TESTATOR'S FAMILY MAINTENANCE:

LEGISLATIVE CHANGES AND UPDATE

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Testator's Family Maintenance
Legislative Changes and Update

BY

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Introduction.

1. By comparison with Shakespeare's seven ages of man (As You Like It, Act II, Scene VII) Victorian testator's family maintenance/family provision law has had four ages. In the first age, before 1906, anyone could do what they liked with their estate. In the second age, from the enactment of the Widows and Young Children Maintenance Act 1906 to 1998 when the Wills Act 1997 came into force, the only possible claimants were initially a widow or young child, later extended to a widower, any child, and former wife entitled to payments of alimony or maintenance. In the third age, from 1998 to where the deceased dies by the end of this year, a person for whom the deceased had responsibility to make provision has been able to claim. In the fourth age, beginning where the deceased dies on or after 1 January 2015, only a person falling within one of the categories of eligible claimants can claim, with varying criteria applying to different categories. This paper commences with the fourth age, deals with the law in the third age, and also raises how cases decided in the third age might be differently decided in the fourth age.

   The following headings are adopted –

   2015 and after.

   The existing law.

   Recent cases on provision.

   Ancillary cases.

2015 and after.

2. The Justice Legislation Amendment (Succession and Surrogacy) Act 2014 was assented to on 21 October 2014. On 29 October 2014 it was proclaimed, 1 January 2015 being was fixed as the day on which the relevant provisions of the Act, being found in Part 2, are to come into operation. Section 26 inserts s. 101 into the Administration and Probate Act 1958, which provides that the amendments made to Part IV of the 1958 Act by Part 2 of the 2014 Act apply in respect of the estate of any person who dies on or after the commencement of Part 2 of the 2014 Act.

3. Part 2 is headed “Amendment of Administration and Probate Act 1958 – Family Provision” and contains ss. 3 – 9 which amend various sections in the 1958 Act numbered 90 – 99A and also insert sections. To avoid cluttering this document only the numbering 90 – 99A will be referred to. It is first proposed to set out the sections and then discuss their effect. Only the main provisions will be discussed, as some of the amendments appear to be simply due to Parliament tidying up language but not making substantive alteration to the law.

4. A central concept in the 2014 legislation is that of “eligible person” as defined in s. 90(2), for whom only provision may be ordered out of an estate for his or her proper maintenance and support: ss. 90A(1), 91(1), (2)(a). It is easiest to deal with each class of eligible person in separate paragraphs. Each class has certain applicable criteria or requirements, which become more onerous in the later classes. They will first be set out in toto before stating which class has to satisfy what. The criteria (in addition to being an eligible person) are -

   (a) the person was wholly or partially dependent on the deceased for his or her proper maintenance and support (s. 91(2)(b)), disregarding any means-tested government benefits that he or she had received or was eligible to receive (s. 91(3)) (“the dependence criterion”);

   (b) at the time of death the deceased had a moral duty to provide for the eligible person’s proper maintenance and support (s. 91(2)(c)) (“the moral duty criterion”);

   (c) the distribution of the estate failed to make adequate provision for this, whether by will, intestacy legislation, or both (s. 91(2)(d)) (“the inadequate provision criterion”);

   (d) in determining amount, if any, the Court must take into account the degree to which at the time of death the deceased had a moral duty to provide for him or her (91(4)(a)) (“the degree of moral duty criterion”);

   (e) in determining amount, if any, the Court must take into account the degree to which the distribution of the deceased's estate fails to make adequate provision for his or her proper maintenance and support (s. 91(4)(b)) (“the degree of failure to make adequate provision criterion”);

   (f) in determining amount, if any, the Court must take into account the degree to which that person is not capable, by reasonable means, of providing

adequately for his or her proper maintenance and support (s. 91(4)(c)) ("the degree of incapability criterion");

(g) in determining amount, if any, the Court must take into account the degree to which the person was wholly or partly dependent on the deceased for proper maintenance and support at the time of death (s. 91(4)(d)) ("the degree of dependence criterion");

(h) the amount of provision must not be greater than is necessary for the person's proper maintenance and support (s. 91(5)(a)) ("the necessary amount criterion");

(i) the amount of provision must be proportionate to the person's degree of dependency on the deceased for the person's proper maintenance and support at the time of death (s. 91(5)(b)) ("the proportionate amount criterion").

5. The following criteria or requirements listed in the previous paragraph are applicable to all classes: (b), (c), (d), (e), (h) ("the basic criteria").

6. Turning to the classes of eligible persons, the first is a spouse or domestic partner at the time of death (definition of eligible person (a)). Only the basic criteria apply.

7. The second class is a composite of the following persons who at the time of death were aged under 18, or were full-time students aged 18 – 25, or had (as defined in s.90(2)) a disability -

A child including one adopted (definition of eligible person (b));

A stepchild (definition of eligible person (c));

A person who for a substantial period during the life of the deceased, believed that the deceased was his or her parent and was treated by the deceased as his or her natural child (definition of eligible person (d)).

Only the basic criteria apply.

8. The third class is a former spouse or domestic partner who at the time of death would have been able to take proceedings under the Family Law Act, but had not taken them or had commenced but not finalised them, and was prevented by the death from taking or finalising them (definition of eligible person (e)).

Only the basic criteria apply.

9. The fourth class is all other persons who would have been in the second category, but for the fact that at the time of death they were not aged under 18, nor full-time students aged 18 – 25, nor had a disability (definition of eligible person (f) and (g)).

The basic criteria apply, plus the degree of incapability criterion.

10. The fifth class is a registered caring partner (definition of eligible person (h)). Section 3(1) of 1958 Act states that a "registered caring partner" of a person who dies means a person who, at the time of the person's death, was in a registered caring relationship with the person within the meaning of the Relationships Act 2008.

The basic criteria apply, plus the dependence criterion, the degree of dependence criterion and the proportionate amount criterion.

11. The sixth class is a grandchild (definition of eligible person (i)). They are subject to the same criteria as the previous category.

12. The seventh class is a spouse or domestic partner “of a child of the deceased (including a stepchild or a person referred to in paragraph (d) or (g) of the definition of eligible person) if the child of the deceased dies within one year of the deceased’s death” (definition of eligible person (j)). They are subject to the same criteria as the previous category.

13. The eighth class is 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 (definition of eligible person (k)). They are subject to the same criteria as the previous category.

14. Accordingly, in summary:

(a) one combination of criteria apply to: a spouse or domestic partner at the time of death; a child, stepchild, or person in substance treated as a child, being aged under 18, a full-time student aged 18 – 25, or with a disability,

and; a former spouse or domestic partner having existing or possible Family Law Act proceedings;

(b) a second combination of criteria apply to a child, stepchild, or person in substance treated as a child, being not aged under 18, nor a full-time student aged 18 – 25, nor with a disability;

(c) a third combination of criteria apply to: a registered caring partner; a grandchild; a spouse or domestic partner "of a child of the deceased (including a stepchild or a person who for a substantial period during the life of the deceased, believed that the deceased was his or her parent and was treated by the deceased as his or her natural child) if the child of the deceased dies within one year of the deceased's death", and; 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.

15. In making a family provision order the Court "must" have regard to certain things (s. 91A(1)) and "may" have regard to certain criteria (s. 91A(2)). Without looking up a dictionary, the normal use of "must" is you have to do it and of "may" is that you can do it if you want to. Also s. 45 of the Interpretation of Legislation Act 1984 provides:

> "(1) Where in ... any Act passed ... on or after the commencement of this Act the word "may" is used in conferring a power, that word shall be construed as meaning that the power so conferred may be exercised, or not, at discretion.
>
> (2) Where in ... any Act passed ... on or after the commencement of this Act the word "shall" is used in conferring a power, that word shall be construed as meaning that the power so conferred must be exercised."

"Must" is not defined but is virtually synonymous to shall. The things the Court "must" have regard to are: (a) the will; (b) any evidence of the deceased's reasons for making the dispositions in the will; (c) and any other evidence of the deceased's intentions in relation to providing for the eligible person. These statutory provisions are new, although in practice judges often took them into account, at least because of s. 94(c) in the 1958 Act, which is not repealed, and provides -

"At the hearing of such application the Court shall inquire fully into the estate of the deceased, and for that purpose may –

...

(c) accept any evidence of the deceased person's reasons for making the dispositions in his or her will (if any) and for not making proper provision for the applicant, whether or not the evidence is in writing."

In *Brandon v Hanley* [2014] VSC 103 at [26] McMillan J noted that at common law a statement by a testatrix that her son has been guilty of misconduct, and for that reason she has excluded him from any benefit under her will, is not admissible to prove that the son was in fact guilty of misconduct, and was admissible only to provide some evidence of the reason why the testatrix has disposed of her estate in a particular way, and that it is not admissible to prove that what the testatrix said that or believed was true; and that the introduction of s. 94(c) did not change this: although the Court may accept that evidence, may accept that those were the reasons for the deceased disposing of his estate in the manner chosen, and may give weight to those reasons under s 91(4)(p), they are not evidence of the truth of the allegations they contain. The amendment in s. 91A(1) also does not appear to make the reasons evidence of the truth the allegations they contain.

16. Turning to the criteria specified in s. 91A(2) which the Court "may" have regard to, the reader will be familiar with these criteria because they are similar to the existing s. 91(4)(e) – (p), but there is the crucial difference because "must have regard to" has been changed to "may have regard to". The criteria are, only one of which, namely (l), is new (but nonetheless was indirectly encompassed by at least one existing criterion) —

(a) any family or other relationship between the deceased and the eligible person, including the nature and if relevant length of the relationship (in substance identical to the current s. 91(4)(e) – each current substantially identical provision will be listed below after "cf");

(b) any obligations or responsibilities of the deceased to the eligible person, any other eligible person and the beneficiaries (cf s. 91(4)(f));

(c) the size and nature of the estate and any charges and liabilities (cf s. 91(4)(g));

(d) the financial resources, including earning capacity, and the financial needs at the time of the hearing and for the foreseeable future of the eligible person, any other eligible person and the beneficiaries (cf s. 91(4)(h));

(e) any physical, mental or intellectual disability of any eligible person or any beneficiary of the estate (cf s. 91(4)(i));

(f) the age of the eligible person (cf s. 91(4)(j));

(g) any contribution (not for adequate consideration) of the eligible person to building up the estate; or the welfare of the deceased or the deceased's family (cf s. 91(4)(k));

(h) any benefits previously given by the deceased to any eligible person or to any beneficiary (cf s. 91(4)(l));

(i) whether the eligible person was being maintained by the deceased before that deceased's death either wholly or partly and, if the Court considers it relevant, the extent to which and the basis on which the deceased had done so (cf s. 91(4)(m));

(j) the liability of any other person to maintain the eligible person (cf s. 91(4)(n));

(k) the character and conduct of the eligible person or any other person (cf s. 91(4)(o));

(l) the effects a family provision order would have on the amounts received from the deceased's estate by other beneficiaries. This is prima facie new, but in fact the concept of moral duty, discussed further below has always encompassed a comparison between what those to whom a moral duty is owed should receive from an estate, or this was simply covered by a Court under any other matter it thought relevant;

(m) any other matter the Court considers relevant (cf s. 91(4)(p)).

17. The existing s. 97 is headed “Contents of order”. It has by s. 6 of the 2014 Act been amended without changing substance, with one exception. The most interesting change without substantial effect is to provide that a family provision order operates and takes effect, if the deceased dies without leaving a will, inter alia as if the provision had been made in the deceased’s will – ie a notional will (s. 97(4)(b)(ii)). However virtually the same result was already achieved in the current legislation, because intestacy was no bar to a family provision order. The significant change is, by the new s. 6(7), to repeal ss. 97(6) and (7) which established a special costs regime for family provision cases. This will be discussed further below.

18. An eligible person must apply within the time specified in s. 99 (s. 90A(2)(a)). A new s. 99 is substituted (s. 8) without difference in substance. A new s. 99A(3) and (4) is substituted (s. 9), again without a difference in substance, as to no action lying against a personal representative who after 6 months from the grant of

probate or letters of administration distributes without notice of an application or distributes with notice of an intended application which is not followed by notice of an actual application within 3 months after the notice of intention.

19. Some of the legislative changes are more apparent than real, but nonetheless the cumulative effect of the changes is to favour estates against plaintiffs. This is explained further as follows in succeeding paragraphs, with reference to the main changes. At the outset, however, two changes more apparent than real are the statutory requirement that at the time of death the deceased had a moral duty to provide for the eligible person's proper maintenance and support (s. 91(2)(c)) ("the moral duty criterion") and that in determining amount, if any, the Court must take into account the degree to which at the time of death the deceased had a moral duty to provide for him or her (s. 91(4)(a)) ("the degree of moral duty criterion"). These statutory requirements do not change the law because currently the Court must consider, in light of the matters specified matters in s. 91(4), what provision a wise and just testator would have thought it was his or her moral duty to make for the applicant; the expression 'moral claim' has always been treated as a convenient shorthand expression referring to the right correlative to the duty imposed on testators to make adequate provision, adequacy or sufficiency being measured by reference to what is right and proper according to accepted community standards: eg *Blair v Blair* [2004] VSCA 149; (2004) 10 VR 69 at [65].

20. The first anti-plaintiff measure is simply to replace "person for whom the deceased had responsibility to make provision" by "eligible person". Thus, unless they do not fall into another class, excluded are:

    (a) Former spouses or domestic partners with finalised Family Law Act proceedings or with uncommenced proceedings the commencement of which was not prevented by the death;

    (b) Unregistered carers;

    (c) Registered carers not wholly or partly dependent on the deceased for proper maintenance and support;

    (d) Grandchildren not wholly or partly dependent on the deceased for proper maintenance and support;

    (e) Spouses or domestic partners of a child of the deceased (including of a stepchild or a person who for a substantial period during the life of the

deceased, believed that the deceased was his or her parent and was treated by the deceased as his or her natural child) where that "child" died more than one year from the deceased's death or where the claimant was not wholly or partly dependent on the deceased for proper maintenance and support;

(f) Persons who, at the time of the deceased's death, were (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, but who were not wholly or partly dependent on the deceased for proper maintenance and support. However, such a person may be likely to be an eligible person on another ground, eg spouse;

(g) Anyone else. Examples in this category are nephews and nieces, in laws, friends.

21. The second anti-plaintiff measure is to require the court to have regard to: (a) the will; (b) any evidence of the deceased's reasons for making the dispositions in the will; (c) and any other evidence of the deceased's intentions in relation to providing for the eligible person (s. 91A(1)). These measures are not, however, particularly strong – see para. 15 above, and the requirement is still only to have regard to.

22. The third anti-plaintiff measure is to preface the long list of criteria in s. 91A(2) with "may have regard to" instead of the previous "must have regard to" and to include in what may be had regard to "(l) the effects a family provision order would have on the amounts received from the deceased's estate by other beneficiaries". The use of "may" could open the door to judges not taking some of the criteria into account. The inclusion of (l) is muted by the fact that courts already took this criterion into account indirectly.

23. The fourth anti-plaintiff measure is to repeal ss. 97(6) and (7) which established a special costs regime for family provision cases. These read –

"(6) Subject to subsection (7), the Court may make any order as to 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."

In *Bentley v Brennan; Re Bull (dec'd)* (No 2) [2006] VSC 226 Byrne J stated at [3] – [4]:

"Part IV of the *Administration and Probate Act* from its earliest inception in 1906[3] has contained in s. 97(6) and its predecessors a provision that the Court may make any order as to costs that is, in the Court's opinion, just. ... The fact is that, in applications under Part IV, orders for costs very often depart from the ordinary rule applicable in civil litigation. Defendant trustees are normally entitled to an indemnity in any event from the assets which they seek to protect. Even plaintiffs tend to be treated differently. If successful, they will often have their costs out of the estate on a solicitor and client basis[4]; and this has become so common that it has been described as "the standard order".[5] Likewise the Court has shown a readiness in the case of an unsuccessful application to depart from the costs-follow-the-event-rule which might otherwise obtain. In such a case, the Court may decline to make any order as to costs, leaving the unsuccessful plaintiff and the estate to bear their own.[6] ...
4 There have even been cases where an unsuccessful plaintiff has, nevertheless, obtained his or her costs from the estate."

Accordingly, the repeal of these sub-sections means the costs rules for normal civil litigation will now apply. Thus, as costs normally follow the event, losing plaintiffs are more likely to be ordered to pay costs. Losing defendants will also be ordered to pay costs, but as at present are unlikely to suffer personally because of the equitable right of a trustee to indemnity out of a trust fund, confirmed by Rule 63.26 in Chapter 1 of the Supreme Court (General Civil Procedure) Rules 2005 which provides that unless the Court otherwise orders, a party who is sued as trustee shall be entitled to the costs of the proceeding out of the fund held by the trustee in so far as the costs are not paid by any other person.

As a postscript recent cases illustrating the current law are: Hartnett & Hartnett v Taylor & Ors [2014] VSC 501 (successful plaintiffs obtaining costs on an indemnity basis); *Briggs v Mantz (No 2)* [2014] VSC 487 (unsuccessful plaintiff ordered to pay costs including, after a Calderbank Offer, on an indemnity basis); *Erlich v Fleiszig & Anor (No.2)* [2013] VSC 288 (unsuccessful applicant for extension of time ordered to pay costs, but Calderbank Offers ineffective).

An eloquent example of judicial concern about estates being wasted in costs is contained in *Morris v Smoel* [2014] VSC 31 at [75] – [78] referring to Bleak House by Charles Dickens.

The existing law.

24. It is now proposed to briefly deal with the existing law, as lawyers for some time to

come will be dealing with claims in respect of persons who die before 1 January 2015. Further, unless stated specifically below, the existing law set out below in this paragraph will still continue to apply. There are approximately 5 - 15 decisions of the Supreme Court each year on Part IV cases, and the judges tend to state the principles similarly – eg see for example the cases decided this August of *Baxter v Baxter* [2014] VSC 377; *Briggs v Mantz* [2014] VSC 281 and *Re Davies* [2014] VSC 248. In each of these three cases McMillan J analyses the facts under the s. 91(4) headings but prefaces this with certain principles which include (taken from *Baxter* at [52] – [63]) –

1. The Court must determine whether the deceased had a moral duty, responsibility or obligation to the applicant (now to be statutory – see above);
2. Keeping in mind the weight given to the freedom of testation, the Court will only interfere if the testator has failed in his or her moral duty;
3. That moral duty reflects an obligation to make adequate or sufficient provision by what is right and proper according to community standards;
4. The adequacy or otherwise of any testamentary provision for an applicant cannot be considered in isolation from the resources and needs of other beneficiaries entitled to a share of the deceased's estate.

Other propositions commonly stated are (this is a fairly representative list taken from *Grey v Harrison* [1997] 2 V.R. 359; *Forsyth v Sinclair* [2010] VSCA 147; *Webb & Ors v Ryan & Anor* [2012] VSC 377; *Christidou v Chris* [2012] VSC 626; *Borebor v Keane* [2013] VSC 35; and *Brandon v Hanley* [2014] VSC 103 (not every proposition is found in each case)). –

5. Assuming the statutory requirements are met the making of an order for provision is still discretionary.
6. Whether adequate provision has been made is determined by a consideration of the facts existing and eventualities which might reasonably have been foreseen at the date of the testator's death, whereas the question what order should be made is to be decided by reference to the state of facts existing at the time of the hearing.
7. As to the knowledge to be attributed to the hypothetical wise and just testator in determining compliance with his or her moral duty, the testator's conduct is to be considered on the basis that he or she was, at the time of death, fully aware of all the relevant circumstances, including

reasonably foreseeable eventualities existing at the date of death, whether or not actually known to him or her.

8. Assessment of quantum requires an instinctive synthesis that takes into account all the relevant factors and gives them due weight.

9. Where further provision for the applicant will not unduly prejudice other beneficiaries for whom the deceased had a responsibility, the court adopts a reasonably generous approach. In a relatively large estate a generous, and not 'niggardly' approach is justified.

10. Where the size of the estate permits and there will be no serious prejudice to the rights of other beneficiaries, the court can order further provision beyond the immediate and likely future needs of the applicant. In addition, the Court should consider the contingencies of life and may provide for a 'nest egg' to guard against unforeseen events.

11. The significance of an estate being small is that, in some circumstances, not all the wishes of a testator can be met, and the Court should give weight to the paramount claim, eg of widow over adult children.

12. In determining whether the deceased has failed to meet her or his responsibility the court may under s. 91(4)(p) ("any other matter the Court considers relevant") take into account the wishes of the deceased as expressed in the will or otherwise, including statements that the existing provision for a claimant was or was not adequate or of an intention to make provision for the claimant.

Recent cases on provision.

25. The facts in family provision cases are so long, and so variable, that it is pointless entering into long discussion of individual cases. The writer is fortified by the following quotation by McMillan J of NSW authority in *Feehan v Toomey* [2014] VSC 488 at [26] under the heading "*A short observation on the citation of authority in Part IV proceedings*" -

"Mr Quickenden referred to a great number of decisions in support of what he said was the obligation owed by the deceased to his widow. Those decisions arose in totally distinct factual situations. They laid down no relevant question of principle. I am reminded of the observations of Windeyer J in *Teubner v Humble*.[17] His Honour deprecated the practice of citation of extracts from cases devoid of context, in support of propositions arising in totally different contexts:

I should add that we were referred by counsel to a number of decisions in other cases of road accidents. But decisions on the facts of one case do not really aid the determination of another case. Observations made by judges in the course of

deciding issues of fact ought not to be treated as laying down rules of law. Reports should not be ransacked and sentences apt to the facts of one case extracted from their context and treated as propositions of universal application..."

26. However the following are cases decided over the last several years in Victoria, which for convenience, and to illustrate the recent legislative change, are briefly listed roughly under the 2014 "eligible person" headings, with however heading omissions where there were no relevant cases under that particular heading.

A spouse or domestic partner at the time of death.

In *Morris v Smoel* [2014] VSC 31 a widow failed on the ground of no breach of the moral duty, and would continue to do so.

In *Sinclair v Forsyth* [2008] VSC 250 (on appeal *Forsyth v Sinclair* [2010] VSCA 147) the deceased was a bachelor and the plaintiff was at all times married to another man, but they were exclusive sexual partners, and spent much time at each other's houses although not living together, and attended social functions together. She succeeded, but would no longer be an eligible person. She also provided many services which a carer might provide, but would not be eligible under that head either because there was no registration. Similarly, in *Whitehead v State Trustees Limited* [2011] VSC 424 (on appeal *State Trustees Limited v Whitehead* [2012] VSCA 274) the first plaintiff with whom the deceased did not live although they were sexually intimate succeeded. She would also no longer be eligible. In *Larkin v Borg* [2013] VSC 128 a girlfriend of the deceased failed on the ground of no breach of the moral duty, and would continue to do so.

A child, stepchild, or person in substance treated as a child, being aged under 18, a full-time student aged 18 – 25, or with a disability.

In *Whitehead v State Trustees Limited* [2011] VSC 424 (on appeal *State Trustees Limited v Whitehead* [2012] VSCA 274) the second plaintiff was aged under 10 when the deceased died, and was not in fact the deceased's son but was treated as such and reciprocated. He succeeded and would still do so.

In *Tavra v Petelin* [2011] VSC 359 the plaintiff was a son, aged 48, and disabled. He succeeded and would continue to do so. In *Bruce v Matthews* [2011] VSC 185 the plaintiff was a son aged 62 with very severe health problems, who however failed because the provision made for him by his father was held not to breach his moral duty – the result would still be same (s. 91(2)(c)).

A child, stepchild, or person in substance treated as a child, being not aged under 18, nor a full-time student aged 18 – 25, nor with a disability.

In *Alabakis v Alabakis & Anor* [2012] VSC 437, *Christidou v Chris* [2012] VSC 626, *Hartnett & Hartnett v Taylor & Ors* [2014] VSC 427, *Valentini & Ors v Valentini* [2014] VSC 91, *In the matter of the Estate of John Demetriou, deceased* [2013] VSC 703 and in *Salloum v Assouni* [2013] VSC 591 adult daughters; and in *McCann v Ward & Burgess* [2012] VSC 63 an adult step-daughter; and in *Borebor v Keane* [2013] VSC 35 a person treated as a daughter; and in *Baxter v Baxter* [2014] VSC 377, *Valentini & Ors v Valentini* [2014] VSC 91, *Brandon v Hanley* [2014] VSC 103, *Hansen v Hennessey* [2014] VSC 20 and *Busuttil v DeGabriele* [2013] VSC 215 adult sons;
each not living with the deceased, succeeded. They would still be eligible but the amount of their provision would be affected by the degree to which the plaintiff is not capable, by reasonable means, of providing adequately for his or her proper maintenance and support (s. 91(4)(c)). In *Briggs v Mantz* [2014] VSC 281 and *Morris v Smoel* [2014] VSC 32 a claim by an adult son failed due to no breach of the deceased's moral duty, and would continue to do so.

A grandchild.

In *Scarlett v Scarlett* [2012] VSC 515 a grandchild aged 26, and in *Re Davies* [2014] VSC 248 grandchildren who were minors with serious psychological issues, succeeded. They would continue to be eligible persons under this head but would not in fact obtain a family provision order unless wholly or partly dependent on the deceased for proper maintenance and support (s. 91(2)(b)). Such lack of dependence was the situation of the unsuccessful grandchildren in *Morris v Smoel* [2014] VSC 32 and *Feehan v Toomey* [2014] VSC 488, who would accordingly continue to fail. *Subasa v State Trustees Ltd* [2007] VSC 399 is a rare or unique example of a successful claim by a step-grandchild, which would now fail as the plaintiff is not an eligible person.

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.

In *Estrella v McDonald & Ors* [2012] VSC 62 the plaintiff and deceased had until some years before the deceased's death been in a same sex domestic relationship and at the date of his death mutually intended to resume it. The plaintiff succeeded and would continue to be an eligible person under this head but would not in fact obtain a family provision order unless he was wholly or partly dependent on the deceased for proper maintenance and support (s. 91(2)(b)).

Excluded.

In *Jensen v Jensen* [2014] VSC 432 the Court declined to summarily dismiss a claim by great-nephews who had a long-standing and close relationship with their great-aunt. They would no longer be eligible persons, as would be the case with nieces and nephews, and in *Jensen v Jensen* Derham AsJ observed that only one case by a niece/nephew had ever succeeded.

In *IMO the will of Vourdoulidis* [2013] VSC 34 a cousin, who had greatly assisted the deceased and was his main relative in Australia, succeeded. He would no longer be an eligible person. Further, in para. 16 of her judgment Zammit AsJ listed various types of claimant who had succeeded in the past, some of which would no longer be eligible persons, ie a foster child, and adult step-grandchild, and an adult sibling.

In *Thompson & Ors v MacDonald & Ors* [2013] VSC 150 a divorced daughter in law succeeded. She would no longer be an eligible person. And even if still married she would still not have been eligible, as her mother in law died on 2 March 2010 and her (former) husband died on 3 October 2012. These deaths were over a year apart and so (if still married) she would not have been "a spouse … of a child of the deceased … if the child of the deceased dies within one year of the deceased's death".

Ancillary cases

27. Applications for extension of time. The matters commonly taken into account on an extension application (eg *Groser v Equity Trustees Ltd* (2007) 16 VR 101) are: the period of delay; reason for delay; prejudice suffered by estate; the strength of the claim for provision or further provision. A recent case where time was extended is *Galvin v Semkiw and Anor* [2013] VSC 142.

28. Summary Dismissal. This topic has come alive in recent years through enactment of s. 62 of the Civil Procedure Act 2010, which provides that "A defendant in a civil proceeding may apply to the court for summary judgment in the proceeding on the ground that a plaintiff's claim or part of that claim has no real prospect of success". This is qualified by s. 64, which provides that, despite the court being satisfied that there is no real prospect of success, the proceeding should not be disposed of summarily because (a) it is not in the interests of justice to do so; or (b) the dispute is of such a nature that only a full hearing on the merits is appropriate. Applicants also at times rely on Rule 23.01(1) of the Supreme Court Rules which use the concepts: "does not disclose a cause of action"; "scandalous, frivolous or vexatious"; and "is an abuse of the process of the Court". A recent example of a claim by great-nephews which survived is *Jensen v Jensen* [2014] VSC 432 where Derham AsJ clearly expounded the relevant principles.

29. Clawing Back Into The Estate Property Alienated By Deceased. Victorian law is now in a state of conflict over this issue, at least where the person who has received the property is also the sole executor and beneficiary of the estate. In *Wood v McLean* [2010] VSC 550, (2010) 31 VR 12 Sifris J held that plaintiffs under Part IV did not have standing to bring an action to set aside an inter vivos transfer by the deceased, because their claim was only a contingent statutory claim, they being required to demonstrate a present or an actual existing interest. However, leave to appeal was granted by the Court of Appeal [2011] VSCA 37, the court tantalizingly stating: "the question might be thought to arise as to whether, in all the circumstances, the applicants have a sufficient financial or economic interest, if no other, as to support a conclusion that they have standing to bring the proceeding". This appeal then did not proceed. In *Van Wyk v Albon* [2011] VSC 120 Habersberger J adopted the reasoning of Sifris J in the context of applications to revoke probate by persons who would not, because of previous wills being materially the same as the will challenged, benefit by revocation, ie an application for revocation can only be made by a party who has an "interest" in the outcome.

However McMillan J has not followed the reasoning of Sifris J. In *Mataska v Browne* [2013] VSC 62 (22 February 2013) a testatrix had in her 80s: executed a will by which she appointed the defendant her daughter as executrix and left her estate to her; and engaged in a property transaction which consisted of her selling

her home, the defendant then receiving some of the proceeds of sale, the deceased and the defendant then purchasing another property as joint tenants, and on the deceased's death the defendant becoming sole registered proprietor by survivorship. The net result was that the defendant received the entire benefit of the deceased's property, the estate was worth under $10,000, the defendant did not propose to seek probate, and further if her sister the plaintiff commenced Part IV proceedings there would be nothing remaining in the estate. The plaintiff sought orders including for a limited grant of letters of administration with the will annexed. She provided evidence that the purchase was in effect a gift which was liable to be set aside. McMillan J stated:

- The plaintiff had to demonstrate an interest sufficient to give her standing to bring the proceeding [49];

- In the circumstances her contingent Part IV interest in the estate gave her standing because: where a Part IV claim succeeded the order for provision operated as though it were a codicil to the will executed immediately before death [50]; although not everyone who contemplated a Part IV proceeding had a sufficient interest in this case there were strong grounds for concluding that the plaintiff (as a daughter) had a prima facie case for provision [51].

- That she disagreed with Sifris J and followed the reasoning of *Hogarth v Johnson* [1987] 2 Qd. R. 383 [52].

Her Honour followed her previous decision in *Fodor v Simudvarac* [2014] VSC 227.

It is submitted that McMillan J is correct, and that this is what was hinted at by the Court of Appeal in giving leave to appeal in *Wood.* If her Honour is not correct then there would appear to be a gap in the law, in that otherwise persons could have their property removed by unconscionable means with impunity without this being able to be undone after their decease.

30. In *O'Loughlin v Arnott & Anor* [2014] VSC 416 a solicitor who had previously prepared a will for the deceased was restrained from acting for a testator's family maintenance claimant. Sifris J. stated [35] that he was "in a real conflict situation and there is a real and sensible possibility of the misuse of confidential information".

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