

January 4, 2013

Victorian Law reform Commission  
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## **Succession Law – Family Provisions**

### **The Victorian Farmers Federation**

The Victorian Farmers Federation (VFF), Australia's largest state farmer organisation and only recognised consistent voice on issues affecting rural Victoria, welcomes the opportunity to comment on the National Penalties Framework.

Victoria is home to 25 per cent of the nation's farms. They attract neither government export subsidies nor tariff support. Despite farming on only three per cent of Australia's available agricultural land, Victorians produce 30 per cent of the nation's agricultural product. The VFF represents the interests of our State's dairy, livestock, grains, horticulture, flowers, chicken meat, pigs and egg producers.

### **Introduction**

The VFF is grateful for the opportunity to comment on Succession Law and particularly the family provisions as they relate to estate settlements.

Succession discussions and planning within the farm sector can often be a struggle to initiate and is often complicated due to the unique nature of farm family businesses and the (sometimes) considerable assets that are considered a part of the farm.

Most farms have large on-farm assets used in production and often there are 2 or 3 generations that operate the farm daily with the asset ownership remaining in the oldest generation. This can lead to significant difficulties between on-farm and off-farm siblings if there isn't a clear understanding and communication within the family.

The VFF and many other service providers have been trying to get more families to discuss succession planning as a healthy way to plan for the future, provide an 'exit strategy' for the older generation and encourage young producers onto the farm. While this is often done grudgingly, when it is completed the family is better for it.

All farm families are different, but it is not uncommon to for the 2<sup>nd</sup> generation to work on a farm for a long time and as a part of the succession and the land is transferred from the 1<sup>st</sup> generation over time. This is in recognition to the work done on the farm day to day. This may mean that non-farm siblings do not get access to the farm asset value, but this is a genuine succession plan and a conscious decision made by the asset holder.

However, it is extremely important that the succession plan and the construction of a Wills dealing with the farm assets are done in a way that is fully informed of the intricacies of estate law. Many farmers would be surprised to hear of the family provisions and the duty to look after those whom the deceased is responsible for.

As a matter of principle, Wills should be upheld as close to the intent of the deceased as possible. While the family provisions are still in place, steps should be taken to ensure people are aware of the Family provisions (especially the farm sector) and to reduce the potential for successful vexatious claims against a deceased.

### **Family provisions**

The VFF is concerned with the family provisions in general. It appears that it may encourage vexatious or 'stab-in-the-dark' claims that would, in most cases, be contrary to the deceased wishes and result in a waste of money on legal fees.

The Act changes in 1997 opened the family provisions significantly to individuals with more distant blood links with the deceased. As the paper explained:

*In Victoria until 1998, only the widow, widower and children of a deceased person could make a family provision application. However, limiting applicants in this way was too restrictive and was resulting in the exclusion of legitimate claims, so case-by-case court determination was substituted by the Wills Act 1997 (Vic).*

*Now anyone for whom the deceased person had responsibility to make provision is entitled to apply to the court within six months of the grant of probate or administration. Victoria's approach to eligibility to make a family provision application is described as 'criteria-based', because statutory criteria must be considered when determining whether the deceased person had a responsibility to the applicant, whether that responsibility was fulfilled and whether the applicant should receive a larger share of the estate.*

The criteria referred to above includes the following:

- any family or other relationship between the deceased person and the applicant, including the nature and length of the relationship
- obligations or responsibilities of the deceased person to the applicant, any other applicant and the beneficiaries of the estate
- the size and nature of the estate, and the charges to which the estate is subject
- the financial resources and needs of the applicant, of any other applicant and any beneficiary of the deceased person's estate
- any physical, mental or intellectual disability of the applicant or any beneficiary of the estate
- the age of the applicant
- any contribution of the applicant to building up the estate or to the welfare of the deceased person or the family of the deceased person
- any benefits previously given by the deceased person to any applicant or beneficiary
- whether the applicant was being maintained, wholly or partly, by the deceased person before their death and, if the court considers it relevant, the extent to which and the basis upon which the deceased person had assumed that responsibility
- the liability of any other person to maintain the applicant
- the character and conduct of the applicant or any other person
- any other matter the court considers relevant.

While the above criteria is intentional inclusive to make sure that Will that are out-of-date or if a Will has an omission that should be rectified it will allow for those cases. Unfortunately, this does open the potential for expensive court proceeds for individuals that did not get a mention in the Will and is not necessarily worthy (in the deceased's view) of a portion of the estate.

The VFF is of the view that the deceased wishes as expressed by the Will should be followed unless there is a clear omission or if the Will is out of date. The recommendations below are designed to ensure vexatious or frivolous claims are avoided and the family provisions are only used in cases of omissions without justifications.

### **Using a Needs Test for access to an Estate under the Family provisions**

The VFF is of the opinion that if an individual is a beneficiary of an estate due to a successful family provisions claim, there should be an accompanying needs test. The needs test will require claimants to prove they are unable to support themselves and there is a clear risk that without the estate's support they would become the responsibility of the Government.

In the discussion paper in sections 2.26 to 2.31 the 'needs test' was discussed. There is obviously a lack of clarity on using a needs test under family provisions. There is concern that even if there is a valid Will that intentionally excludes a person, whom already has significant personal wealth, they can still appeal through mediation and courts to gain access to a portion of the estate (Page 23).

*The Supreme Court of Victoria has emphasised that even if an adult child of the deceased person is independently wealthy, the deceased person may still have a responsibility to provide for them:*

*Because a child has been prudent in his or her financial decisions and thus accumulated a degree of wealth is no reason, where no other competing claim is made, to conclude that a moral obligation to provide for that child does not exist.*

Recommendation: Unless there is clear evidence that an omission in a Will was not intentional there should be a needs test under that family provisions.

### **Low Cost Mediation**

Under the current system, there is a 6 month window to contest a will. Traditionally, this would in the first case happen through mediation and if that does not resolve the issue completely then the next step would be to use the legal system.

Both of these options can be extremely expensive especially if it is conducted through lawyers. Victoria currently has a Small Business Commissioner that conducts mediation between small business and their

Recommendation: Victoria establishes a low cost mediation service for contesting Wills, similar to the Small Business Commissioner service.

### **Removing the Incentive to Challenge**

It appears that under the current system of requiring the provision for those you are responsible there becomes an incentive to challenge Wills. This incentive exists because costs incurred by the challenge (either mediation or court action) will be borne by the estate. It would be preferable to all those executors of Wills to limit the ability of individuals not named in the Will to challenge a Will under the family provisions. One approach to do this would be to have the cost of the challenge to be borne by the challenger regardless of outcome of the challenge. This will ensure that only challenges that are legitimate will be pursued and should reduce the number of 'stab-in-the-dark' challenges.

Recommendation: Costs associated with challenging of Wills should be that of the challengers regardless of success or failure of challenge.

### **Conclusions**

The family Provisions of Succession Law is mechanism to ensure there is away for legitimate claims against an Estate can be heard. Certainly, there are cases that families are forced to work through an out-of-date Will and try to determine what the deceased would want. However, we are concerned that the family provisions are used against the wishes of the deceased and may impact estate beneficiaries if there are arrangements associated with the past and future farm business activities.

It is clear that in all cases courts should be avoided. The end result of High Court action is family acrimony, expensive legal costs and a smaller estate to distribute in the end. Identifying ways to limit the cases against Wills under the family provisions would be helpful.

Thank you for the opportunity to comment and if you wish to discuss further please contact Darryl Harrison, Policy Manager [REDACTED]

Kind regards,

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**Peter Tuohey**  
President  
Victorian Farmers Federation

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