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Succession Laws – Family Provision

SUBMISSION

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Arnold Bloch Leibler thanks the Commissioner for the opportunity to provide the submissions below.

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

We act mainly for executors, whose obligation is to uphold the will, but also for beneficiaries. In our experience the factors affecting a decision to settle a family provision claim are:

1 the merits of the claim and level of uncertainty, including in relation to costs;

2 the size of the estate;

3 the size of the claim;

4 The significant legal costs inherent in defending any claim all the way to trial and the fact that even if the claim is successfully defended, there is very little prospect that the plaintiff will be ordered to pay the estate's costs;

5 family embarrassment and desire for confidentiality; and

6 family stress.

The weighting that these factors have varies significantly depending on the size of the estate. The starting point is the costs of resolving the claim. If the executors recognise a claim as being particularly strong, then settlement can often be achieved early before significant costs are incurred, sometimes even before a proceeding is commenced.

Examples of claims that settled before trial:

- Our client was the executor and child of the deceased. The deceased had a large estate and left the vast majority of the estate to the executor/child and a minimal amount to the deceased's remaining child. The executor willingly increased the provision to the sibling based on the perceived merits of the sibling's claim.

- Our client was the executor of his mother's estate. The will provided for our client's step-father, via a testamentary trust controlled by our client. Recognising the validity in the complaint by the step-father that his independence was now fettered by his step-child, they rearranged his provision so that he had financial independence, before proceedings were even commenced.

- Our client was the sole beneficiary of the estate of a deceased who had been a parent-type figure in our client's life since our client was a child. As an adult our client married and our client's spouse met the deceased on many occasions. Our client and the spouse divorced. After the divorce the ex-spouse continued to visit the deceased occasionally at the aged care facility where the deceased resided. When the deceased passed away, leaving the modest estate to our client, the ex-spouse threatened to make a family provision claim seeking half of the estate on the basis that the ex-spouse had continued to visit the deceased and whenever the ex-spouse visited, the deceased had promised to leave an amount in the will to the ex-spouse. An offer of a token amount was made to the ex-spouse, coupled with the foreshadowing of a summary judgment application if a proceeding was commenced. The offer was accepted.

- A long term employee of the deceased made a family provision claim on the basis that the employee had been in a secret relationship with the deceased for several years. At the mediation the employee's barrister boasted that, successful or not, the employee would never be required to pay the estate's costs and characterised the claim as 'a free kick [at the estate]'.

- A testator left her large estate to charity. Nieces of the deceased made a family provision claim. They had never been financially dependent on the aunt.

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?

Satisfactory.

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

In our view, the current law provides a significant opportunity to make opportunistic or non-genuine claims.

Victoria has the widest approach to eligibility of all the States and anyone can make a claim by alleging that they are a person for whom the deceased had a responsibility to provide. The lack of any eligibility criteria means that even the most tenuous relationship with the deceased can be alleged to support a responsibility on the deceased to provide for the plaintiff. Plaintiffs are bolstered by the knowledge that the worst outcome for most unsuccessful plaintiffs is that they bear their own costs but not the estate's costs, except in the rarest of cases.[1]

[1] We note the exceptional case of *Webb v Ryan (Costs)* [2012] VSC 431 in which the plaintiffs were ordered to pay the estate's costs. *Webb* will hopefully serve as a warning to plaintiffs with weak claims.

Where the alleged relationship is on the periphery of recognised responsibility to provide, it is only at the time of judgment that the parties know for certain whether the plaintiff was indeed a person for whom the deceased had a responsibility to provide. Some plaintiffs do exploit the uncertainty inherent in the broad approach because the costs ramifications for them are considered to be low, and their lawyers recognise that sensible executors, faced with litigation costs and the evidentiary difficulties inherent in the fact that the testator (who would be the best person to give evidence in defence of the claim) has passed away, will try to settle.

For example, in our experience a testator with no spouse or children is a particularly attractive target for a family provision claim by nieces, nephews, the adult children of longstanding family friends and neighbours. Those claims are often 'dressed up' with an assertion that the relationship with the deceased was unusually close and akin to a parent/child relationship.

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?***

No, section 97(7) does not deter opportunistic applicants because, as acknowledged in the VLRC Consultation Paper at [2.52], it is rarely or insufficiently applied. We perceive that plaintiffs do not see such an order as a real risk.

In our view, if s97(7) set out a presumption that unsuccessful plaintiffs will be ordered to pay the estate's costs, that would do far more to deter opportunistic plaintiffs that s97(7) in its current form.

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

Family provision claims are based heavily on witness testimony. There is no contract to read and the testator is no longer alive to give their side of the story. As a result, there is always a difference of views. Obtaining summary judgment in that context is very difficult. So far as we are aware, only Mukhtar AsJ to date has given summary judgment in a family provision claim.

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

Yes, ultimately, that impact falls unfairly on beneficiaries.

If a plaintiff is successful then they get their costs from the estate. That is fair.[2] What seems unfair is that even when a plaintiff's claim fails, they are not usually required to pay the estate's costs. As a result of the plaintiff's attempt to have a share of the estate, the size of the estate to be shared among its beneficiaries has been reduced. Why are existing beneficiaries, who the testator definitely intended to benefit by virtue of providing for them in the testator's will, seen as the more appropriate party to shoulder the costs of the plaintiff's failed litigation?

[2] That said, the practice of awarding costs on a solicitor and client basis, rather than a party and party basis, appears to have no real justification. There is no solicitor and client basis in the Supreme Court of Victoria's new scale of costs and it remains to be seen whether a successful plaintiff will be awarded costs on a standard basis or an indemnity basis.

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?***

Victoria's wide approach to eligibility, coupled with the lack of certainty in the size of any provision that the Court may award, has meant that, on occasion, we have acted to restructure a testator's assets to ensure that the majority of the testator's assets fall outside the reach of family provision legislation.

By way of an example, a testator with significant assets, several children and a new partner sought to ensure that, upon his death, the bulk of his assets would be divided between his children. We restructured his assets so that the majority of his assets fell outside the reach of family provision legislation. The new partner was also generously provided for. Even if notional estate provisions similar to those in NSW existed in Victoria, once the time periods set out in the legislation expired, the restructuring could not be challenged.

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

Yes, people should be entitled to deal with their assets as they choose during their lifetime, provided they do so lawfully . Apart from that, the reasons why they deal with their assets in a particular way is, and ought to remain, a matter for the them.

Notional estate provisions in New South Wales are very broad. A common scenario involves the family home held jointly between spouses. Half the house can be claimed as notional estate on the basis that the deceased failed to sever the joint tenancy before death. This is a scenario which we believe few couples would expect when succession planning.

In our view, overturning inter vivos transactions should be limited to transactions involving undue influence and duress.

FP9 & FP 10 ***Should the purpose of family provision legislation be to protect dependants and prevent them from becoming dependent on the State? Are there wider purposes or aims that family provision laws should seek to achieve?***

In our view, at the minimum, family provision legislation should ensure that testators provide for:

(a) people who were actually financially dependent upon them at the time of death; and

(b) spouses/defactos and children of the deceased, regardless of whether they were financially dependent on the testator, unless there are good reasons to the contrary.

Currently, plaintiffs are making family provision claims even though they were never financially dependent on the testator. Some of those cases have been successful,[3] and others unsuccessful.[4] It seems fair to say that the absence of

[3] *Scarlett v Scarlett* [2012] VSC 515 at [110], Unger v Sanchez [2009] VSC 541.
[4] *Jackson v Newns* [2011] VSC 32, *Webb* v Ryan [2012] VSC 377.

financial dependence on the testator gives rise to uncertainty as to the merits of the claim, and therefore, often makes the claim more difficult to settle.

Of considerable internal debate was whether, as a society, we have an expectation that a testator should provide for a person who, for no payment, has provided significant care and assistance to the testator. With an ageing population instances of such circumstances will only increase. Further, in the last few decades in particular, in times of financial stability in Australian society, there seems to be a greater focus on individual rights and a commensurate reduced focus on community responsibility, perhaps leading to a greater expectation of reward by people who assist others. As a society, do we expect a testator to make some provision for that carer? Society's answer may be yes, at the very least in circumstances where the carer has clearly given substantial care to the testator and is in financial need .

People who take a strict view of testamentary freedom may view the matter of whether to benefit a carer as solely a discretionary matter. On the one hand, the Courts are clear that family provision was not intended to be a way of obtaining compensation for assisting the testator during their life. In *Schmidt v Watkins* [2002] VSC 273 the Court held that even extraordinarily generous deeds over a long period of time would not give rise to a responsibility on the testator to provide for that person. Somewhat inconsistently, in *Unger v Sanchez* [2009] VSC 541 the Court held that the extraordinary assistance provided by a plaintiff to her neighbours gave rise to an obligation on the testator to provide for the plaintiff even though the plaintiff was well off financially. In doing so the Court characterised the relationship between the plaintiff and the deceased similar to that of an elderly parent and an adult daughter.

There is a concern that if acts of generosity could establish an obligation on a testator to provide for that person in the testator's will, it could encourage mercenary behaviour with the elderly and give rise to a fear in the elderly that if they accept assistance it will lead to a family provision claim on their estate.

We have acted in some family provision claims which were based on nothing more than the claimant having assisted the testator occasionally during their lifetime and visiting them in the aged care facility at the end of the testator's life. Any legislative change should make clear that the level of care provided to the testator must be significant, before it could establish a responsibility on the testator to provide for that person.

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

No. Under the National Committee's approach there would be four categories of eligibility. The fourth category is essentially the same as the current eligibility criterion in Victoria; it includes anyone to whom the deceased person owed a responsibility to provide maintenance, education or advancement in life. We do not see how the National Committee's proposed approach would reduce spurious claims or reduce costs.

FP12 & FP13 *Questions regarding the New South Wales categories*

We support the adoption of the New South Wales categories.

We do note that under the New South Wales categories, claims by grandchildren whose parents had predeceased them would not be possible unless the grandchild had, at some point, been wholly or partially dependant on the deceased grandparent. In Victoria there is a line of cases successfully awarding family provision to grandchildren from a grandparent's estate in circumstances where the grandchild's parent had predeceased the grandparent. [5] A minor amendment to the categories could be made if it was thought that grandchildren should be able to claim on their grandparent's estate, regardless of whether they had been dependant on the deceased grandparent.[6]

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?*

If 'responsibility' were retained but could only be found where the plaintiff was financially dependent, then 'responsibility' could be removed altogether as superfluous. However, we do not support the need to show dependence on the testator for immediate family members (including de factos and same-sex couples).

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

We do not believe a dependence requirement would encourage dependence on the deceased during their lifetime. We doubt r the average person in Victoria is sufficiently well informed of the eligibility requirements in our family provision law to change their behaviour to satisfy the provisions. Further, becoming dependent or increasing one's dependence on another person in the mere hope of later succeeding in a family provision claim would involve sacrificing one's own independence to some extent for an unknown length of time and for uncertain reward. We doubt whether many people would seek to become dependent on another person in order to one day be eligible to make a family provision claim.

We also note that, even if someone decided to intentionally become dependent on another to benefit from Victoria's family provision laws (which we think unlikely), it is still the deceased's choice as to whether or not to allow this person to depend on them. Responsibility to provide for a dependent after death arises from a choice made to provide for or support that person during one's life. As dishonourable as it may be to depend on another more out of greed than need (i.e. to be eligible to one day make a family provision claim), the law does not permit a person to allow or encourage dependence by another during life then ignore a dependent's needs after death.

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[5] *Petrucci v Fields* [2004] VSC 425; *Scarlett v Scarlett* [2012] VSC 515; *Day & Anor v Raudino & Anor* [2009] VSC 463 (in this case the grandparent relationship was considered in the context of an application for an extension of time).

[6] See for example, s 7(1)(d) of the *Family Provision Act 1972* (WA); s 7(3) of the *Family Provision Act 1969* (ACT); and s 7(3) of the *Family Provision Act 1970* (NT).

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

We do not believe there should be a requirement that plaintiffs show financial need. It appears to be a very difficult criterion to apply. Apart from destitute circumstances, 'financial need' tends to be a fluid concept. When does a person have sufficient funds such that they are not in need? If the Court were formulating an award, would the Court be required to award only an amount sufficient to alleviate the plaintiff's current financial 'needs' (as opposed to wants)?

We doubt that unmeritorious claims will be reduced by requiring plaintiffs to show financial need. In our experience, unmeritorious claims are often made by plaintiffs with significant financial needs. The issues in those cases is whether their significant financial needs are a matter which the testator was responsible for alleviating.

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

Yes.

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 follow 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.

We believe that a 'Loser pays, costs follow the event' is an appropriate starting point.

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

We have no experience in the County Court and therefore cannot comment.

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

As a general rule in litigation, we find that an early settlement negotiation between well-informed, well-advised parties gives the best prospects of a fair and early settlement. Unfortunately, our experience in family provision mediations is that one or more parties is ill- or under-informed or over-bullishly advised. It follows, that there are not many current measures in family provision proceedings which reduce costs.

Our experience in family provision mediations is that plaintiffs, even with very weak cases, expect to settle for at least their full legal costs to date and they threaten to persist with their claim to trial in the knowledge they will not, absent extraordinary circumstances, have to pay the estate's costs.

We have encountered plaintiffs who have commenced family provision claims with a view to getting to mediation as rapidly as possible, with the intention of settling at mediation. Some applicants view the process from initiating a claim up until the mediation as risk-free on the basis that the worst case scenario is that the applicant will walk away from the claim with their costs to date paid.

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

We put forward the following suggestions for consideration:

1 Procedurally - In our experience, a plaintiffs 'tests the water' by filing a brief affidavit in support of their claim and then, after the estate has investigated the claim and incurred the costs of preparing a defence, the plaintiff supplements their evidence in support of their claim by way of reply affidavits. The defendant then has to consider filing further evidence. Steps could be taken to limit that approach; in other words, to force the plaintiff to put on their full case by affidavit from the outset;

2 Proper basis for amount of claim - Plaintiffs regularly claim in their originating motion half the estate, regardless of the size of the estate and whether their claim is strong or weak. If plaintiffs were required to name a realistic figure in their originating motion, parties may achieve settlement earlier.

3 Early neutral evaluation - Family provision claims are usually fraught with family history and discord. Negotiating settlements at mediations in that context is particularly difficult. Plaintiffs and executors (and the beneficiaries who they represent, and who often attend the mediation) often have very different views about the likely size of any award of family provision, to say nothing of the merits of the claim. In that context, mediators, who generally will not provide a view on the merits of the plaintiff's claim, are of little assistance in tempering the views of the parties on the strength of their claim or defence.

We note the existence of early neutral evaluation in the Commercial Court. We believe some consideration should be given to a form of early neutral evaluation in the context of family provision claims; perhaps instead of mediation, or preceding mediation. An opinion on the merits by an experienced, respected member of the Court in the period leading up to mediation could be a great influence on the parties attempting to reach an early settlement.

4 Family provision judgments place little emphasis on when the will was drafted. That may be because a will is taken to have been written immediately before death. However, in our view the age of the will should be given more consideration by the Court. Where a will is recent, the Court should be cautious to alter the will as little as possible so as to impinge as little as possible on the testator's (recently expressed) testamentary freedom. For example, where the plaintiff claims to be a carer, and the testator's will was recently drawn, that fact should tell against further provision, as the testator can be taken to have considered the merits of leaving a bequest to the carer in the testator's will.

5 Clients express concerns to us that they can do little to prevent a family provision claim being made after their death and that their testamentary freedom seems to have little weight in family provision claims. Clients may write a letter to accompany their will but there is uncertainty as to whether it would be more appropriate for the testator to sign a statutory declaration. Perhaps some other document altogether would be more appropriate. For example, should a

document be prepared setting out the reasoning behind the will and certifying that the lawyer has explained the testator's obligations under family provision legislation family provision. Perhaps such a document could be given some legislative recognition.

6 New South Wales provides for a Court approved release during the testator's life of a person's right to claim family provision and that could be considered for Victoria.[7]

[7] See s95 of the *Succession Act 2005* (NSW).