that the unsuccessful party in a proceeding pays the costs of the successful party does not apply to family provision cases in that the unsuccessful party can seek reimbursement from the estate unless the case was deemed to be vexatious or had no reasonable prospect of success.

It is considered that differentiation is warranted in the application of costs involving such cases. It is noted that the NSW national uniform succession legislation sets out two categories of applicants for a family provision order:

- those who are automatically entitled to apply, as of right (clause 6, NSW Family Provision Bill 2004);
  and
- those who may apply only if the Court determines that they are entitled to do so (clause 7, NSW Family Provision Bill 2004).

It is noted that similar provisions apply in the Victorian Administration and Probation Act 1958, for example in clause 91, 'Power of the Court to make maintenance order' and regarding costs in clause 97, 'Contents of order'.

It is considered that those applying under clause 6 (automatically entitled to apply) ought to be entitled to seek costs regardless as to whether or not they were successful.

However those applying under clause 7 (may apply only if the Court determines that they are entitled to do so) should not be entitled to obtain costs from the estate if their case is unsuccessful and the general rule should apply, that is, that costs 'follow the event'. The costs involved in such cases are substantial owing to costs of representation and Supreme Court and County Court charges and can have a severe impact on the funds available for distribution to parties nominated in the will.

Costs from the estate awarded to individuals in categories under clause 7 for contesting the will are considered to be highly contentious as, having been granted approval to apply, they know in advance that most of the costs of their litigation will be awarded against the estate.

Although frivolous and vexatious cases may be charged, it is considered that individuals who do not have an 'as of right' entitlement to an estate, should not have any rights for their unsuccessful litigation to be funded by the estate on the grounds that: (a) their litigation has a severe impact on the funds available for distribution to parties named in the will who have a genuine entitlement to the assets of the estate; and (b) paying the costs of unsuccessful litigation rewards and encourages such litigation while depleting the assets of the estate.

Accordingly the current provision in the Administration and Probate Act 1958 for the awarding of costs against the estate for unsuccessful litigation by applicants who have been allowed to apply by the Court (clause 7), needs to be withdrawn.

1.4 Recommendation

That the awarding of costs against unsuccessful litigation by individuals (and / or their representatives) in clause 7 of the NSW Family Provision Bill 2004, be withdrawn.

2. FAMILY PROVISION

2.1 Extent of definition of 'family'

Concern is expressed over family provision contained in both the Victorian Administration and Probate Act 1958 and in the national uniform succession laws as delineated in the NSW Family Provision Bill 2004.

As outlined in the Commission's excellent consultation paper on wills, the doctrine of testamentary freedom inherent in the 1837 Act was gradually changed to include family provision legislation and this places limits on the freedom of a will-maker to dispose of their property as they wish. The family provision empowers the Court to alter the distribution of property in a way that was not intended by the will-maker.

This provision extends significantly the former definition of family to include a list of specific matters and circumstances. The NSW national template on family provision in succession laws, contained in the Family Provision Bill 2004, identifies this list (Appendix A refers).

These provisions have been made without adequate community consultation or awareness and little attempt has been made to increase awareness of the radical provisions regarding the wide range of categories that can apply if the Court determines they have an entitlement to apply.

It is considered that the community supports neither Court intervention nor the awarding of costs against unsuccessful litigation by individuals (and / or their representatives) in clause 7 of the NSW Family Provision Bill 2004.

2.2 *De facto* inheritance tax

It is considered that the category of who may apply if the Court so determines, operates as a *de facto* inheritance tax and is objectionable on those grounds as it is not transparent regarding its intent. It is considered to operate as a *de facto* inheritance tax owing to the categories of matters to be considered by the Court (Appendix A refers), particularly those relating to maintenance and support.

It is notable that the direction of the changes to the Administration and Probate Act 1958 (Vic) involving family provision are aimed at distributing private assets so as to alleviate financial expenditure by government.

2.3 Recommendation

That family provision legislation involving permission for applicants in categories in clause 7 of the NSW Family Provision Bill 2004 and the awarding of costs against unsuccessful litigation by individuals (and / or their representatives) in clause 7 of the NSW Family Provision Bill 2004 be withdrawn.

3. LEGAL PRACTITIONER EXECUTORS

3.1 Commission and fees

It is noted that the Administration and Probate Act 1958 (A&PAct) makes provision for the executor's commission in paragraph 65. Commission must be no more than five (5) percent of the assets of the estate or, if the executor is a licensed trustee company, the commission must not exceed the commission or percentage that a licensed trustee company may charge under Chapter 5D of the Corporations Act. The A&PAct specifically allows the executor to apply for commission "for his pains and trouble as is just and reasonable" (Para 65 refers).

The A&P Act does not envisage the executor applying for commission plus the charging of legal fees and is silent on the question of double charging by legal practitioner executors. Such executors have been known to charge fees at their normal hourly rate for every minute of time spent on the estate administration (evidenced by their 'Release and Indemnity' applications to the Supreme Court) and then in addition, also charge up to the maximum in commission of the total assets of the estate.

Once the legal practitioner charges for their time in estate administration they should be excluded from any further entitlement out of the estate. The principle here is that they have been paid for their work. It appears to be an abuse of the Act to take advantage of the commission provision while simultaneously charging legal fees for time worked on the estate administration. The Act needs to be amended to specify that charging legal fees in

handling the work of the estate, excludes the legal practitioner executor from taking commission.

3.2 Recommendations

1. That if the legal practitioner executor charges legal fees for all their time in estate administration they should be excluded from making an application for commission.
2. That if the legal practitioner executor charges legal fees for some of the work in handling the estate they can apply for a lesser amount of commission than the maximum, taking into account the amount already charged and paid.
3. That if the legal practitioner executor has not charged legal fees they may apply for the relevant commission from the estate.

4. ADMINISTRATION OF ESTATES

4.1 Accounting and transparency issues

The A&P Act appears to be especially weak on documented accountability for the financial administration of estates by executors, whether by a Trust or individual.

The A&P Act is supported by the Supreme Court (Administration and Probate) Rules 2004 which sets out rules regulating procedures in the Supreme Court in relation to administration and probate together with providing template forms.

However overall there appears to be a sub optimal standard of accountability and transparency in relation to a comprehensive account of expenditure and income of the estate, supported by documented evidence. Section 2A.04 Application supported by affidavit sets out the documentation requirements for applying for probate.

It is considered that the full range of income and costs charged against the estate needs to be provided to the Supreme Court together with fully documented evidence. The onus needs to be placed on the executor/Trustee to retain all receipts and account for all charges and income. Similarly, in the case of income from sources such as rental, sale of properties, share dividends, documented evidence in the form of rental agreements, share certificates and sale of property agreements, need to be attached to the 'Release and Indemnity' report.

An accounting standard needs to be specified for the administration of all estates and in the case of large estates, for example those involving over $500,000 in assets, there needs to be a professionally audited statement prepared by a chartered accountant, independent from the executor, attached to the 'Release and Indemnity' application to the Supreme Court.

The current low level of accountability for executors invites opportunities for taking advantage of the proceeds of estates and is considered highly unsatisfactory.

It is difficult to build up a portfolio of assets and often comes at a cost to the individual who has saved rather than spent. The treatment of these assets is not considered to be adequately protected by current laws and rules of accounting and transparency or of accountability to the relevant responsible authorities. Unless the Supreme Court has reason to investigate, a 'Release and Indemnity' application may conceal anomalies yet be approved on the grounds of lack of awareness of issues.

4.2 Recommendations

1. That there be a requirement that all expenses be accounted for by documentary evidence and attached to the 'Release and Indemnity' application to the Supreme Court;
2. That in the case of income from sources such as rental, sale of properties, share dividends, documented evidence in the form of originals of rental agreements and sale of property agreements, be attached to the 'Release and Indemnity' application to the Supreme Court;
3. That an accounting standard be specified for the administration of all estates and in the case of large estates involving over $500,000 in assets, there needs to be a professionally audited statement prepared by a chartered accountant, independent from the executor, attached to the 'Release and Indemnity' application to the Supreme Court.

5. WILLS

5.1 Witnesses to wills

It is agreed that the current requirements in the Victorian Wills Act 1997 (the Act) regarding witnesses are weak and need to be strengthened.

It is noted that while the Act is weak on quality assurance processes regarding content and execution of wills, including signature and witnessing, it is specific regarding powers of the Court.

There are existing models for signing documents and it is considered that counter signatories required for United Kingdom passports is a useful model for wills. Counter signatories for United Kingdom passports must work in a recognised profession or be ‘a person of good standing in their community'. The rules specify that those who can countersign applications and photos must meet certain criteria and cannot be closely related or involved with the person applying. For example, they cannot be related by birth or marriage; or be in a relationship or live at the same address as the applicant.

It is important to ensure independence from coercion in the drafting and provisions of a will and independent witnesses are an important component of the quality assurance process.

The counter signatory of a will also needs to be aware that they are witnessing a will being signed. It is recommended that the Wills Act be amended to require witnesses to be aware that they are witnessing the signing of a will.

A witness also needs to be independent in the sense of having no interest in the estate for himself or herself, any relative or friend. The witness should be required to sign an independence certificate, which is attached to the will. They should also be required to certify that the will maker appears to have capacity to understand the provisions contained in the will.

5.2 Ademption

It is considered inappropriate to protect testamentary property of the will maker from ademption on the grounds that individuals are entitled to acquire and dispose of their assets without legislative and / or government intervention. A will can be made at any time during the life of the will-maker and the purpose of the will is a statement of intent but not a literal

and rigid statement of asset distribution incapable of revision. It is of considerable concern that the Commission is giving consideration to protecting testamentary assets from ademption as it appears to be contrary to the purpose of will to distribute those assets available for distribution at the point of the will-maker's death.

All levels of government today are seeking to reduce red tape but it appears that assets belonging to an estate are increasingly being restricted by red tape.

5.3 Recommendation
That all testamentary property disposed of during the will-maker's lifetime be allowed to be adeemed at the discretion of the will-maker.

5.4 Construction of wills
Provisions contained in wills, even when prepared by a legal practitioner, can be flawed and contain details that are unsupported by legislation or by the discretion of the will-maker. For example a will-maker may want assets from their estate to be given to a nominated individual and request that individual to provide those assets in their will to particular family member/s. Such provisions are not legally enforceable but yet can be contained in the will (to no effect).

The difficulty is that most people are not sufficiently familiar with the laws relating to wills to know whether or not their will has been written with full legal effect.

There needs to be a system in place allowing will-makers to check whether the drafting of their wills is legally enforceable. Such a system might be in electronic form.

5.5 Recommendation
That a system or process be introduced allowing will-makers to check whether the drafting of their wills is legally enforceable.

6. USE OF TERM 'SUCCESSION LAWS'

6.1 Succession law terminology
It is considered that the use of the term 'Succession Laws' implies *de jure* entitlement and therefore contains an inherent bias towards the distribution of assets from an estate to individuals forming any part of a family tree.

In royal families, succession refers to the legitimate successor to the throne based on lineage. The following dictionary definitions apply to the word 'Succession':

- the act or an instance of one person or thing following another;
- the act, process or right by which one person succeeds to the office of another;
- the order that determines how one person or thing follows another;
- a line of descent to a title etc.

Implied in these definitions is the expectation that a sequence or order must be followed. It is understood that the Family Provision Bill 2004 identifies two categories who may apply for a family provision order:
- those who are automatically entitled to apply, as of right (cl 6);
  and
- those who may apply only if the Court determines that they are entitled to do so (cl 7).

However it is considered that use of the word 'succession' unduly emphasises entitlement in favour of removing discretion by the will-maker.

The word 'bequest' or term 'Bequeathal Laws' removes this inherent bias and is considered more consistent with community expectation that the will-maker has a level of discretion concerning the distribution of their assets.

6.2 Recommendation

It is recommended that use of the term 'Succession Laws' be withdrawn and substituted with the term 'Bequeathal Laws'.

7. CONSIDERATION OF OTHER RELEVANT LEGISLATION

7.1 Future voluntary euthanasia legislation and settling wills in advance of death

In the history of legislation concerning wills and the Administration and Probate Act, voluntary euthanasia has never been permitted by the State. Accordingly wills are considered after death. Laws allowing voluntary euthanasia have been enacted in a number of countries and in Australia, consideration is being given by Tasmania on the possible introduction of a Bill. With the possibility of the introduction of such laws in Australia, it is considered that this type of death, the date of which is determined by the individual, has implications for wills.

Individuals who determine the date of their own death ought to be able to settle their will in advance of their death. In particular, if they have grounds to believe that their will might be contested, they should be able to apply to the Court for a hearing to have the case considered and determined before their death.

The advantage of this procedure is that the individual who made the will would have the opportunity for a hearing at Court and to address the case made by person/s contesting it. The outcome would need to be binding on all parties.

Recommendation

Although it is premature to introduce such provision at present, it is recommended that consideration be given to considering the future introduction of a process that enables the consideration of wills in advance of death, where the date of death is set in accordance with voluntary euthanasia laws.

APPENDIX A

Extract from NSW Family Provision Bill 2004 - model State and Territories law
The following outlines those who may apply only if the Court determines that they are entitled to do so (cl 7).

11 Matters to be considered by Court
(1) The Court may have regard to the matters set out in subsection (2) for the purpose of determining:
(a) whether a person is entitled to make an application under section 7, and
(b) whether, in the case of any application under Division 1, to make a family provision order and the nature of any such order.

(2) The following matters may be considered by the Court:

(a) any family or other relationship between the person in whose favour the order is sought to be made (the proposed beneficiary) and the deceased person, including the nature and duration of the relationship,

(b) the nature and extent of any obligations or responsibilities owed by the deceased person to the proposed beneficiary, to any other person in respect of whom an application has been made for a family provision order or to any beneficiary of the
deceased person's estate,

(c) the nature and extent of the deceased person's estate (including any property that is, or could be, designated as notional estate of the deceased person) and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered,

(d) the financial resources (including earning capacity) and financial needs, both present and future, of the proposed beneficiary, of any other person in respect of whom an application has been made for a family provision order or of any
beneficiary of the deceased person's estate,

(e) any physical, intellectual or mental disability of the proposed beneficiary, any other person in respect of whom an application has been made for a family provision order or any beneficiary of the deceased person's estate that is in existence when the application is being considered or that may reasonably be anticipated,

(f) the age of the proposed beneficiary when the application is being considered,

(g) any contribution, whether made before or after the deceased person's death, for which adequate consideration (not including any pension or other benefit) was not received, by the proposed beneficiary to the acquisition, conservation and
improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family,

(h) any provision made for the proposed beneficiary by the deceased person, either during

the deceased person's lifetime or any provision made from the deceased person's estate,

(i) the date of the will (if any) of the deceased person and the circumstances in which the will was made,

(j) whether the proposed beneficiary was being maintained, either wholly or partly, by the deceased person before the deceased person's death and, if the Court considers it relevant, the extent to which and the basis on which the deceased
person did so,

(k) whether any other person is liable to support the proposed beneficiary,

(l) the character and conduct of the proposed beneficiary or any other person before and after the death of the deceased person,

(m) any relevant Aboriginal or Torres Strait Islander customary law or other customary law,

(n) any other matter the Court considers relevant, including matters in existence at the time of the deceased person's death or at the time the application is being considered.