Victorian Law Reform Commission Succession Laws Consultation Papers

Background

The Legal Services Commissioner (LSC) has an obligation under the *Legal Profession Act* 2004 (the Act) to ensure complaints against Australian legal practitioners are dealt with in a timely and effective manner, to educate the legal profession about issues of concern to the profession and consumers of legal services and to educate the community about legal issues and the rights and obligations that flow from the client-practitioner relationship.

As noted in our previous submission, in the 20010-2011 and 2011-2012 financial years Probate and Estate matters represented 10 per cent of the complaints received by the LSC. As this represents a high number of complaints the LSC held a Round Table[1] conference on succession law in June 2010 to identify some of the areas of concern. One of the concerns that was identified in the Round Table was that succession law can generate high emotions as it involves dealing with grieving families and often internal family conflicts which can lead to problems during the estate settlement process.

This LSC response to the consultation papers draws on the experiences of staff working on matters relating to wills and probate. Much of what is set out in the consultation papers accords with the previous LSC submission. For this reason this response to the consultation papers is limited to observations and remarks that extend and clarify the position put forward in the previous submission.

Testamentary capacity

In the previous submission it was suggested that legal practitioners should be required to document testator intent and capacity when taking instructions from elderly clients or where there is evidence that capacity may be diminished. The common law[2] establishes that where there are circumstances which give rise to suspicion about the testator/testatrix's testamentary capacity this places a burden of affirmatively proving the requisite capacity to make a will upon the propounder of the will. It would therefore be prudent for a legal practitioner to document intent and capacity in line with the standard of proof, as set out in *Banks v Goodfellow* (1870) LR 5 QB; *Bailey v Bailey* (1924) 34 CLR 558; *Timbury v Coffee* (1941) 66 CLR 277; *Nicholson v Knaggs* [2009] VSC 64; *The matter of Dimitra Giofches* [2011] VSC 533.

Questions

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?

There should be special witnessing provisions wherever there is evidence of vulnerability or diminished capacity. Obviously, age and other factors are relevant to the question of capacity, intent and the potential for undue influence and coercion. Where there is any evidence of diminished capacity, vulnerability or undue influence, legal practitioners should take appropriate steps in line with common law and statutory requirements.

W4 Would introducing a professional requirement that solicitors obtain a medical capacity assessment for their clients prior to drafting a will for them to 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)?

[1] Succession Laws Summary – Summary from the Probate and Estate Round Table available at http://www.lsc.vic.gov.au/cms.php?user=legalservicesvic;doc=Home;page=;pageID=188

[2] *Banks v Goodfellow* (1870) LR 5 QB 549; *In the matter of Dimitra Giofches* [2011] VSC 553.

A requirement for medical capacity assessment would be useful wherever there is evidence of diminished capacity or vulnerability. Age is obviously a relevant consideration, but it may be more appropriate to view this as a consideration in determining whether a medical assessment is needed, rather than a determinative factor in itself. A person's particular circumstances must be considered to determine if that person possesses sufficient legal capacity. Where there is evidence to suggest a lack of capacity, the practitioner should take adequate steps to address this evidence. It is noted that requirements based on a factor such as age not only reverse the assumption of capacity, which may constitute discrimination, but may also create practical difficulties relating to cost and availability in obtaining assessors with sufficient expertise.

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?

A person acting under an enduring power of attorney should be able to access a person's will in the same way as an administrator. Access should depend upon proof of the will-maker's lack of capacity.

Undue Influence and Conflict

The Professional Conduct and Practice Rules 2005 establish a range of obligations and requirements relating to potential conflicts of interest or duty. Rules 8, 9 and 10 set out restrictions relating to acting for other parties, where the practitioner's own interest is involved or they receive benefit under the will. As with testamentary capacity, the common law provides some guidance with respect to conflicts. In *Szmulewicz v Recht* [2010] VSC 447 the Court held that regardless of a practitioner's good intention or good faith, they must not allow their personal interest to conflict with their duty of loyalty to the client. The Court found that the only way that breach could be neutralised is where it can be shown that the fiduciary had obtained the fully informed consent of the person to whom the fiduciary duty is owed. Similarly, in *Petrovski v Nasev; The Estate of Janakievska* [2011] NSWSC 1275 and *Dickman v Holley; Estate of Simpson* [2013] NSWSC 18 the Court held that the essence of the legal practitioner's fiduciary obligations to the client is "the unfettered service of the client's interests", as distinct from the interests of any other party to the transaction, potential beneficiaries or previous clients.

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?

It is arguable that there are existing requirements under the common law (as set out above).

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 the guidelines contain?

If the common law requirements are captured in legislation then guidelines may not be required. However, if such changes are not made, guidelines may help bridge the gap between existing legislative and common law requirements. The guidelines would therefore set out existing common law requirements. The New South Wales Law Society's *Client Capacity Guidelines* and *When a client's capacity is in doubt: A Practical Guide for Solicitors* provide useful models.

Receiving a Benefit under a Will
Executors

Section 65 of the *Administration and Probate Act 1958* represents a departure from the common law position that a person in the position of a fiduciary is not entitled to benefit personally from that position, providing that the court may allow an executor to charge commission not exceeding 5% of the value of the estate.

While Rule 10 effectively requires informed consent to be obtained from the will maker, much recent case law[3] in relation to executor's commission concerns communication with, and treatment of, beneficiaries. The key principle in these cases is that the courts will refuse to enforce agreements for executor's commission where there is any suggestion of unfairness or undue pressure. In particular, a number of conditions must be met before informed consent will be provided, including informing the beneficiaries of:

- the work done to justify the commission (detailed account)
- legal fees and disbursements (detailed invoicing, separate from commission)
- their entitlement to have the Court assess the commission pursuant to s 65
- the desirability that they seek independent legal advice.

Beneficiaries should not be given the impression that any substantial distribution of the estate is contingent upon beneficiaries agreeing to commission at the rate claimed, nor should the practitioner/executor imply that any application to the Court will cost the estate extra funds.

The Legal Services Commissioner believes that any reform of the law relating to executors should enshrine consumer protection principles, underlining the fiduciary duty owed by the executor and the need for fairness and transparency in charging. While any reform related to professional responsibilities should be included in the legal profession regulatory framework, consideration needs to be given to consistency with the draft National Legal Profession Legislation developed as part of the National Legal Profession Reform process (as set out at http://www.ag.gov.au/Consultations/Pages/NationalLegalProfessionalReform.aspx).

[3] Walker & ors v D'Alessandro [2010] VSC 15, Re Estate of Zsuzanna Gray [2010] VSC 173, Legal *Services Commissioner v Hession* (Legal Practice) [2010] VCAT 1328 (11 August 2010).