FAMILY PROVISION

– A YEAR IN REVIEW

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Family Provision - A Year in Review:

Justice Legislation Amendment (Succession and Surrogacy) Bill 2014

and

Recent Cases

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At the time of writing the *Justice Legislation Amendment (Succession and Surrogacy) Bill 2014* is before the Victorian Parliament. The second reading speech was moved on 20 August 2014 in the Legislative Council. As I understand it, the terms of the Bill are the subject of negotiation between the two major parties, with a possibility that something will pass both houses in the next week or two.

1. Key Matters Addressed in the Bill:

The draft legislation has new provisions dealing with:

- **"Statutory wills",** that is wills authorised by the court on behalf of the persons who do not have testamentary capacity.
- **Insolvent estates,** and the application of assets in solvent estates towards estate liabilities (in substitution for the existing Second Schedule of the *Administration and Probate Act*).
- **Small estates,** increasing the threshold for assistance to be provided in obtaining a grant to $100,000 to be indexed to CPI, and allowing to the transmission of assets valued at less than $25,000 without a grant.
- **Surrogacy arrangements,** and the registration of children with Births Deaths and Marriages.
- **Testator Family Maintenance (Part IV) Claims.**

The aspects of the legislation that I focus on in this paper are the amendments of the existing Family Provision laws contained in the *Administration and Probate Act*.

At the conclusion of this paper I make a somewhat gratuitous and perhaps belated suggestion for how some of the unintended hardships which will arise from the draft legislation could be ameliorated without any watering down the objective of removing the perceived scourge of "nuisance claims" from this area of the law.

2. Agreements to release rights

Significantly, people will be able to contract out of the right to bring a family provision claim. The Bill provides for the insertion of a new section 99B enabling parties to enter into an agreement releasing their rights to apply for family provision when a person dies. This is similar to the position in NSW under section 95 of the *Succession Act 2006*, although the Victorian Bill omits the requirement for Court approval of the agreement.

According to the Bill the agreement must be with the person against whose estate the claim can be brought, must be in writing and the person releasing their rights must have taken independent legal advice in relation to the agreement. These provisions appear to be a sensible augmentation of "binding financial agreements" under the *Family Law Act* and may be particularly popular in cases of second or subsequent relationships later in life, and according to the Second Reading Speech are expected to be of particular relevance to succession planning in relation to farming properties.

There is no prescribed form for the agreements, and practitioners may look to Binding Financial Agreements made under the *Family Law Act* for some useful drafting tips.

3. Changes to the legislation dealing with eligibility to bring Family Provision claims

3.1 Objective

The *Succession Laws Report* of the Victorian Law Reform Commission handed down in late 2013 refers to cases that are opportunistic, or non-genuine claims, which although they lack merit, are settled by estates for “go away money” in order to avoid the depletion of the estate through legal costs[1].

[1] Victorian Law Reform Commission: *Succession Laws Report* Victorian Law Reform Commission tabled in the Victorian Parliament on 15 October 2013, paragraphs 6.08 - 6.17

Clearly a key objective of the Bill is to prevent these dubious claims, and avoid the costs associated with them. The second reading speech, dated 20 August 2014, says:

> *… However, the fact that there is no restriction on who can make a claim, together with the broad nature of the test to be applied, has lead to a wide range of claims, putting pressure on executors, administrators and other* [sic] *beneficiaries to settle even dubious claims to prevent the estate being consumed by legal costs…*
> *… the Bill seeks to deter unmeritorious family provision claims by repealing the current family provisions costs provisions…"*

3.2 Adequate Provision / Proper Maintenance

The legislation retains the concept that the potential for judicial intervention is enlivened where a will (or the intestacy provisions) do not make adequate provision for the proper maintenance and support of the plaintiff (existing s.91(1) and (3), new s.91(1)).

3.3 Moral Duty

The legislation now explicitly adopts the concept of "moral duty" which has often been referred to in judgements dealing with the existence and scope of the responsibility of a testator under the existing legislation. "Moral duty" is relevant both to determining whether the court ought to make an order for family provision (proposed s.91(2)(c)), and to determining the amount of provision to be made (proposed s.91(4)(a)). Moral duty is not defined under the Act, and given the apparent express adoption of a term with a long pedigree in the case law, existing decided cases should be instructive as to its meaning. By making explicit the requirement for a finding of a moral duty, in addition to a finding that the criteria for eligibility to bring a claim are met, it is clear that mere eligibility in and of itself is not sufficient to see a claim succeed. This appears to be an affirmation of the existing position.

So what is a "moral duty" in this context?

In Collicoat v McMillan [1999] 3 VR 803 Ormiston JA said at [45] that:

> *"the expression 'moral duty' remains a simple and convenient way of referring to the obligation, hypothetical as it may be in some cases, resting upon a testator to make a wise and just assessment of the interests of all persons*

who might fairly ask to be taken into account in determining what adequate provision for proper maintenance and support should have been made for them."

Recently in Baxter v Baxter [2014] VSC 377McMillan J said at [57]:

> **"***A moral claim involves a broad evaluative judgment, made with respect to a capable testator's judgment as to who should benefit from the estate. A balance must be struck between, on the one hand, the freedom our society accords to a person to do as he or she pleases with his or her own property, and on the other hand, the moral requirement that a testator consider those persons closest to him or her as being the first in the line of recipients of the estate. The Court should only interfere with the terms of a will if the testator has failed in his or her moral duty."*

Given the prevalence of the use of the concept of moral duty in the existing cases I don't anticipate that importing of the term into the legislation will have any impact on the determination of cases.

3.4 Eligible Persons

In a substantial departure from the existing law, under the new statutory regime claims can only be bought by "eligible persons". Unless a would-be claimant is shown to come within one of the definitions of eligible person, the court has no power to make provision for them from a deceased estate.

This contrasts with the current position where claims may be bought by persons for whom, having regard to the matters under the existing section 91, the deceased had a (moral) responsibility to make provision.

When the present law, which moved away from defined categories of claimant, was introduced in1997, the second reading speech included:

> *These* [i.e. the then existing] *provisions are quite restrictive, excluding the ability of other persons who may have a moral claim on the deceased's estate from making a claim. The need for amendments to the act to enable a wider category of persons to make testator's family maintenance applications has been recognised for a while …*
>
> *This bill introduces amendments to the act to enable a wider group of people to apply to the court for testator's family maintenance. The bill empowers the court to make an order for provision out of the estate of a deceased person for the maintenance and support of a person for whom the deceased had responsibility to make provision. The bill does not include a list of eligible applicants for testator's family maintenance, instead leaving it to the court to determine on a case-by-case basis whether provision should be made for a particular applicant, which is a more equitable method of dealing with*

testator's family maintenance applications. To ensure that only genuine applications are made, the bill allows the court to order costs against an applicant if the court is satisfied that the application was made frivolously, vexatiously or with no reasonable prospect of success.

In *State Trustees Ltd v Bedford [2012] VSCA 274*,-Neave JA (Tate JA and Davies AJA agreeing) stated @ [130]:

> *"Family relationships have become increasingly diverse. Changes in the law have resulted in ties based on affection, rather than formal legal status, receiving greater recognition for a variety of legal purposes. Part IV itself recognises that a person may have a moral duty to provide for the maintenance and support of another person, even in the absence of a de jure marriage or a de facto relationship, or a parent/child relationship."*

Where the existing law is flexible and facilitates the accommodation of a potentially infinite variety of situations giving rise to a relevant "moral responsibility", the proposed law reverts to an approach of adopting strict criteria for eligibility.

3.5 Who are Eligible Persons?

3.5.1 Spouses/ Domestic Partners

Under the proposed new laws, an eligible person includes the spouse or domestic partner of the deceased at the deceased's date of death, or a former spouse or domestic partner who "would have been able to take proceedings under the *Family Law Act*… and has either not taken those proceedings or commenced but not finalised those proceedings, and is now prevented from taking or finalising those proceedings because of the death of the deceased." (see proposed s 90 definition of eligible person (a) (e)).

The *Family Law Act* specifically allows proceedings under the Act to be maintained by and against the legal personal representative of a deceased litigant, and so it would only be in rare circumstances that a party was prohibited from finalising proceedings due to the death of a party (see e.g. s. 79(8) and s.90SM(8). Of greater relevance will be the question of when proceedings cannot be commenced due to the death of the deceased.

Under s 44 of the *Family Law Act* property and maintenance proceedings can be commenced as of right within 1 year of a divorce, or within two years of the end of a de facto relationship, or any time later if the Court grants leave (which requires a consideration of hardship or whether the applicant was unable to support themselves without recourse to an income tested pension at the expiry of the applicable period).

S.44 allows that proceedings can be commenced to revive, vary or set aside an order for maintenance, and under s 79A (and s 90SN) a final property order can be varied or set aside at any time where the circumstances justify it having regard to the considerations noted in the section. As such, in cases of prospective Part IV claims by former spouses care will need to go into consideration of whether they would have been able to bring a claim under the FLA but cannot due to the death of the deceased.

Where people are not married proceedings for property and maintenance can be brought where the de facto relationship lasted for a period, or periods cumulatively of over two years, or there is a child of the relationship or where the applicant made a substantial contribution and the failure to make an order would result in "serious injustice", or where the relationship was a registered relationship. Practitioners should note the potential existence of geographical issues where a de facto relationship was not largely conducted in Australia (s 90SD and s 90SK).

Under the existing law where there has been a final order made under the *Family Law Act*, Part IV claims may be brought by former spouses in the special circumstances of the case, for example where there was ongoing maintenance being paid by the deceased at the date of death, or where there had been a resumption of cohabitation between the parties since the final orders were made, or where the final orders have been tainted by fraud or non-disclosure[2]. In practical terms there may be few if any circumstances where the proposed provisions command a different outcome with respect to former spouses and former domestic partners

[2] See Draskovic v Bogicevic[2007] VSC 36, Armstrong & Ors V Sloan & Anor [2002] Vsc 229.

One potential for different outcomes may be where subsequent to the making of the final orders in the Family Court the plaintiff supported the children of the deceased without financial support from the deceased. In certain circumstances this may not give rise to a right to bring a claim under the FLA, and as such under the proposed law the claim may not be available, whereas under the existing Part IV law such a claim may succeed. (see Galvin v Semkiw and Anor [2013] VSC 142 [32]).

Another circumstance which may justify a family provision order where there have been final property orders under the *Family Law Act* is where there is ongoing maintenance or child support being paid by the deceased to the plaintiff at the date of the deceased's death.

3.5.2 Certain Children

Under the terms of the Bill various individuals are treated in a like manner:

children,

stepchildren and

persons *"who, for a substantial period during the life of the deceased, believed that the deceased was a parent of the person and who was treated by the deceased as a natural child of the deceased*"

are all treated as equivalent in the legislation[3].

Unless expressly indicated to the contrary in discussing the new draft provisions I will simply refer to all three groups as "children", as the legislation does not appear to make any material distinction between them.

Children will be eligible to bring claims for Family Provision where they are:

- under the age of 18
- full-time students under the age of 25

[3] See proposed s 90 definition of eligible person, subparagraphs (b) (c) (d), (f) and (g). This unusual category of persons treated as the children of a testator but who were in fact not his or her children seem to be modelled on the facts in Borebor v Keane [2013] VSC 35, and can be expected to have very limited application.

- a child with a disability[4].

Notably most adult children will not fall within the criteria of those who are eligible to bring proceedings by virtue of their relationship to the deceased alone.

3.5.3 Persons who were dependent upon the deceased

Persons who were dependent upon the deceased for their proper maintenance and support at the date of death (see proposed s.91(2) (b)), and:

i. are a child, step child or person believing themselves to be a child, of the deceased (not otherwise covered by the preceding category)

ii. "*registered caring partner of the deceased*"- (See the *Relationships Act 2008* s 5 - essentially where two people are not a couple but where at least one provides personal or financial commitment and support of a domestic nature for the material benefit of the other, and where the relationship is registered under the Act).

iii. a grandchild of the deceased

iv. a spouse of a child of the deceased, if that child died within 12 months of the testator.

v. A member of the deceased's household being: *"a person who, at the time of the deceased's death, is (or had been in the past and would have been likely in the near future, had the deceased not died, to again become) a member of the household of which the deceased was also a member".*

3.5.4 Eligibility: Summary

There are three categories of eligible applicant:

[4] The definition of disability under the Bill has apparently been adapted from the Commonwealth *National Disability Insurance Scheme Act 2013*. The use of "child" in (d)(iii), being a person who believed the deceased to be their parent etc. and who is disabled, is interesting in that the person contemplated by the section appears to be neither a child by relation to the deceased (in contrast to those coming within (c) (ii)) nor a child in the sense of being under 18, or (d)(i) would make (d) (ii) otiose.

* spouses,
* some but not all children, and
* some but not all dependants.

It is noteworthy that for at least 100 years adult children have been able to bring claims where, even though there may not have been a relationshipdependency, there were at least "special circumstances" – this is to be removed under the proposed law.

Further the issue of dependency of the plaintiff on the deceased only flows one way under the Bill, and assistance and support provided by the plaintiff to the deceased is not a sufficient basis for a plaintiff being considered eligible to bring a claim.

3.6 Extent of Provision

In all cases the court is directed to make provision that is "not greater than necessary" for the eligible persons proper maintenance and support: s 91(5)(a).

Where eligibility is based on the plaintiff being dependent upon the deceased, then in accordance with the proposed s 91(4)(c) a court is required to have regard to the degree of that dependence in determining *the amount of provision* to be made, and further any order *must be proportionate to the eligible persons degree of dependency* on the deceased at the date of death (per s 91(5)(b)).

3.7 Costs

The existing provision for costs is found in s 97 of the *Administration and Probate Act 1997*, which relevantly provides:

> *"(6) Subject to subsection (7), the Court may make any order as to the costs of an application under section 91 that is, in the Court's opinion, just.*
>
> *(7) If the Court is satisfied that an application for an order under section 91 has been made frivolously, vexatiously or with no reasonable prospect of success, the Court may order the costs of the application to be made against the applicant."*

These provisions will be repealed. According to the Second Reading speech this provision has been applied by the court with the effect that:

> "*parties do not usually bear the risk of paying costs in the event that they are unsuccessful, removing a disincentive to bringing weak or opportunistic claims while forcing some families to settle those claims to avoid having legal costs taken out of the estate. The Bill repeals this cost rule as a signal that there is no need for particular leniency towards successful* [sic] *claims in family provision matters, and the usual cost rules should apply".*

Whether that statement is a correct statement of the state of the law is moot, but having regard recent cases where unsuccessful plaintiffs have paid costs, the second reading speech may reflect perception more than recent practice (see e.g. Webb v Ryan (No2) (2012) VSC 131).

3.8 The VLRC *Succession Law Report*, August 3013

In a number of respects the Bill reflects the recommendations of the VLRC report into succession law tabled in Parliament on 15 October 2013.

That report recommended the adoption of legislation based on the NSW model of allowing:

1) that spouses, domestic partners, and children would always be eligible to bring a claim, and

2) that former spouses, people who had been dependant on the deceased, grandchildren, and members of the deceased's household and people in a ***"registrable caring relationship"*** and stepchildren only be eligible if having regard to all the circumstances of the case there were factors which warranted the making of an application. In considering that question the Court was to have regard to the existing s 91(4) factors[5].

However the Bill departs from the recommendations of the Report in elevating stepchildren to the category of those who may bring a claim as of right (at least

[5] See recommendations 38-40, p.114 of the Report.

where they are under 18, disabled, or under 25 and a full time student), and demotes non-disabled adult natural children from being presumptively eligible, to being persons who must show dependency to bring a claim.

The Bill imposes a need for dependency on most adult child claimants, where the VLRC report did not.

By including people in a "registrable caring relationship" (whether or not there had been actual registration) the potential for meritorious claims by some carers appears to have been recognised in the VLRC Recommendations.

Under the *Relationships Act 2008*[6] a "registrable caring relationship" means 'a relationship (other than a registered relationship) between two adult persons who are not a couple or married to each other and who may or may not otherwise be related by family **where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other, whether or not they are living under the same roof**, but does not include a relationship in which a person provides domestic support and personal care to the other person—

(a) for fee or reward; or

(b) on behalf of another person or an organisation (including a government agency, a body corporate or a charitable or benevolent organisation);'

Notably the Bill excludes the possibility of claims by carers (who don't otherwise fit within a category of eligibility) unless they are "registered caring partners". The requirement for actual registration under the Bill, as opposed to the relationship being registrable per the VLRC report is very significant, as the former will be a very small and easily ascertainable class, whereas the latter potentially describes many of the relationships, which while varying in degree and kind, are currently recognised as founding legitimate Part Iv claims by carers.

[6] Section 5

4. Discussion: A Categories Approach to Eligibility

It seems that the primary impact of the legislation as drafted would be in two categories of claim.

4.1 Carers

Firstly, the legislation appears to rule out claims by non-immediate relatives (excluding, for example, parents, nieces and siblings), friends and other carers, irrespective of the nature of the relationship between the deceased and them, and irrespective of any sacrifice made in caring for the deceased by them or the benefit the deceased may have received from their devotion, *unless* those relatives, friends and carers are:

1) members of the deceased's household (or had been in the past, and will likely to become so again in the near future), and
2) were at least partially dependent on the deceased

(unless they are "registered caring partners" of the deceased).

Many practitioners who practice regularly in this area would have come across marginal claims brought by people who *claim* to have provided assistance to the deceased in the final years of their life giving rise to an entitlement to provision. Anecdotally it seems that a number of these sorts of claims are settled for "nuisance money" to protect the estate from the cost of litigation, and notwithstanding that the claims appear to lack merit.

The Bill's Second Reading Speech observes:

> *"However, the fact that there is no restriction on who can make a claim, together with the broad nature of the test to be applied, has lead to a wide range of claims, putting pressure on executors, administrators and other* (sic) *beneficiaries to settle even dubious claims in order to prevent the estate being consumed by legal costs."*

To this extent the amendments may appear to be a positive development. The problem may be that in limiting the possibility of "dubious claims" the legislation necessarily excludes other people, who would be found under the existing law, and

by reference to general community standards, to be people to whom the deceased had moral obligation to make provision.

The universe of modern relationships seems to give rise to every permutation and combination of possible relationship. Within that universe there are cases of people who, whilst maintaining their own separate residence, sacrifice their lives for many years in the care of persons and who, whilst not children of the deceased, treat the deceased as an exemplary dutiful and caring child might, providing them with all the society, companionship love, support (practical and financial) and care that might otherwise be expected of an attentive child.

Such people may be nieces or nephews, they might be daughters-in-law (even of a separated son who does not extend love and care to his parents), or they may simply be unrelated persons who enter into a relationship with the deceased of mutual care and devotion which does not develop into a sexual or domestic relationship. Experience supports the conclusion that these relationships are often accompanied by informal reassurances or promises by the deceased to "make sure they are looked after".

Sometimes that stated intention might not be fulfilled due to neglect by the testator in updating their will. Sometimes the testator may deliberately lead the carer along. Sometimes the testator may lose testamentary capacity before amending their will in accordance with the genuine wishes to benefit the carer. Sometimes a testator may simply show an egregious lack of judgment concerning their duty to those who care for them.

All these circumstances do arise in practice, and under the proposed law, irrespective of whether the court finds that the testator owed the claimant a "moral duty" to provide for them, they will be prevented from bringing a successful claim against the estate under the family provision legislation.

Under the VLRC recommendations, such claims would have been, I appropriate circumstances, sustainable under the category of "registrable caring relationship". Under the terms of the draft Bill they appear to be left out in the cold.

4.2 Adult Children's Claims

The elimination of carer's claims may not, however, be the most significant impact of this legislation. The change in the treatment of adult children from a position of being able to sustain a claim where they can demonstrate that the deceased owed them a moral duty having regard to all the circumstances of the case, to a situation where they can only sustain a claim where they are under age, disabled, or wholly or partially dependent upon the deceased, represents a radical departure from long established law in this area.

Historically adult children, and in particularly male adult children were able to bring claims against the estate where they could demonstrate "special circumstances" justifying such provision. Actual dependence was only one matter which could satisfy the special circumstances test. The requirement to demonstrate "special circumstances" no longer forms part of the law of adult child family provision claims under the current Victorian legislative regime (see e.g. *Blair v Blair [2004] VSCA 149 at [19] – [22]*).

Although under the current law adult children do not need to show any particular "special circumstances" nevertheless as recent cases (some of which are discussed below) demonstrate, under the existing law adult children do not have an automatic right of entitlement in the estates of their parents. All the circumstances, including thier character and behaviour (particularly their behavior towards a parent) are taken into account, and can sometimes lead to the complete disentitlement of an adult child.

4.3. Summary

The existing law in relation to adult children is flexible and adaptive. Adult children can succeed where in all the circumstances they have been (having regard to societal concepts of moral duty) neglected by their parents, particularly where that neglect was not attributable to the children's behaviour towards the parent. It is not clear why the Parliament has determined that this approach to adult children's claims requires amendment.

Carers who are not close family members can succeed under the existing law, but only in very exceptional circumstances where their conduct towards and relationship with the deceased has elevated the strength of their claim to a position viewed as akin (apt word) to that of a surviving spouse or child.

In seeking to categorically define the meets and bounds of eligibility to bring claims by reference to particular closed categories of relationship the legislation necessarily excludes meritorious cases in which the plaintiff can otherwise demonstrate that having regard to all the circumstances of the case the deceased owed them a moral obligation to provide for them.

It seems to me that the best way of illustrating how the proposed changes to the law may operate is to consider some of the reported cases decided in recent times. In some of these cases the outcome would be the same, dispelling suggestions that the existing law operates inadequately in allowing unmeritorious claims to succeed. In other cases the outcome would probably be different.

The question is, do these likely differences in outcome reflect an improvement in the way the law deals with the duty of deceased persons to distribute their estate having regard to the obligations they owe the people around them?

I trust that this approach will not only be illustrative of the potential changes operation of the law, but will also provide a case update in the area of testator family maintenance claims.

6 Recent cases, through the lens of the proposed new l law

6.1 Adult Children's Claims

Valentini & Ors v Valentini [2014] VSC 91 (26 March 2014) (Vickery J)

The distributable estate after costs and other estate expenses were allowed for, was about $650,000. The deceased in his will left his entire estate to his youngest child by his second marriage. The plaintiffs were three adult children, each with financial

needs of different kinds. In contrast to the approach of the courts in Brandon v Hanley and Hansen v Hennessey discussed below the judge did not embark on a detailed analysis of the evidence concerning the causes of the poor relationship between the deceased and his adult children. He concluded that the deceased was a violent man prone to cruelty which gave rise to deep seated trauma which had affected all his children:

> *44. "[Pamela] also deposes to living with Dana at the time of an assault upon her by the Deceased and witnessing marks on Dana's neck and jaw and her emotional state after arriving home from reporting the assault to police.*
>
> *45. Dana also described a later event in 2003 when she was subjected to a physical assault coupled with a threat by the Deceased to kill her, while she was heavily pregnant. This was followed by the Deceased pursuing Dana on a motorcycle with a shot gun strapped to his back.*
>
> *46. Elio gave evidence of physical cruelty directed by the Deceased to his children, for example by cutting their finger nails so close to the quick that he drew blood.*
>
> *47. Evidence was also given about an incident when Carlo broke his leg while on the farm as a child. Elio described the incident as follows:*
>
> > *When Carlo broke his leg our dad smacked us in the ambulance the whole 50 kilometres to Bendigo because it inconvenienced him making sausages."*

He noted that while all the plaintiffs had been estranged from the deceased, the deceased had failed in his parental duty towards them. This mitigated the significance of their neglect of him. After considering the circumstances of each child, the court determined that they should receive 25% of the estate each.

As none of these children were dependent upon the deceased at his date of death, all these claims would have failed under the proposed law.

Salloum v Assouni [2013] VSC 591 (01 November 2013) (McMillan J)

The substantial asset of the estate, a house valued at $695,000, was left in the deceased's will to two of the deceased's adult children who had lived with the deceased up to his death. The deceased had 10 children, nine of whom survived him. The plaintiff was one of those. Like most of her siblings she had little education. She and her husband lived in premises rented from their son. Her husband was on a

disability pension. She was on a carer's pension. Somewhat incidentally for present purposes she alleged that she had been raped by her father, (an allegation which the court found was not made out on the balance of probabilities). The court awarded the plaintiff a legacy of $45,000.

It would seem that under the proposed law, as the daughter was not dependent upon her father at his date of death and was not herself disabled (although her husband may have been), she would not fit with in any of the categories of eligible claimants and her claim would have failed.

A child of the deceased who is not disabled but whose capacity to work and support themselves is compromised by an obligation to care for a disabled spouse or child is not brought within the delineation for eligibility (absent dependency) under the Bill.

IMO the Estate of John Demetriou [2013] VSC (13 December 2013) (Zammit AsJ)

The estate was valued at approximately $4 million. The will included specific legacies of $245,000, left benefits of an approximate value of $1.9 million to the deceased's son, and benefits to the deceased three grandchildren (being the children of the testator's predeceased daughter) valued at $520,000. The approximate value of the benefit under the will to the surviving daughter, being the plaintiff, was approximately $520,000.

The grandchildren of the deceased (being the children of the predeceased daughter) had settled a claim for $695,000. The court was left to deal with the claim of the plaintiff. Her circumstances were poor. She worked as a cleaner, and was close to retirement. Her husband had retired and was on a part pension. Whilst they owned their own home, they had little by way of savings to support them in their retirement. The defendant son, who inherited the greater portion of the estate, did not put forward any competing financial or other needs. The court found that the provision made by the will was not adequate, and ordered an additional sum of $350,000 to be paid to the daughter from the son's entitlement.

It seems under the proposed law the daughter's claim would fail as the plaintiff daughter was not dependent upon the deceased at his date of death.

Hansen v Hennessey [2014] VSC 20(10 February 2014) (Lansdowne AsJ)

The estate was valued at approximately $200,000. The will made some *de minimus* bequests to three of the five children of the deceased. It left $40,000 to one child, and the residue to one daughter (the executor). An earlier will made in 1995 had divided the estate evenly between the children. In approximately 2009, two of the children had ceased contact with the testator. They said this was to protect themselves from emotional abuse from her. The trial judge did not accept that the testator had caused the alienation. It seems that the relationship between the testator and her children was influenced by those children's poor relationship with their sister (the executor/daughter) and the fact that the testator was apparently providing her with financial assistance.

The three adult children plaintiffs sought $25,000 provision. Two of the three claims failed with the court holding that they had in effect repudiated their relationship with the deceased. In one case the court found that the adult child had not repudiated his relationship with the deceased, nor was he responsible for the estrangement between them. His claim succeeded to the extent of $19,000. There is an interesting consideration of the executor intermingling estate funds with her own. The court applied a notional interest rate of 4.5% to the estate assets which had been intermingled by the executive in determining the estate available for distribution at trial.

Under the proposed law the two failed claims would still fail. The one successful claim would not have succeeded as there was no apparent existing dependency at the date of death.

Trapani v Ciocca & Anor [2013] VSC 462(06 September 2013) (DALY AsJ)

The testator left her estate valued at $468,000 to her executors to be held on trust for the benefit of the plaintiff for his life with the remainder to be divided amongst nieces and nephews. The executors were the testator's sister, and the sister's son. The plaintiff was the deceased's adult son. He was a paranoid schizophrenic who was being cared for by his mother (who had separated from the testator many years before, and who had a poor relationship with the testator which had seemingly carried over to the executors). The court determined that it was not appropriate that

the funds be held on trust by the aunt and cousin, and allowed a property to be purchased for the plaintiff absolutely (but subject to a caveat requiring court approval for any dealings with it). The court determined that any balance be paid to the Senior Master for the benefit of the plaintiff.

In light of the son's disability this case would probably have had the same outcome under the proposed law.

Kozlowski v Kozlowski [2013] SASCFC 112 (18 October 2013) (The Honourable Justice Sulan, The Honourable Justice Vanstone and The Honourable Justice Anderson)

Although not Victorian this is an interesting case to consider because of the issues it raises. It was an intestacy. The sole asset of the estate was a house valued at $275,000. The deceased had been separated from his wife since 1984 but not "estranged". He had purchased three properties with her as joint tenant from compensation monies he received after separation relating to an accident. She took these properties by survivorship upon his death. The plaintiff's sister, (i.e. the wife's daughter) had purchased a house together with her mother and father. The mother had contributed $74,000, the testator $240,000 and the daughter $42,000 by a mortgage. In earlier proceedings the court had found that the property was owned by the daughter, but subject to a life interest in favour of the mother. The plaintiff's son said the sole property in the estate had been purchased for him by the deceased, he had always lived there, it had been placed in the deceased's name to protect the plaintiff in the event of divorce, the plaintiff had expended money maintaining it, and had been promised it by the deceased. This evidence was accepted by the trial judge. The trial judge left the whole estate (being that property) to the plaintiff and ordered the respondent to pay the plaintiff's cost. The Full Court overturned the trial judge's decision and awarded 3/8 of the estate to each of the son and the wife, and 2/8 to the daughter and provided that each party pay their own costs. The Full Court found the trial judge had conflated the existence of a moral duty arising out of the promise made to the plaintiff that the property was/would be his, with a determination of the extent of appropriate provision to be made. The court held that the promise was only one of the matters to which regard must be had in determining the extent of provision to be made.

Under the proposed law it seems that the son would be in a position to argue that he was partially dependent upon the deceased to the extent of his use and occupation of the property which was the sole asset of the estate. As the court is required under the proposed s 91(5)(b) to make provision that is "proportionate to the eligible persons degree of dependency on the deceased", it may be that were such circumstances dealt with by the Victorian courts under the new law, the plaintiff may have done better than he did in South Australia. However the proposed s 91(5)(a) provides that the court "must not provide for an amount greater than is necessary for the eligible persons proper maintenance and support", and conceivably the reasoning applied by the South Australian Full Court could be applied to the Victorian provisions leading to a similar outcome.

Peter Moris v Smoel [2014] VSC 32 (14 February 2014) (McMillan J)

The value of the estate at trial was between $200,000 and $300,000. The deceased's widow (by a second marriage) died before the conclusion of the proceedings. The court found that her stubborn pursuit of litigation since the death of the testator had primarily, although not solely, been responsible for the astonishing diminution of the assets of the estate (which had been around $1.8 million at the date of death). In a subsequent decision in the same case (referred to below) her Honour observed:

> "In Re Sherbourne (No 2); Vanvalen v Neaves, Palmer J was faced with a like outcome and made the following observation, with which I concur:
>
> What has happened in this case is a dark stain on the administration of justice. One might wonder that anything has changed since Dickens' Bleak House"

The will had left a life interest to the widow with the remainder going to the deceased's two daughters from his first marriage, with a legacy to his son of the first marriage.

The son was working and earning about $40,000 per annum. He had a home with a significant mortgage. The son's infant daughter was a second plaintiff. She had a non-verbal learning disorder.

The court found that the son had been provided with a good start in life. He had subsequently withheld his love from the testator and at the time of his death they had no relationship at all. Her Honour considered the cases concerning alienation and grandchildren's claims and found that there should be no provision made for either the son or the granddaughter. At [70] her Honour observes "…There are no bright-line rules of law in relation to estrangement, and the individual circumstances of each case are critical."

Under the proposed amendments to the law it seems there would be no difference in the outcome to this case.

Peter Moris v Smoel [2014] VSC 31 (14 February 2014) (McMillan J)

This case dealt with questions of costs, and in particular the fact that the widow's former solicitors were substantial creditors to the estate of the widow. The court found that "Where an award of provision has the effect of benefitting the creditors of an applicant [in this case the widow's former solicitors] , generally, the authorities regard such provision not to be for the maintenance and support of an applicant".

Brandon v Hanley [2014] VSC 103 (21 March 2014) (McMillan J)

The estate comprised a property located in New South Wales valued at approximately $950,000, together with about $900,000 worth of personal estate (before legal fees were deducted). The will left pecuniary legacies payable by the estate of (in effect, and after the payment of distributions from a family trust) $233,000, and the residue to the defendant who was the adult daughter of the testator.

The plaintiff was an adult son aged 71 years. He suffered from multiple chronic health issues. He was married with an adult son on a disability pension who was still living with him. The plaintiff owned his own home, a farm valued at $550,000, and two commercial properties together worth approximately $500,000. He had liabilities of $373,000.

The plaintifff sought $447,000 to pay off his debts.

The case concerned the issue of the plaintiff's estrangement from his father. The judgment gives an extremely detailed account of 70 years of the plaintiff and testator's lives, commencing when the plaintiff had been born whilst the testator was a prisoner of war in World War II. The plaintiff and his father did not bond after the father returned from war. There was significant conflict between them, leading to the plaintiff receiving much of his education in boarding school. The plaintiff retained a very close relationship with his mother who died in 1976 while still married to the testator. There was little contact between the testator and the plaintiff during much of the plaintiff's adult life, although for the last years of the testator's life that improved, particularly after the testator moved into a nursing home. There was a suggestion that the defendant-executor-sister sought to limit or control the plaintiff's (and a second sister's) contact with their father. There had been litigation between the two sisters over the defendant-executor-sister selling paintings which had belonged to the testator and retaining the proceeds whilst she was his administrator.

The court found that whilst the relationship between the plaintiff and the testator was less than ideal it was not a case of an estrangement. In fact, the court found that the plaintiff had shown great resolve in keeping in touch with his father given his father's behaviour towards him.

At [251] her Honour observed:

> "There is no requirement that the deceased treat all of his children equally — far from it — but where there is a high degree of disproportion in the treatment of siblings there ought be something in the nature of the relationship or the wellbeing of the competing claimants which justifies that disproportion."

The plaintiff succeeded in his claim to further provision in the sum of $427,000.

Under the proposed law whether or not the plaintiff was able to succeed would depend upon whether his health issues were such as to place him within the definition of having a "disability". Under the existing law the existence of the plaintiff's ailments does not appear to have played a prominent role in her Honour's determination. It seems that as he was aged 71, the court probably would have concluded that he was not in a position to earn significant personal exertion income in the future regardless of his health, and that his claim would have succeeded whether or not he suffered from health issues.

The basis upon which the case would be decided would be materially different under the new law, as due to the absence of existing dependency the plaintiff would be excluded from succeeding if his health issues were not such as to satisfy the definition of disability.

In a follow-up decision the defendant executor's solicitors had claimed a lien over a estate funds held by them. The court held that their claim for a lien could rise no higher than their client's entitlement to the funds, and that the funds were estate monies available to meet the plaintiff's claim in precedence to payment of the solicitors' costs: *Brandon v Hanley [2014] 179 (23 April 2014) (McMillan J)*

Burke v Burke [2014] NSWSC 1015 Rein J

The deceased was survived by his three children. He left an estate valued approximately $1,300,000. The plaintiff son had been left a legacy $100,000. The balance of the estate was divided between his two siblings. The plaintiff was estranged from his father. He was a bankrupt in receipt of a pension. The evidence included a compelling letter written by the deceased which accompanied the will and which explained the pain that had been caused to her by the plaintiff deciding to have nothing to do with her, or his siblings.

The judgment contains a statement of the law in New South Wales, which seems to be equally applicable to the law in Victoria under the existing legislation:

> "the Court should accept that testators are, in certain circumstances, entitled to make no provision for children, particularly in the case of children who treat their parents callously, by withholding without proper justification, their support and love from them in their declining years. Even more so where that callousness is compounded by hostility".

The court refused to make any provision for the son.

Under the existing and proposed Victorian law the outcome of this case would be the same, evidence of the fact that non-meritorious adult children's claims can be appropriately disposed of under the law as it stands, and without the imposition of arguably arbitrary or at least proscriptive categorisation of dependence as a prerequisite for eligibility for potential plaintiffs.

Baxter v Baxter [2014] VSC 377 (McMillan J)

The testator left an estate of $742,000. His wife had predeceased him a few years earlier leaving an estate of $2.3m which she had distributed largely between two of her three son's including devising property to one of two family trusts which were used to managed the family farming enterprise (the farm was run by one of the two sons who benefited under her will, and his son). Prior to his death the testator had transferred various properties into the trusts and to his preferred children. At trial the assets of the trusts were estimated a total of approximately $6m. The non-farming preferred son controlled the trusts. That son had served as a member of the Victorian Parliament for 30 years and was retired with a Parliamentary pension of about $145,000 per annum. He was noted to have provided limited financial disclosure of his own position. The son managing the farm owned shares in his own name and with his wife valued at $1.7m, and had a further $1.8m in trust loan accounts owing. He had superannuation of around $790,000.

The Plaintiff son had only received $50,000 under his mother's will (against which he made no claim) and a further $50,000 under his father's will. Although not estranged from his parents he had less to do with them than his siblings. He lived in Sydney and visited the family farm in northern central Victoria 3 to 4 times each year. Initially in the early 1970's he had lived in a de facto relationship which he said his father objected to. He subsequently realised he was homosexual. He had a successful career, and at the time of trial was recently retired (although still sitting on various volunteer boards). He was in a long standing relationship. He and his partner owned their home in Sydney valued at around $1,000,000. He had super of around $500,000 and an investment studio apartment valued at around $170,000 from which he derived around $10,000 per annum in rental income.

The judgment adopts an interesting approach of reciting the facts as know to the testator at his date of death, and ultimately her Honour concludes that the while the Plaintiff's current income is sufficient to meet his expenses (largely from superannuation), he had an inadequate financial buffer for future contingencies (having regard to the size of the estate and to the other benefits which the siblings had received from their parents, and the Trust entities). The judge award the plaintiff $350,000 plus the legacy included under the will.

Under the current law it seems the plaintiff's claim would fail as he was adult and not dependent at the testator's date of death.

6.2 Non- Children's Claims: Adult Stepchildren

Although the objective of the legislation appears to be to narrow down the class of potential claimants, the reference to "stepchildren" without any attempt to define them appears problematic. When does a child of a partner become a "stepchild"?

On the one hand there is the position of a child raised from infancy in the home of a stepparent, treating them as a parent, and being treated by them as the child. In these cases the stepparent / stepchild relationship can take on a life independent of the relationship between the step-parent and the biological parent with whom they reside, and assume the characteristics of a caring child-parent relationship.

At the other extreme is a child whose father or mother remarried when the child is an independent adult. Such a child may never live in the household of the "stepparent", and may never have any form of personal relationship, or interdependence. Assume that the parent and stepparent subsequently separate, and the step parent dies. Why would a stepchild be considered in the class of someone eligible to bring a claim simply based on their relationship to the deceased?

Under the existing law "stepchildren" are not considered a natural object of the testamentary bounty. Stepparents may have a responsibility to provide for stepchildren for the purposes of family provision claims but only in special circumstances. For example, where the relationship is akin to a parent–child relationship, or where the stepparent's estate was largely derived from an inheritance from the step-child's deceased natural parent.

Currently the law considers the primary responsibility for maintaining and supporting children as residing with their natural parents.

It seems that often there is compelling force behind stepchild claims where the child receives no inheritance from their parent, with that parent leaving their whole estate to a new partner, who then dies making no provision for the child (see McKenzie v

Topp [2004] VSC 90[7], James v Day [2004] VSC 290[8], Keets v Marks [2005] VSC 172[9]), but absent this scenario, or other special circumstances, it is not self evident that stepchildren ought necessarily to have the same status as children in Part IV claims.

Busuttil v DeGabriele [2013] VSC 215 (Digby J) (2 May 2013)

The plaintiff ("Billy") was the 53-year-old stepson of the testator. Billy was illiterate, intellectually impaired and living in a Housing Commission flat, supported by a disability pension. Billy' s father had married the testator when Billy was 18 years old. Billy's father died in 2010 and his entire estate had passed to Billy's "stepmother". After specific legacies of $85,000, she left $100,000 on trust for Billy. The balance of the estate was left to the testator's brother, and his wife. The claims of Billy's two siblings had been settled for $107,000 and $91,000 (inclusive of costs). The court determined that after the payment of legacies there was $458,000 available distribution. Billy was awarded $250,000.

As at the time of the testator's death Billy was not financially dependent upon the testator. He would have been ineligible to bring a claim under the new law unless he was treated at the deceased's stepson and his degree of intellectual impairment was sufficient to meet the test of "disability" under the Act. Although the judgement does not analyse Billy's impairment in great detail, it is probable that Billy would have met the definition of disabled for the purposes of the Act.

On the basis that Billy's father married the testator when Billy was 18 years of age it is unclear whether, for the purposes of the legislation, and in the absence of any definition, he would be considered the testators "stepson".

[7] The adult child's deceased father had left his whole estate to his second wife "the stepmother" against whose estate the claim was made.[56]-[58] In addition the plaintiff was found to have made some contribution to the deceased's welfare during her life [31], including six years as the deceased's carer [37].

[8] "It is apparent that the genesis of [the stepmothers] Estate was the father of the plaintiff's." [35] This is also a case of the deceased stepparent having inherited the estate of the plaintiff's biological parent.

[9] Followed the preceding cases in deciding that the responsibility of a deceased parent had transferred to the stepfather who had inherited her estate, who thereby owed a moral obligation to his stepson [30]

Robertson v Koska [2010] VSC 134

This case discusses the unreported New South Wales decision of *Graziani*[10] at paragraph [87]-[88] . The following passage is quoted:

> "Accordingly, it seems to me that those who were raised as part of the family as stepchildren would have less difficulty in establishing factors which warrant the application than would those at the other end of the spectrum who may have been members of the family for only a brief period and with only limited dependence".

In the current case the claims were made out because the stepchildren were "quite young when they became part of the deceased household in which they remained for some years. The relationships continued after the stepchildren left his home…" Of further relevance is the fact that the deceased had been the primary breadwinner, and therefore financial supporter, of the children at [87].

At [89] to [90] another New South Wales case is discussed, *Re Fulop (Deceased)*[11]. In that claim, a stepchild was successful. The child had lived in the household with the deceased since the age of four years, during which the plaintiff's biological father had remained as the primary breadwinner. Under circumstances where "the only substantial asset in the deceased's estate, her home at Wentworthville, was acquired from funds derived to a substantial extent directly or indirectly from monies earned by [the plaintiffs] father", the stepmother was found to owe the child a moral obligation.

The court noted (at paragraph [98]) that even where it is demonstrated that the estate of a deceased stepparent had been substantially contributed by the estate of the deceased biological parent of the plaintiff, it does not necessarily follow that the step-parent has a moral obligation to make provision for the stepchild.

Turning to the case before it the court noted that although the plaintiffs did not enjoy regular contact with the stepfather "they did maintain family ties with him. Of particular relevance in this case is the value of the property which passed from the plaintiff's natural mother to the stepfather of the plaintiffs upon her death, consisting of her half interest in the Glen Waverley property". The Court went on to order a

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[10] Unreported decision of NSWSC, BC 8701578, 20 February 1987 per Cohen J

[11] (1987) 8 NSWLR 679.

payment of $55,000 to each of the three plaintiffs. (The Glen Waverley the property had been valued at $730,000).

As there was arguably no dependency these claims would have probably failed.

McCann v Ward [2012] VSC 63

The estate was valued at $23 million.

This case was unusual for a stepchild's claim in that the applicant's natural parent was not deceased. The application was successful where the applicant had immediate, high financial needs(see [53]) and would have otherwise had to wait for the death of her mother (who had lost capacity) to have those needs met.

During his lifetime the deceased had acknowledged a responsibility to provide for the plaintiff (see [35]).

The Court found that there had been a warm relationship between the plaintiff and the deceased (see [47]), sufficient for the deceased to recognise a moral responsibility to provide for the plaintiff (see [81]).

The plaintiff received a legacy of $750,000, together with annual payments in the sum of $50,000 indexed at 10%, until her mother's estate is distributed.

Paola v State Trustees Ltd [2012] VSC 158

This decision quotes Beach J in *Henderson v Rowden* [@14], in a statement of the existing position:

> "Whilst a stepparent may have a moral obligation or responsibility to make adequate provision for the maintenance and support of a stepchild, the mere fact of such a relationship, in the absence of any other factor, does not give rise to such an obligation or responsibility… The court will look at factors including… The closeness of the relationship… What was the age of the plaintiff when he was she became a member of that family… The extent to which the plaintiff was supported by the deceased, whether financially or emotionally. If a consideration of these matters leads a court to the opinion that the plaintiff was brought up and treated as a child of the testator, and if all

the other circumstances show that there may have been a moral duty on the part of the testator provide for the plaintiff, then there are factors would warrant the making of the application".

Elevating (infant, disabled or full-time student under the age of 25) stepchildren to membership of the limited class of eligible claimants (without, for example, the requirement that they had been a member of the deceased household and financially dependent upon them which in any event would have seen them eligible under subparagraph (k) of the definition of "eligible person), without providing any attempt at creating certainty around who is and was not a "stepchild", in my view, creates uncertainty inconsistent with the apparent objective of the legislation to limit possibly marginal claims.

6.3 Non- Children's' Claims: Grandchildren

Scarlett V Scarlett [2012] VSC 515

The estate comprised of cash in a bank of $80,000 and a property that was sold by the executor for $660,000. The testator had two sons. One was the executor/defendant, one predeceased the testator.

The will left the real estate to the surviving son, and divided the cash among five of seven grandchildren, excluding the plaintiff.

The plaintiff had a good relationship with the deceased and enjoyed "intermittent but regular" social contact with her, visiting her about five times per year and keeping up by telephone.

This case contains a succinct summary of the existing position of grandchildren:

101. "Pulling these threads together in relation to claims by grandchildren under the Act the following may be said:

(a) There is **no moral obligation** upon a grandparent to make provision for the maintenance and support of his or her grandchildren simply **by virtue of the existence of such a relationship**. Such a moral obligation will normally rest upon the parents of a grandchild but not the grandparents;

(b) **Additional or special factors need to be shown** to bring a grandchild into the category of persons for whom the testator ought to have made provision. The presence and nature of these additional factors will vary from case to case, as will the weight to be assigned to each in the mix of considerations.

(c) **The categories of "additional or special factors" are not closed**. In every case, it will be necessary to consider the particular circumstances of the relationship and the impact of each of the other factors specified in s 91(4)€-(p) of the Act to which are to be applied the standards of a wise and just testator when measured against prevailing community standards.

(d) Examples of relevant additional or special factors include:

(i) where the testator had come to assume, for some significant time in the grandchild's life, a position more akin to that of a parent (in loco parentis) than a grandparent, with direct responsibility for the grandchild's support and welfare. However, absence of a de facto parental role will not necessarily exclude responsibility to provide in a will;

(ii) where the testator has undertaken a continuing and substantial responsibility to support the grandchild financially;

(iii) where particular care and material support combined with emotional comfort and affection has been provided by a grandchild to his or her grandparent;

(iv) it is also relevant to consider whether a grandchild has lost the immediate and continuing support of a parent who would normally be expected to have assumed direct responsibility for the grandchild's advancement and welfare and what inheritance, or financial support, a grandchild might fairly expect from his, or her, parents for future needs.

(e) Generosity shown by the grandparent to a grandchild, including contribution to the education of the child, even if manifested by a pattern of significant generosity, does not convert the grandparental relationship into one of obligation to provide for the grandchild upon the death of the grandparent as distinct from one of voluntary support, generosity and indulgence.

(f) Considerations of fairness, where for example grandchildren from one side of the family are preferred in the will over those from another branch of the family, are irrelevant. The purpose of the discretion vested in the Court is not to re-write the will of a deceased to achieve a fairer distribution of the assets of the deceased.'

The Court went on to find that in the circumstances of this case provision ought be made:

114. "I am of the view that a wise and just testator in the position of the grandmother would, looking at the family line constituted by Tania's father, Ian, and Tania herself, and considering the early loss of her father who I infer at the time of his death was penniless, conclude that she had a responsibility in the particular circumstances to make some provision for the grandchild's future needs.

115. The responsibility arises after taking into account the following factors:

(a) Without some testamentary assistance, Tania, in this case will more than likely not be able to set herself up in life for herself. She has lost any possibility of financial support from her father;

(b) The fact that Tania's father Ian, prior to his death, had given significant personal and financial support to his father Ronald Scarlett, the former husband of the Deceased, which included the contribution of his principal capital asset being the proceeds of sale of his former residential property and loan funds from a bank;

(c) The fact that, following the falling out between them, Ian did not inherit anything from his father, leading to the position that there was no possibility of the Tania inheriting anything of value from her father; and

(d) The fact that Ian's brother, Gregor, had inherited the bulk of his father's estate ought to have lessened the burden of any moral obligation imposed on a wise and just testator in the position of the Deceased to gift most of her estate to him."

The Court awarded the plaintiff $67,000.

The plaintiff's claim would have probably failed under the new Act as she was not apparently dependant on the deceased at the deceased's date of death.

Re Davies [2014] VSC 248 (15 August 2014) (McMillan J)

This is an unusually tragic case in an area of law where tragedy is the norm. The deceased left an estate worth a little under $3m. She had three children. One, the executor, who was aged 58 and appears to have had no children, took the whole estate (apart from three $10k legacies to grandchildren and a $12k legacy to charity). One of the testator's other children had committed suicide as an adult in 1995 leaving no issue.

The remaining son, Nicholas, had 3 children from 2 marriages. His second marriage with Susan remained intact. Nicholas had been diagnosed with MS in 1990.

Following a deteriation in his condition in 2008 his quality of life significantly worsened. He became depressed and made an attempt on his own life. In April 2012 he committed suicide in circumstances that were noted as being well planned, but kept secret from Susan. Unsurprisingly his death had a devastating impact on Susan and their two sons (who were then aged 12 and 15). Approximately 5 months later Nicholas's mother, the testator, died.

Shortly prior to her death she had changed her will, which had previously divided her estate between two testamentary trusts, one for each of her then surviving sons, with ultimate gift overs to her grandchildren, being Nicholas's children. After Nicholas's death, and shortly before her death she instructed her solicitor that she wanted to change her will. She told her solicitor that Susan's house was worth $1m, and that she had more than enough to support herself and her grandchildren, particularly if she sold her house. She did not want her grandchildren spoilt by being given any more money than the $10k legacies as "it would take away any incentive for them to make good in life of their own volition". She wanted her sole surviving son to take the benefit of the majority of her estate.

She did not even want to forgive a loan of $220k she had made to Nicholas and Susan to enable them to purchase their home.

The surviving son owned his own home but had few other assets.

Susan and each of the two children (by their litigation guardian) commenced proceedings. Susan's claim was settled for $370,000, which covered the mortgage owing to the estate and allowed her a modest sum for contingencies.

The evidence demonstrated the devastating impact their father's death had on the two grandchildren. One who was 15 when his father died and 17 at trial stopped attending school completely, had commenced using marijuana, and had fathered a child. A psychologist found him at risk of developing an anxiety disorder.

The other child was refusing to take medication for his epilepsy leading to seizures at school, was being bullied at school and suffered from low self esteem, was suffering from memory problems, had a learning disorder and was showing signs of anxiety and depression.

Her Honour found at [104] that the testator's stated reasons for excluding the children from further benefit had been misplaced. Their mother was not as financially secure as she thought. He concerns about more substantial benefit taking way their incentive to achieve in life could be addressed via the use of a trust. She found that the testator's statement to her solicitor that her relationship with Susan was poor was at odds with the facts.

It seems quite possible that the deceased's thinking had been gravely impacted by her grief over the recent loss of a second son, although there was no issue taken with testamentary capacity.

The Court found that the deceased had an obligation to provide for her grandchildren. Both were in need of substantial professional assistance with their psychological and educational issues. The court assessed them as requiring $200,000 each to assist with immediate needs, and $200,000 for longer term needs, and ordered that $400,000 be held on trust for each of them until they turn 28, with income and capital to be available for their maintenance, education, advancement and benefit in the meantime. The Court did not feel it was appropriate to make Susan or the litigation guardian trustees as she preferred them to be available to the children to support them in any issues they may have with the administration of the trust or the exercise of discretion as to income and capital.

In respect of the change to the will shortly before her death Her Honour noted:

> "98… A significant change in a longstanding intention to benefit grandchildren, in a will made only shortly before death[raises serious questions of sanity, propriety, and wisdom."

In respect of the circumstances which pertained at the time of Nicholas's suicide she found:

> "100…Nicholas knew when he committed suicide that his mother was elderly, and had been diagnosed with colorectal cancer. Had he known that any inheritance his family was to receive from the deceased was dependent on his surviving her, his actions may — and I stress may — have been different. I do not consider that the expectation raised by the deceased is one that can be enforced by way of Part IV, but in these circumstances I consider that it significantly colours the deceased's moral responsibilities to the plaintiffs."

As there was apparently no dependency at the testator's death the grandchildren's claim would probably have failed under the proposed law.

6.4 Non- Children's' Claims: Deceased's Sister

Fanning v Harding [2013] VSCA 208 (16 August 2013) Hansen and Tate JJA

The deceased left her estate valued at ultimately $125,000 to her son. The plaintiff was the deceased's sister. The case is an appeal to the Full Court of the Supreme Court from a decision of the County Court to deny the plaintiff leave to commence proceedings out of time. Three years prior to the deceased's death the plaintiff had sold her home to move to be near to her sister, the deceased. She had loaned the deceased $35,000 (a liability of the estate), she had paid for a trip for her and the deceased to Europe. She provided around the clock care for the deceased over the last two years of her life following the deceased's diagnosis with pancreatic cancer. She was an age pensioner with $150,000 in savings, presumably representing the balance of the proceeds of sale of her home. The Full Court found that having regard to her financial circumstances, the relationship between the deceased and the plaintiff, and the plaintiff's health, her case was not "less than arguable" and leave ought to be granted for her to bring proceedings out of time.

Under the existing law the sister's claim would fail no matter how much assistance she provided to the deceased over the last years of her life, and irrespective of the sister's self-sacrifice, unless it could be shown, as does not seem to been the case here, that the plaintiff was also a member of the deceased's household, and financially dependent upon her.

It is not self evident why, in a case like this, the fact of residence in a household at or around the time of death should delineate eligibility to make a claim.

6.5 Non- Children's' Claims: Cousin

Vourdoulidis [2013] VSC 34 Zammit AJ

The deceased left a distributable estate valued $217,000 at trial. The beneficiaries of his estate on an intestacy were an uncle and aunts who lived overseas. The plaintiff was his cousin.

The deceased suffered from an intellectual disability and schizophrenia. In the absence of anyone else caring for the deceased after the deceased's father's death in 1992 and his mother's in 2005, responsibility had fallen to the plaintiff. The Judge said at [18]:

> "I cannot say whether this relationship with its strong bond emerged from cultural roots or it was particular to this family, however, there is no doubt that the relationship between Theodosis and Nikos was strong and enduring. It was a relationship which placed significant obligations on Theodosis and which for the most part he met."

The plaintiff had been extremely involved in the deceased's life. From 1993 to 2006 he was the "go to man" for the deceased and the deceased's mother. He had helped his aunt following his uncle's death with things like shopping, paying bills and visiting doctors. After his aunt's death he cleaned up her home, and assisted making arrangements for the deceased's finances, providing him with food and clothes, advocating on his behalf in relation to care and accommodation. The plaintiff's involvement had reduced during the last couple of years of the deceased's life on the advice of the plaintiff's own doctor due to the plaintiff's own circumstances, but the plaintiff remained the family contact person for the deceased affairs.

The plaintiff was on a disability pension, although he owned his own home and had $213,000 in savings.

The court found that the relationship between the deceased and the plaintiff was such as to give rise to an obligation to make provision, and awarded him a legacy of $150,000.

Under the new legislation his claim would appear to have no prospect of success, irrespective of the extent of care provided, the responsibility he assumed, and the sacrifices he made, and irrespective of any disability or financial need he may have, as he did not fall into one of the proposed categories.

6.6 Non- Children's' Claims: Mistress

Larkin v Borg [2013] VSC 128 McMillan J

The deceased left an estate with over $7 million. The plaintiff had had a long term (over 20 year) but not exclusive relationship with the deceased, and never cohabited with him. This relationship had commenced when the deceased's wife was still alive, and continued for approximately 10 years after the deceased wife died. There was never any combining of finances.

The plaintiff's claim failed, and would have failed under the new legislation.

Forsyth v Sinclair [2010] VSCA 147

The deceased made his last will in 1973, leaving his estate valued at approximately $791,000 to his brother. The plaintiff claimed to have been the deceased's lover and companion for the last 20 years, although they had maintained separate households and finances (and unusually the plaintiff continued to live separated under the one roof with her former husband). The circumstances are summarised by the Court of Appeal as follows:

> 37. "Although Malcolm did not tell his brother and sister-in-law that he had a relationship with Marlene, there was considerable evidence from witnesses other than Marlene that the couple had a long standing, close and intimate relationship, in which they relied on each other for company and emotional support, and were regarded by their friends and Marlene's family as a couple. His Honour took account of the fact that the couple did not live together all of the time, that Marlene retained a separate residence and was not financially dependent on Malcolm, and that she was not divorced until after Malcolm's death. His Honour accepted the evidence that Marlene and her husband had separated and lived independent lives since 1992."

The trial judge awarded her 50% of the estate, a decision which was upheld by the Court of Appeal.

The claim would have failed under the new legislation as the plaintiff was not a domestic partner of the deceased, nor a member of his household.

6.7 Non- Children's' Claims: Son-in-law / Daughter-in-law

Lewis v Every [2013] VSC 445

The deceased left an estate valued, after costs, at $470,000 and a property in Rutherglen. The plaintiff was married to the deceased's daughter. The daughter died after the death of her father. The will had left the daughter a life interest in the property and estate residue, with the remainder to nieces and nephews.

The plaintiff and the deceased daughter had lived at the Rutherglen properly since 1987. The daughter had suffered from disabilities, and the plaintiff was an unsophisticated person. The plaintiff had no means of support.

The court awarded the plaintiff a life interest in the Rutherglen property and a life interest in $210,000 of the residuary estate.

The son-in-law's claim would have failed. This would be so even if he had provided attentive care for the deceased during a latter part of the deceased's life because, although he was financially dependent upon the deceased at the deceased's date of death (in that he resided in the Rutherglen property) he was not a member of the deceased's household and would not otherwise come within the categories of eligible claimants (eth daughter had died two years after her father).

Thompson v McDonald [2013] VSC 150

The deceased left an estate worth approximately $3.7 million. The deceased was survived by two sons. One son died about 2 years after the deceased. The deceased son's wife, and three of his four children made a claim on the estate which had been left to the surviving son and (in light of the death of the deceased son) to only one of teh deceased son's daughters.

The daughter-in-law had had a 39 year relationship with the deceased. She had lived for much of her married life on a farm owned by the deceased's and worked hard on it.

The daughter-in-law was found to have made central (even "arduous") contributions over many years to the deceased's estate and welfare, and that of her family. At [48] her Honour found:

> "…The evidence concerning Lorraine's character and conduct is generally of an exemplary woman who devoted herself as a wife, mother and daughter-in-law until, having reached the age of 60, she decided no longer to provide financial and emotional support to an alcoholic husband and preferred to devote herself to the care and support of her disabled son. There was no evidence of any kind reflecting adversely upon the character of Lorraine or adversely upon her conduct beyond the fact that having left her husband she no longer saw her former mother-in-law. Even that may need to be tempered with the evidence of Sharon that on more than one occasion the testatrix had indicated to Sharon that Lorraine had made the right decision in leaving William so that she could provide Kenneth with a better life."

She had ongoing responsibility to care for an intellectually disabled child (the deceased's grandchild). She was in receipt of an age pension (she was 70), and the disabled child was in receipt of a disability pension. She had assets valued at $325,000 largely from an inheritance she had received form her mother's estate following her separation from the deceased's son. Further provision was made in the sum of $800,000, but the claims of the grandchildren were dismissed.

This claim would seemingly have failed under the proposed law.

6.8 Non-Family Members:

Unger v Sanchez [2009] VSC 541 KAYE J

> "… a neighbour of the deceased essentially took on a role equivalent to that of a most dutiful daughter. The trial judge found there that the applicant had displayed what he described as "quite extraordinary" dedication and self-sacrifice, and had given "invaluable and indispensable" support to the deceased over a considerable period. That was held to be enough, although the provision which the applicant sought was substantially more than what the trial judge was prepared to order."[12]

This was a seminal case in non-family carer's claims. In his Honour's judgment he observed the following:

> "69 Although the 1997 amendments dispensed with specific categories of claimants, confined to particular members of the deceased's family,

[12] As summarized by Whelan J in Webb v Ryan [2012] VSC @[23]

nevertheless the legislation retained, as the touchstone of the relevant responsibility, the obligation to make "adequate provision" for the "proper maintenance and support" of the claimant.
70… As I have stated, that obligation, of a parent or spouse, is well recognised according to contemporary accepted community standards. On the other hand, in my view, those standards would only support the existence of such a moral duty by a testator, to a person, who is not a member of his family**, in quite rare and exceptional circumstances. Ordinarily, I would not expect that a wise and just testator, adhering to contemporary standards, would perceive it his or her moral duty to make provision for the maintenance and support of a close friend or neighbour, even where such a person had rendered invaluable and selfless service or aid to the testator. It might be commendable, or even desirable, for a fair-minded testator to include such a person in his or her bounty. However, in my view, it would only be a rare and quite exceptional case which would justify a conclusion that the testator had a moral duty to provide for his or her maintenance and support."**

In determining to make provision he held:

"101 In reaching that conclusion, **I regard the circumstances of this case to be quite exceptional.** The dedication of the plaintiff to Julie, and to her husband, was quite extraordinary**. So, too, was the extent of the self-sacrifice made by the plaintiff on their behalf.** The support which the plaintiff gave them, in their last years, was invaluable and indispensable. In terms of the authorities relating to Part 4 applications, her "deserts" were extraordinarily strong. Those deserts are significant in reflecting what a wise and just testator would have considered to be "proper" maintenance and support for the plaintiff."

Under the proposed law notwithstanding the finding that the deceased owed the plaintiff a moral duty arising from the extraordinary level care the plaintiff had provided to the deceased, the plaintiff's claim would have failed as there was no dependence, and she was not a member of the deceased's household.

Webb V Ryan [2012] VSC 377 (see also Webb V Ryan (no2) (2012) VSC 131) Whelan J

This was a claim brought by friends and business partners of the deceased. The case reinforces the fact that under the existing law it is only a rare and exceptional nonfamily relationship which gives rise to a moral duty to make provision from an estate. The claims failed and costs were awarded against the unsuccessful plaintiffs.

"23. The kind of non-family relationship which will give rise to a responsibility to provide for a person's proper maintenance and support will be a rare and exceptional one. A mere business relationship would not be enough. A

relationship of friends or neighbours founded on acts of kindness or consideration well beyond the ordinary, even extraordinary generosity over an extraordinarily long period, may not do so. Contributions made to a deceased's estate may perhaps give rise to a responsibility but generally they would not do so of themselves. A relationship might be special as a result of a wealth of shared experience, but that does not necessarily constitute a relationship by virtue of which there is a responsibility to make provision.

Conclusion

59. The claims made in this proceeding fall well short of establishing the kind of rare and exceptional relationship which would give rise to a responsibility on Mr North's part to make provision for the proper maintenance and support of any of the Webbs. Mr and Mrs North on the one hand and the Webbs on the other shared a wealth of common experience working together in the Norwebb business. For most of that time they were as close as business partners and friends might be expected to be, but in my view none of the factors relied upon by the Webbs relevantly advances the position beyond that. They do not create a responsibility in Mr North to make provision for their proper maintenance and support."

This claim failed under the existing law and would fail under the proposed law, arguably demonstrating the adequacy of the existing provisions in this context.

7. Epilogue: A proposed augmentation of the new law

There seems to be no good reason why the claims of children ought be limited to disabled, young or financially dependent children of the deceased. The law in this area in Victoria has never imposed such restrictions - whether before or after the 1997 Act, and it is not apparent why it is proposed now. I'm yet to encounter anyone in favour of setting the bar for adult children so high, and it is hoped this will not survive Parliament's review of the Bill.

As for non-spouse, non-children's claims it seems from the decided cases that the issue with the existing law is not so much in how individual cases that get to trial are decided, but rather the cost to estates of either defending or settling marginal "nuisance" claims.

By reverting to a categories-based approach to circumscribe those entitled to seek provision from an estate (even if all children are included as eligible), the risk is that many meritorious claims will be excluded.

This outcome can be avoided by retaining a category approach for those entitled, as of right, to bring a claim against an estate for provision, but in addition allowing those who do not come within the recognised categories to commence a proceeding for further provision but only with leave of the court, where such leave is only to be granted where the applicant is found to have a strong *prima facie* case (in contrast with the current test under s 63 of the *Civil Procedure Act* for summary dismissal of "no real prospect of success"). In determining whether to grant leave the court could be enjoined to have regard to the quantum (in general terms) of any likely provision and whether the likely cost of the proceedings justifies the claim being pursued in the circumstances.

This would ensure that those who fall outside the stated categories, but whose unique relationship with the deceased gives rise to a compelling claim are not excluded.

Applications for leave to bring proceedings could be made *ex parte* (thus avoiding any expense to the estate). Only where the court grants permission on the basis of an apparently strong claim supported by appropriate evidence would the applicant be permitted to issue proceedings against the estate.

By making the threshold for leave being granted sufficiently high, only meritorious claims would get to the starting block, and the initial cost risk of getting them there would sit with, and act as a deterrent to, the prospective plaintiff.

This allows both a recognition of the need for nuance in an area of law where the infinite variation in human relationships can potentially give rise to an obligation to make provision, whilst preventing nuisance claims from eroding estates.

The VLRC recommended that persons in "registrable caring relationship" with the deceased be included among the categories of potential claimants. This would have allowed for both family and non-family carers and others who provide domestic and financial support to the deceased to bring claims irrespective of them living under the same roof, however the Bill has not taken this recommendation up. To the extant that

(and I am speculating here) this failure arises from a concern that doing so would perpetuate the exposure of estates to dubious “try-on” claims, a requirement that such persons first obtain leave may suffice to retain the flexibility inherent in that category, which achieving the underlying objective of protecting estates from unmeritorious claims.

However if applicants on eth margins were required to seek leave to proceed *ex parte*, at their own risk, with a requirement that they demonstrate a good *prima facie* case (not merely more than no reasonable prospect of success), there would seem to be no real benefit in creating any definitional limit to those who could seek leave, other than the existing touchstones of a failure of the testator’s moral duty to make adequate provision for proper maintenance, having regard to all the relevant factors under the Act.

Due to the ambiguity around the relationship of stepparent / stepchild, and the fact view that in a number of circumstances stepchildren would not be considered natural objects of a testator’s bounty, I believe there would be merit in consideration being given to placing step-children’s claims in with those requiring leave.

Lachlan Wraith
Barrister
Jarndyce Chambers
8 September 2014