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WILLS AND PROBATE

REFRESHER

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Continuing Professional Development Seminars

Introduction

Over 30 cases are decided by the Victorian Supreme Court each year on wills and probate. This seminar is a “Refresher” and is also advertised as being focused on recent cases. Accordingly this Paper does not purport to cover the field of Wills and Probate, or **for reasons of space** to cover County Court cases, but to focus on topics raised by Victorian Supreme Court cases in roughly the past 1 – 3 years. The modus operandi will be to set out at length only cases decided in the past year, or only one case per topic, so that the reader can see the law in a detailed factual context, and to briefly note others. The Paper frequently quotes from judgments or states that a particular judge enunciated a particular legal proposition: however, in many cases these are judicial restatements of propositions found in, or exact re-quotes from, previous cases, but for reasons of space the previous case is generally not referred to in this paper. Also, for reasons of space, paragraph numbers in judgments are generally not given.

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Testator’s Family Maintenance – General Propositions

The Administration and Probate Act 1958 (the Act) provides in s. 91 (which is found in Part IV) –

(1) … the Court may order that provision be made out of the estate of a deceased person for the proper maintenance and support of a person for whom the deceased had responsibility to make provision.

…

(3) The Court must not make an order under subsection (1) in favour of a person unless the Court is of the opinion that the distribution of the estate of the deceased person ...

...

does not make adequate provision for the proper maintenance and support of the person.

(4) The Court in determining—

(a) whether or not the deceased had responsibility to make provision for a person; and

(b) whether or not the distribution of the estate of the deceased person …

makes adequate provision for the proper maintenance and support of the person; and

(c) the amount of provision (if any) which the Court may order for the person; and

(d) any other matter related to an application for an order under subsection (1)—

must have regard to—

(e) any family or other relationship between the deceased person and the applicant, including the nature of the relationship and, where relevant, the length of the relationship;

(f) any obligations or responsibilities of the deceased person to the applicant, any other applicant and the beneficiaries of the estate;

(g) the size and nature of the estate of the deceased person and any charges and liabilities to which the estate is subject;

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(h) the financial resources (including earning capacity) and the financial needs of the applicant, of any other applicant and of any beneficiary of the estate at the time of the hearing and for the foreseeable future;

(i) any physical, mental or intellectual disability of any applicant or any beneficiary of the estate;

(j) the age of the applicant;

(k) any contribution (not for adequate consideration) of the applicant to building up the estate or to the welfare of the deceased or the family of the deceased;

(l) any benefits previously given by the deceased person to any applicant or to any beneficiary;

(m) whether the applicant was being maintained by the deceased person before that person's death either wholly or partly and, where the Court considers it relevant, the extent to which and the basis upon which the deceased had assumed that responsibility;

(n) the liability of any other person to maintain the applicant;

(o) the character and conduct of the applicant or any other person;

(p) any other matter the Court considers relevant.

(For brevity testator's family maintenance proceedings will herein be referred to as “Part IV proceedings”)

The many Part IV cases tend to repeat a similar suite of legal propositions. The following is a fairly representative list taken from *Forsyth v Sinclair* [2010] VSCA 147; *Webb & Ors v Ryan & Anor* [2012] VSC 377; *Christidou v Chris* [2012] VSC 626; and *Borebor v Keane* [2013] VSC 35 (not every proposition is found in each case) –

1. Assuming the requirements of ss. 91(1) and (3) are met the making of an order for provision is still discretionary.

2. The Court must consider, in light of the specified matters, 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. In *Blair v Blair* [2004] VSCA 149; (2004) 10 VR 69 at [65] Nettle JA stated -

"The court is bound in answering each of those question to have regard to the matters mentioned in ss 91(4)(e) to (o) and, pursuant to s 91(4)(p), to any other matter considered to be relevant. Self evidently, such matters are of themselves incapable of providing an answer to either question. To reason from the matters mentioned in ss 91(e) to (p) to a conclusion that a testator had a responsibility to make provision for a claimant, or that the testator failed to make adequate provision for the claimant, necessitates the application of a test or standard to the matters to be considered. That test remains one of whether and if so what provision a wise and just testator would have thought it his moral duty to make in the interests of the claimant."

3. In *Grey v Harrison* Callaway JA (Tadgell and Charles JJA agreeing) said

"we must not underestimate the significance, both practical and symbolic, of freedom of testation. … [I]t is one of the freedoms that shape our society, and an important human right, … there is no equity, as it were, to interfere with a testator's dispositions unless he or she has abused that right."

This is reiterated in *Webb & Ors v Ryan & Anor* [2012] VSC 377 at [20] per Whelan J. His Honour added [21] that, because of the seriousness of the allegation that a testator has abused his or her freedom of testation, the principles concerning the qualities of the proofs required as set out in *Briginshaw v Briginshaw* (1938) 60 CLR 336 need to be borne in mind. This appears to be a reference to the following statement of Dixon J. at 362 -

... it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. ... It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained."

4. Whelan J added at [22] that a substantial burden is placed upon an applicant whose case relies upon evidence of things allegedly said by the deceased, in that such evidence must be very carefully examined (because the deceased cannot refute it).

5. 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.

6. 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.

7. The judge's determination of the order which should be made requires the application of an instinctive synthesis, a process that has been approved by this court in like cases where an arithmetic calculation was not possible. Determining what is adequate and proper involves 'making a value judgment' or 'a sound discretionary judgment'.

8. 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.

9. 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.

10. 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.

11. If an existing beneficiary gives no evidence of their personal situation the court may assume that the beneficiary has adequate resources for his or her proper maintenance and support.

12. In determining whether the deceased has failed to meet her or his responsibility the court may under s. 91(4)(p) 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.

13. Section 96(1) formerly gave the court a discretion to refuse to make an order for provision if, in the opinion of the court, 'the character or conduct of the applicant [was] such as ... to disentitle him or her to the benefit of any provision'. That discretion was removed by the repeal of that provision by the 1997 amendments. Under the new provision, the court must have regard to 'the character and conduct of the applicant or any other person' (s 91(4)(o)). If bad character or conduct is alleged, it must be such as would provide objective justification for making provision less than what the responsibility of the deceased would otherwise have required. The objective responsibility of the deceased has not been regarded as reduced by the kind of disputes which commonly occur within families or even by shameful or embarrassing misbehaviour for which there were significant exculpating circumstances.

Testator's Family Maintenance – Spouses And Domestic Partners

Claims by spouses and domestic partners in recent years include –

- *Panozzo v Worland* [2009] VSC 206. This was a claim by a widow who in an estate of approximately $700,000 net would receive under the will a house worth $140,000. Further provision was granted of $175,000.

- *Anslow v Journeaux* [2009] VSC 250. The plaintiff was the deceased's domestic partner (de facto wife) for 30 years before his death. He left her $200,000 in an estate of approximately $1.6 m. This was increased to $800,000.

- *Sellers v Scrivenger & Anor* [2010] VSC 320. A claim by a domestic partner for further provision, which was provided in the form of the estate purchasing a unit in which she could live for life and increasing a legacy from $100,000 to $198,000.

- *White v Hanover* [2010] VSC 577. A couple were in a happy and loving relationship for nearly five years. The male received provision of approximately 20% - 25% of the **female's** estate.

- *Youn v Frank & Anor* [2011] VSC 649. This was a claim by a widow of an intestate male who also had two children from an earlier marriage. In an estate of $450,000 she was awarded $300,000.

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Testator's Family Maintenance – Children

The cases decided in the past year by the Supreme Court have concerned adult daughters. A useful background statement is **by** McMillan J in the past month in *Mataska v Browne* [2013] VSC 62 (22 February 2013) that there was a prima facie presumption that a deceased did have a responsibility to make provision for an adult daughter [51].

In *Alabakis v Alabakis & Anor* [2012] VSC 437 the deceased (Theo) had three children by his first wife being Linda, Thomas and Alex, and was survived by his second wife (Kathleen) and their two daughters including the plaintiff Pauline, born in November 1982. By his will he left: his sons equally his share in a market garden business and real estate at Werribee South and also in land at Melton, valued together at approximately $3.3 m., subject to a life interest for Alex in the residence on the land at Werribee South; Kathleen, land valued at $185,000 and the residue of the estate (which appeared to be non-existent or insignificant); Linda, $10,000; Pauline, nothing. However Theo had settled land now worth approximately $289,000 on Pauline.

Kathleen and Linda commenced Part IV proceedings which were settled by them retaining their entitlement under the estate and respectively also receiving $420,000 and $435,000.

Pauline commenced Part IV proceedings. She had a Law degree and had done articles. At the date of Theo's death she lived with her partner with whom she had two young children and was at the date of trial expecting a third **child**. At the time of Theo's death she was not in full time employment, and now was unemployed with debts of approximately $110,000. Her partner owned the house in which they lived, subject to a large mortgage, and he was not in full time work. She had a severe health issue which had caused her to be hospitalised on a number of occasions.

Macaulay J held or noted -

- The first argument raised against Pauline was that her behaviour towards Theo disentitled her to provision. It was agreed that their relationship had been poor when she was a teenager but she gave evidence that it had improved. His Honour: found that Theo's behaviour had domineering, abusive and aggressive aspects; and stated that he placed little, if any, weight on Pauline's conduct towards her father.

- Thomas and Alex left school early to take on fulltime work on the market garden, had devoted their lives to building up this business and developing the land for that purpose and it was now not feasible that they could turn their hands to anything else which could

support their families. On that land was Alex's family home since 1994 to which he made significant capital improvements. However, while a wise and just testator, may feel obliged to enable the sons to continue to earn their livelihood from the farm and business, this was not exclusive of the deceased's responsibility to make provision for Pauline.

- Pauline received provision of $475,000 to give her and her children a measure of security for their accommodation, relief from her existing debt, and a modest fund to assist her onto her feet until she **could** begin to use her tertiary qualification to provide for her own financial security.

In *Christidou v Chris* [2012] VSC 626 the deceased was survived by three daughters, Natasa, Lisa and the executrix Mary, now aged in their 40s. At the date of death Mary was bankrupt but had since been discharged, and Lisa was currently bankrupt. The inventory showed an estate of approximately $360,000 of which the main item was a unit in poor state of repair worth it appeared $220,000. Mary had one child Noah aged 12 and Lisa had four dependent children. The deceased left $40,000 to Natasa, divided the rest of her cash between her other daughters and grandchildren, and devised the unit to Noah on terms that he be permitted to live in it until aged 35.

Natasa commenced a Part IV claim. The only remaining asset in the estate (after payment of costs etc) was the unit. Natasa now received a disability pension, and owned a unit in poor condition with virtually no equity, and owed creditors approximately $40,000. Noah had had a close relationship with the deceased, and had some special learning needs and difficulties.

McMillan J found that as at the date of death the deceased knew that Natasa: had suffered significant childhood trauma and abuse from both parents; had previously been depressed and had no financial security for the future; had uncertain Australian citizenship, and had lived with and was dependent on the deceased for the last 8 months of her life, during which period the deceased said that she could stay in the unit for as long as she needed; and had significant health needs.

McMillan J held –

- The legacy to Mary would be extinguished, because: she being bankrupt at the date of her mother's death it would go to her creditors, and so she was unable to receive its benefit;

- The character and conduct of Natasa after her mother's death were irrelevant.

- A wise and just testator would make such provision as to attempt to give Natasa a home and as much relief from her existing debt and ongoing expenses as achievable. She would accordingly receive further provision of the unit on condition that she sell it and from the net proceeds of sale pay $10,000 to Noah, $6,000 to Lisa, and $1,000 to each of Lisa's children, and retain the balance.

Further claims by children in recent years have been –

- *Leyden v McVeigh & Anor* [2009] VSC 164. The deceased left an estate of $235,000 net to friends. A claim by his adult son succeeded, the son being awarded approximately $115,000.

- *Torney & Ors v Shalders & Anor* [2009] VSC 268. The deceased left her five daughters approximately $540,000 in an estate of, at trial, about $2.75 m. leaving the rest consisting largely of farming properties to her son. The three daughters who were plaintiffs, who had received together about $324,000, received further provision of $395,000 between them

- *Berkelmans v Bulach* [2009] VSC 472. The deceased left her estate of $2.6 m. to her husband. Her sole child (a adult daughter) received provision of $600,000.

- *Litchfield v Smith & Anor* [2010] VSC 466. The deceased divided an estate of approximately $1.8 m. gross between three adult children. The claimant daughter, who already received real estate worth $500,000 – $650,000, received further provision of $250,000.

- *Klemke v Lustig* [2010] VSC 502. The deceased left a net estate of about $2.1 m. of which the plaintiff, his only daughter and blood relative received $250,000. She received further provision of $980,000.

- *Re estate of Yee (dec'd)* [2010] VSC 645. The deceased died intestate leaving a husband who she had not seen for 30 years and two daughters. The daughters received the entire estate.

- *Moerth v Moeth and Another* [2011] VSC 176. The deceased's estate consisted virtually entirely of a residential property (which **had** to be sold to meet costs) worth approximately $750,000. She had two sons, and gave one a life interest in the property, leaving the remainder to the children of the other son. Both sons brought Part IV proceedings. The son already provided for received further provision of $25,000. The claim of the other son failed.

- *Hyatt & Anor v Covalea* [2011] VSC 334. The deceased left an estate of, after legal costs, $270,000 to a carer/friend. This was a successful claim by his two daughters who received provision of $250,000.

- *Greely & Ors v Greely* [2011] VSC 416. In a net estate of approximately $400,000 the deceased left $5,000 each to four children and a charity, leaving the balance to her other child. In **a** claim by one son and two daughters, the son received at further $70,000, a daughter a further $95,000, and the claim of the other daughter was dismissed.

- *Amicucci & Ors v Di Tullio* [2011] VSC 539. An estate of approximately $1 m. was left to the deceased's son. A claim by his 3 adult daughters was successful, one receiving a quarter and the other two each receiving one eighth of the estate

Testator's Family Maintenance – Step Children

The most recent case is *McCann v Ward & Burgess* [2012] VSC 63. The deceased ('David') was survived by his second wife ('Jill'), and by three children of his first marriage and by Jill's two daughters Giselle and Lisa. The estate was worth approximately $10 million at death and $15 million at trial, almost entirely made up of shares in a family company. Due to gifts to her by the deceased Jill had assets of about $7.5 m. which would increase during the rest of her life. The deceased's will: left his shares to Jill for life with remainder to his children; gave a holiday home worth $274,000 to his daughter and Giselle and money for its maintenance; and, as there was no residuary estate, left nothing for Lisa. At the time of David's death, Jill's will broadly left her estate, she having survived her husband, to the five children and stepchildren equally. Her will, at the date of trial, which could not be altered because of her dementia, was substantially the same, and accordingly on present values, each of the children and stepchildren would receive approximately $1.5 million under it.

Lisa commenced Part IV proceedings.

Hargrave J held or noted –

- The deceased's children were each in a very comfortable financial position. But Lisa needed immediate financial assistance to save her home, to provide for reasonable living expenses for the foreseeable future and to cater for life's contingencies. Her immediate financial future was bleak, unless her mother died soon.

- Section 91(4)(e) required consideration of the relationship between David and Lisa. There was at the time of his death a warm and close relationship between them, even though that warmth was tempered by David's disapproval of the way Lisa and her husband conducted their financial affairs.

- Section 91(4)(f) required consideration of any obligations or responsibilities of the deceased to the applicant. David had recognised that he had a moral responsibility to provide for the plaintiff through his wife's estate.

- Under, s. 91(4)(o) the Court was required to consider the character and conduct of the applicant or any other person. The defendants placed reliance upon the conduct of Lisa and her husband in the mismanagement of their financial affairs. His Honour

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found this to be established, but held that it did not relieve the deceased of his moral responsibility to provide for Lisa.

- Under s. 91(4)(p) , which required regard to be had to any other matter the court considered relevant, the defendants relied on the provision Jill had made **for** Lisa in her will, likely to be $1.5 m. However, his Honour stated, the question was whether Lisa's current need could have been reasonably foreseen by a wise and just testator in David's position at the time of his death, with knowledge of all relevant facts. He found that they could.

- David accordingly had a responsibility to make adequate provision for the contingency (which had eventuated) that Lisa would be in financial need if he died before Jill. His Honour ordered, inter alia: a legacy of $750,000, which would cover the plaintiff's debts and leave approximately $100,000 for any other debts, living expenses and contingencies over the next year, to be paid to a trustee who could make sound financial decisions; and an annual **payment** of $50,000 increasing annually by 10% until final distribution of Jill's estate.

Other cases in recent years are –

- In *Quinn v Robertson* [2009] VSC 245 an adult stepdaughter received approximately two thirds of an estate of approximately $750,000.

- In *Robertson v Koska* [2010] VSC 134 each of three step children received $55,000 in an estate of approximately $700,000.

- In *Paola & Ors v State Trustees Ltd* [2012] VSC 158 the three plaintiff step sons had been treated as if **they** were **children** of the deceased. They received $400,000 out of an estate of approximately $500,000 after costs **were taken into account**.

Testator's Family Maintenance – Persons Treated As Children

Some background statements are relevant, not only to persons treated as children but more generally –

"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. … "

(*State Trustees Ltd v Whitehead* [2012] VSCA 274 at [130])

And -

"The term 'family' would, in this legislation, therefore be given the 'flexible and wide' interpretation which has been adopted in similar contexts, being an interpretation which has regard to contemporary social standards embracing relationships other than those which are based on consanguinity or affinity."

(*Whitehead v State Trustees Limited* [2011] VSC 424 at [48])

The most recent case is *Borebor v Keane* [2013] VSC 35. The deceased (Alex) left an estate mostly consisting of residue of approximately $3.15 m. mostly left to his nearest relatives, being three nephews who played no significant part in his life. In 1986 when travelling to the Phillipines he had sexual intercourse with the mother of the plaintiff (Richie). Richie claimed to be his biological daughter but DNA testing disproved this. Richie was aged 26, lived in the Philippines, was a sole parent of an infant son, supported her mother and grandparents, owned no property and had significant financial needs.

Hargrave J found:

- despite Alex's doubts, he had acknowledged his paternity and had treated Richie as his daughter from her birth;
- he had given Richie extensive financial support and led her to believe that she could rely on him for financial support and fatherly guidance;
- Alex was a lonely and friendless man, whose only significant attachments were to his business and his relationship with Richie;
- Richie reciprocated with love, affection and obedience for the most part to Alex's wishes;

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- Accordingly, Alex had a responsibility to make provision for Richie in his will. As to quantum, the court received evidence of the costs of housing and living in the Philippines. The judge ordered that Richie receive –
    - $350,000 to enable her to purchase a suitable five bedroom home to accommodate herself, her son and her extended family;
    - $75,000 to supplement her income while she completed her studies, she having a responsibility to maintain her son and a cultural obligation to support her family unit;
    - $100,000 as a nest egg for contingencies;
    - $100,000 to enable her to pursue a university course in Darwin – with a view to the possibility of her and her son emigrating to Australia;
    - $50,000 to enable her to repay loans or advances;
    - The foregoing sums and any significant assets purchased by them, and an amount to cater for management of the fund, would be held in trust for 20 years, the trustee applying the amount of the provision in accordance with the judge's reasons.

Testator's Family Maintenance – Persons In A Sexual Relationship But Not In A De Jure Marriage Or Registered Relationship With The Deceased

This topic blurs at its edges with the topic above of "Spouses and Domestic Partners". Some of the relationships described below came quite close to domestic partnership.

A foundational case subsequently described as being "at the margin" (*Forsyth v Sinclair* [2010] VSCA 147 at [106] per Redlich JA) is *Sinclair v Forsyth* [2008] VSC 250. The deceased (Malcolm), was a bachelor, who left his estate of approximately $791,000 to his brother. In 1989 he met the plaintiff (Marlene) and from 1992 the couple became exclusive sexual partners, and spent much time at each other's houses although not living together, and attended social functions together. They had a loving and intimate relationship until his death. She looked after him, and provided many services which a carer might provide. They shared the cost of all they did together but were financially independent. Marlene throughout remained married to another man, they living separate lives. The deceased's brother and his wife cared for Malcolm after two fatal heart attacks and when he was hospitalised with angina. **Marlene commenced Part IV proceedings.** Harper J found -

- the couple contemplated a pooling in retirement of assets and liabilities, with consequential financial benefits.
- that Malcolm intended to provide for Marlene if she survived him.
- that Malcolm had a responsibility to make provision for Marlene, chiefly because [41] "the shaping force in the lives of each … was their love for each other. … her dependence on him, and his on her, was I think about as complete as it is possible to be."
- that adequate provision was a sum sufficient to make significant inroads into Marlene's mortgage, being half the estate.

An appeal failed: *Forsyth v Sinclair* [2010] VSCA 147. At [88] Neave JA, with whom Habersberger AJA agreed, found that, although Harper J did not explicitly find that the couple were de facto partners, their relationship could have been so described.

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In *Re Watchorn; Allen v Huntley* [2011] VSC 175 a duty to make further provision **was** found in relationship which, save for there being no sexual element, was similar to that in *Forsyth v Sinclair.* The plaintiff was granted a life interest in property and a legacy.

Forsyth v Sinclair provided a foundational authority for *Whitehead v State Trustees Limited* [2011] VSC 424 (particularly at [321] – [322]). The deceased (Barry), who died aged 66, never married, and had no children. He left an estate of $2.1 m. divided between siblings and the children of a deceased sibling. When aged 56 he met the first plaintiff (Kim), 28 years his junior. Bell J held or found –

- Kim and Barry did not live together but became sexually intimate, which ceased two years before he died. They were engaged for nearly 10 years and would have married but for his death. They were tender and loving to each other [103]. However, they were not a de facto married couple in the legal sense, under s. 35(2) of the Relationship Act 2008 (Vic) or otherwise [188]. They kept separate finances and were not financially dependent.

- In 2001 Kim became pregnant to another man in a single encounter. Alex persuaded her not to have an abortion, although he knew he was not the father. He promised to support Kim and help her care for her child.

- The second plaintiff Alex was born in 2002. Barry treated Alex like a son and Alex reciprocated. Although Barry paid for some fees, he was not maintaining Alex. Alex's father did not support Alex.

- Barry intended to make a new will specifying Kim and Alex as beneficiaries.

- Kim supported Barry in his illness. She did a considerable amount of cooking, cleaning and personal caring for him.

- Kim and Barry kept separate finances and were not financially dependent on each other.

- Kim, Alex and Barry represented a social unit which was tantamount to a family.

- Barry, however, had no liability to maintain Kim or Alex [302 – 303].

- At the time of the hearing Kim was a personal carer but not in full-time work and received a disability pension. Her assets were basic. Without an order for provision she would be likely to be largely dependent on welfare support and would never be likely to own her own home [239].

- The judge received evidence of Alex's financial needs to age 22, including cost of raising him and of education, totalling $211,319.

- The financial resources and earning capacities of the beneficiaries were generally poor and their financial needs substantial and several had considerable health problems.

- **His Honour concluded that** Barry had a responsibility to make provision for both Kim and Alex, which should reflect his promise to help Kim and to help her care for Alex.

- Kim accordingly received $400,000 towards the cost of purchasing accommodation plus $50,000 for contingencies. Alex received sufficient to pay for his upkeep and education during his minority, and eventually for a motor vehicle and a deposit on real estate, being $400,000.

An appeal was dismissed in *State Trustees Limited v Whitehead* [2012] VSCA 274. At [131] Neave JA stated -

"A man and a woman may have an emotional commitment to each other akin to that of family members, even if they do not live together. Such a commitment may exist even though the parties are not financially dependent on one another and neither party contributes to the building up of the other parties' property. The scope of Part IV is not confined to those in relationships which do not conform to traditional ideas about male/female and parent/child relationships."

The first **reported** Victorian **Supreme Court** use of similar principles in same sex relationships is found in *Estrella v McDonald & Ors* [2012] VSC 62. The deceased left an estate of approximately $2.5 m. between his children and grandchildren. The plaintiff asserted that he was the de facto or domestic partner of the deceased.

Lansdowne AsJ held or found –

- Guidance was obtained from the Relationships Act 2008 as to when a de facto relationship, there described as a domestic relationship, may be found to exist for the purposes of Part IV. For the purpose of court ordered financial support, which was most analogous to an application under Part IV, s. 39 recognised two forms of domestic relationship - a registered domestic relationship or a "relationship between two persons who are not married to each other but who are living together as a couple on a genuine domestic basis (irrespective of gender)". In determining whether a non registered domestic relationship existed s. 39(2) required all the circumstances of the relationship to be taken into account, including such of the matters specified in s. 35(2)(a) – (h) as were relevant.

- The plaintiff and deceased were in a domestic relationship from 1985 until 1996. After this until 2004 the plaintiff was working away from Melbourne for long periods. And from at least the end of 2004, **although** it was inaccurate to describe the relationship between the plaintiff and the deceased as a domestic relationship [169], **it** continued to be one of intimacy and affection, although not an exclusive sexual relationship from the deceased's perspective. At the date of the deceased's death the parties mutually intended to resume a domestic relationship [174].

- Her Honour found [208] that the deceased had a responsibility to make provision for the plaintiff having regard to: the duration of the relationship; the state of the relationship between them from 1985 – 1996 and from 2004; their disparity in ages and, in particular, that the plaintiff was so young when they first met; the deceased's intention to buy a business in which the plaintiff could work and over time acquire equity; the relationship was the most significant personal relationship of their lives, other than with their respective families; the estate was sufficiently large to make appropriate provision for the plaintiff.

- The plaintiff's assets and income were only modest. He received an award of $300,000.

Testator's Family Maintenance – Grandchildren

In *Scarlett v Scarlett* [2012] VSC 515 the deceased had two sons Ian who died in 1995 and Gregor who survived her. The deceased left her residuary estate (approximately $600,000 net) to Gregor. She also divided (approximately $60,000 net) between five of her seven grandchildren. She omitted the plaintiff (Tania) now aged 26 who was the daughter of Ian.

Tania commenced a claim under Part IV. She was unmarried, lived with her mother, and worked as a casual bar employee earning $250 per week. She had never lived with her father and received nothing from his estate.

Vickery J held or found –

- Tania was in financial need. She sought $67,000 comprising: $7,000 to repay a debt; $10,000 to purchase a vehicle; $20,000 to undertake a TAFE course; $30,000 to establish herself independently in rented accommodation by way of a rental deposit, furniture and the like.

- From 2005, when the plaintiff got her driver's licence, she visited her grandmother and a warm relationship developed between them.

- His Honour discussed a number of cases concerning claims by grandchildren and at [101] enunciated propositions about such claims, of which the main ones are -

  (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;

  (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;

  …

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

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(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 with direct responsibility for the grandchild's support and welfare;

(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 the grandchild;

(iv) whether a grandchild has lost the immediate and continuing support of a parent 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;

(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.

- His Honour concluded [110] – [124] –
  - A strong relationship existed during the last four to five years of the deceased's life. However, it was not a dependent relationship, and as such would not have created a responsibility to make provision.
  - Tania, did not have the resources to establish herself in life. Her needs on their own would not have taken the case out of the ordinary. However there were additional and special factors of significance. 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 (probably penniless), conclude that she had a responsibility to make some provision, because: Tania would probably not otherwise be able to set herself up in life; Ian gave significant personal and financial support to his father, but did not inherit anything from his father and the flowed through to Tania; Gregor had already inherited the bulk of his father's estate so reducing any moral obligation on the deceased to provide for him.

- The amount of provision awarded was the $67,000 sought, to come from Gregor's share. This case is accordingly a good illustration of the wisdom of the plaintiff coming to the court with a specific proposal.

Subasa v State Trustees Ltd [2007] VSC 399 is a rare or unique example of a successful claim by a step-granchild, but only to the extent of a deposit on a modest home.

Testator's Family Maintenance – Business Relationships

Webb & Ors v Ryan & Anor [2012] VSC 377 is a rare example of such a case proceeding to trial. Mr and Mrs Webb and Mr and Mrs North worked together for many years in a business eventually conducted by a company in which the Norths owned 52% of the shares and the Webbs owned 48%. Mr North survived his wife and left an estate of approximately $970,000 to nieces and nephews of himself and his late wife. Before he died he in effect paid off all of the external secured debt of the company and transferred his shares to Mr and Mrs Webb for a nominal sum.

Mr and Mrs Webb and their four children commenced Part IV proceedings.

Whelan J held or noted –

- The Webbs acted as no more than very good long term friends of the Norths, **and** did not do anything involving extraordinary dedication or self-sacrifice.
- The Webb children claimed that they were told by Mr North that they would be beneficiaries in his will, and he showed two of them a will or draft will which named the Webb children as beneficiaries. However, although Mr North had originally made some statements or done some actions to this effect, he retracted these 2 years before his death.
- Even if two Webb children made significant personal sacrifices for the sake of the business this did not give rise to any responsibility in Mr North, particularly because he paid off the business debt and transferred his shares to their parents.
- He dismissed the claim on the ground of lack of responsibility to make provision. At [17] he added significant remarks about restrictions on claims namely that:
    - Although a plaintiff need not be a member of the deceased's family it was significant that in dealing with the relationship between the applicant and the deceased, s. 91(4)(e) imposed a requirement that the court have regard to "any family or other relationship" between the deceased person and the applicant;
    - The reference to "other relationship" gained colour from the specific reference to family; thus where the applicant is not a family member this factor, the continued use in the legislation of the concept of "proper maintenance and support", and the

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historical origins of the legislation, all combine to focus the inquiry on whether the deceased and the applicant had a relationship which, at the least, had a material resemblance or equivalence to the type of family relationship from which notions of moral duty and obligation are commonly derived.

- And at [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."

Testator's Family Maintenance – Disabled Claimants

Wills Probate and Administration Service Victoria (Butterworths) at [35,305] states –

"… where the applicant is so severely disabled as to require constant full time care, which is being provided by the state. In these circumstances, there is a very strong argument that the applicant has no need, irrespective of the moral claim which may be involved". Reference is then made to a Victorian case decided in 1947;

And -

"If a need can be established … institutionalised applicants are likely to receive an amount to cover such items such (sic) as clothing, outings and other items which help to make life more comfortable. A person who is intellectually disabled but able to live in the community would, prima facie, have a very good claim for provision";

Bruce v Matthews **[2011] VSC 185 is an example of the first proposition, albeit affected by the personal circumstances of the other beneficiaries.** The plaintiff was 62 with very severe health problems. He lived in a shared house managed by DSS and most of his disability pension went towards funding his accommodation and other day to day needs. His father divided his estate of about $300,000 equally between the plaintiff and his sisters. Daly AsJ held that, while a particular factual analysis suggested that an appropriate legacy for the plaintiff would have been $105,000 his father had not breached his moral duty because: he was entitled to assume that his son would have secure accommodation and care for life; his siblings were in modest financial circumstances and, in some respects, more subject to the vicissitudes of life; and the discrepancy between $105,000 and $75,000 was not in the circumstances sufficient to justify the exercise of a favourable discretion, particularly given the size of the estate and the competing claims of his siblings. At [44] her Honour stated that it was also relevant that the plaintiff was essentially supported by the State, and the likelihood of him ceasing to receive such support was minimal.

Tavra v Petelin [2011] VSC 359 **is an example of someone capable of living in the community.** The plaintiff, aged 48, was the deceased's only child. The estate was worth over $2.8 m. and was left to two friends of the deceased. The plaintiff had suffered serious injuries, would receive WorkCover payments he was 65, and had minimal assets. Zammit AsJ awarded the plaintiff $1.9 m. based on actuarial evidence of the lump sum required to maintain the equivalent level of his current net income from age 65 until his expected death and on evidence of the cost of purchasing a suitable dwelling.

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Testator's Family Maintenance – Extension Of Time For Commencing Proceedings

Section 99: establishes a time limit for commencing Part IV proceedings of 6 months from the grant of probate or letters of administration; enables this to be extended provided the application for extension is made before the final distribution of the estate; and provides that no distribution of any part of the estate made prior to the application shall be disturbed by reason of the application or of any order made thereon. 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 illustrative case is *Bennett v Pettitt* [2012] VSC 234. Probate was granted on 27 September 2010 to the deceased's son the defendant. The estate consisted of cash (which would be absorbed by administration costs and gifts) and a residential property. Before the lapse of 6 months the plaintiff's solicitors unsuccessfully sought to file electronically an originating motion seeking provision under Part IV and arranged for plaintiff to swear an affidavit in support which was not filed or served. On 8 April 2011 the defendant's solicitors advised the plaintiff that they had instructions to finalise the estate and to make distributions to beneficiaries. The letter enclosed a cheque for $1,000, being the legacy due to the plaintiff under the will. In April 2011 all entitlements under the will were paid or the defendant undertook to make payments directly to the legatees, and a cash balance of $8,566.10 remaining after payment of entitlements and costs and disbursements was paid to the defendant. The residential property was registered in the name of the defendant as the beneficiary of the will on 13 April 2011.

By originating motion dated 27 February 2012 the plaintiff commenced a Part IV proceeding and also sought an extension. $4,500 was paid by the defendant to the legatees before 27 February 2012 and the balance of $11,500 was paid after that date.

McMillan J held or noted, inter alia -

- The power to extend time for commencing Part IV proceedings was discretionary and must be exercised judicially.

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- A plaintiff will not ordinarily be shut out from making a claim when the reason for the failure to comply with a time limit is due to the error, omission or negligence of a solicitor. This had occurred here and when the plaintiff became aware of the right to apply for an extension of time she acted promptly.

- For the purposes of an extension application, the judge was only required to determine whether there was evidence of the plaintiff having an arguable case for provision or further provision, which the plaintiff had **here** merely as a daughter of the deceased.

- Final distribution of an estate occurred when it was actually distributed and removed from the hands or name of the personal representative and placed in the hands or name of the beneficiary. There had been final distribution here and in any event the distribution of real estate could not be disturbed.

Claims defeated by final distribution are fairly uncommon, another example being *Gilchrist v Equity Trustees Limited* [2011] VSC 107.

The requirement which most typically brings claimants for extension unstuck is that of an arguable case for provision or further provision, either alone or in combination with other factors. If a claimant falls within a traditionally acceptable category, eg widow or child, the claimant's road is much easier. Accordingly examples of successful claims for extension in recent years include: *Menzies v Marriott* [2009] VSC 345, son; *Day & Anor v Raudino & Anor* [2009] VSC 463, adult grandchildren; *Sheppard v Heathcote (No 3)* [2010] VSC 190, daughter; *McCann v Ward & Anor* [2010] VSC 452, stepdaughter; *Re estate of Yee (dec'd)* [2010] VSC 645, daughters; *Moerth v Moeth and Another* [2011] VSC 176, son; *Leggett v Jansen (aka Bell) & Ors* [2011] VSC 364, long standing de facto partner of the deceased; *Clark v Burns* [2011] VSC 394, granddaughter; *Vogdanos v Kriaris* [2012] VSC 248, son. And examples of failed claims for extension in recent years include: *Corbett v State Trustees Limited* [2010] VSC 481, claim by non blood relative claiming to have a relationship akin to niece; *Stanley v State Trustees Ltd* [2012] VSC 24, claim by the former de facto partner of the deceased, whose claim was "quite weak"; and the very recent *Erlich v Fleiszig & Anor* [2013] VSC 63, by a claimant whose father was a cousin to the deceased's late husband (the claim being described at [8] as not strong).

Testator's Family Maintenance – 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 long list of criteria relevant to the application for obtaining summary judgment under ss. 63 and 64 is contained in *Webb & Ors v Ryan & Anor* [2011] VSC 461 at [9] – [12].

This topic has some similarity to claims for extension of time within which to commence a **Part IV proceeding**, because both areas take into account the strength of the possible claim. Examples of dismissed claims are: *Jackson v Newns* [2011] VSC 32, nephew; *Napolitano v State Trustees Limited* [2012] VSC 345, nephew by marriage. Examples of claims which survived a dismissal application are: *Story v Semmens* [2011] VSC 305, grandchild; *Re will and estate of Angelo Marotta (dec'd)* [2011] VSC 324, sister; *Re Will and Codicil of Griffiths (dec'd)* [2012] VSC 85, niece; *Webb v Ryan* [2011] VSC 461, persons claiming to be friends or having a close relationship akin to parent or child – however this was also influenced by the facts being vast, the defendants having filed materials, the litigation being advanced (ie the application being brought after mediation), and the plaintiffs having the expectation **that the** case will proceed to trial – Zammit AsJ described this application as an unfair use of the procedure [43].

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Testator's Family Maintenance – Costs

Because costs are in the discretion of the court it can be difficult to lay down hard and fast rules. The reader is referred to the author's longer treatment of this topic in an article in the December 2011 Law Institute Journal "Costs in Part IV Cases". Suffice to say that typical orders, with some examples from the past year are:

- A successful plaintiff will ordinarily obtain solicitor/client or indemnity costs, eg: *Borebor v Keane* [2013] VSC 35, indemnity costs.
- An unsuccessful plaintiff is less likely than one in non Part IV litigation to be ordered to pay costs, but nonetheless there are judicial examples of both no orders as to costs and the plaintiff being ordered to pay costs. In *Webb & Ors v Ryan & Anor (No 2)* [2012] VSC 431, costs were awarded against unsuccessful plaintiffs on a party/party basis up to the date of a Calderbank Offer and on a solicitor/client basis after that date. In *Alabakis v Alabakis & Anor (Costs)* [2012] VSC 496 a beneficiary was joined as defendant and, although the plaintiff succeeded in the proceeding, she was ordered to pay a percentage of that defendant's costs through raising a discrete issue against him which she abandoned at trial.
- The normal defendant's costs order is for solicitor/client or indemnity costs out of the estate.
- The normal settlement mechanisms of Calderbank offers and offers of compromise are applicable, eg *Webb & Ors v Ryan & Anor (No 2)* [2012] VSC 431.
- *Forsyth v Sinclair (No 2)* [2010] VSCA 195 is a reminder that what is said at a mediation cannot generally be subsequently referred to on costs.

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Testator's Family Maintenance – Discovery

This topic is illustrated by the very recent case of *Dinakis & Zurcas v Zurcas & Ors* [2013] VSC 79 (28 February 2013). The bulk of an estate was left to the deceased's son and his children. The deceased's daughters commenced Part IV proceedings and sought discovery and inspection related to acquisitions, transactions and financial records. They alleged that the material sought was relevant under, particularly, s. 91(4)(l) which required the court at trial to take into account any benefits previously given by the deceased person to any beneficiary. They failed before an Associate Justice and were also unsuccessful before Digby J. His Honour held –

- In Part IV proceedings discovery will not be ordered unless the applicant can establish that the discovery sought relates to a question in the proceeding and special circumstances exist which justify the making of the orders sought.
- The plaintiffs' entitlement to discovery was not tested by reference to the list in s 91(4) but to substantial issues raised in the originating motion and affidavits in the main proceeding. The plaintiffs' reference in their affidavits in the main proceeding to whether the deceased had provided benefits to his son was minor and accordingly the discovery sought did not relate to a significant issue in the proceeding.
- There were also no special circumstances and the discovery sought was disproportionately large and far reaching.

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Testator's Family Maintenance – Clawing Back Into The Estate Property Alienated By Deceased

Victorian law is now in a state of uncertainty 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 recently 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:

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- 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].

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**.

Proprietary Estoppel Indirectly Securing Testator's Family Maintenance Type Relief

This topic has been highlighted by the decision of Kaye J in *Harrison & Ors v Harrison* [2011] VSC 459. A farmer died leaving a widow, a son Christopher and daughters Sue, Louise and Kathryn. He appointed Christopher as his executor and devised his interest in farming land (which interest consisted of a 25% share) and water rights (jointly valued at trial at $2.9 m.) to him and otherwise left his estate (approximately $100,000) to his widow. Probate was granted in 2004. The daughters were dissatisfied with the will. In 2007, wholly or partially repeated in January and later in 2008, Christopher told his sisters that he would provide from the estate for Louise and her children, and that he would also make financial provision for all his sisters and their children, by establishing a trust. The daughters accordingly did not seek an extension of time to bring Part IV proceedings, and this was barred on 29 July 2008 by the final distribution of the estate. Christopher did not honour his promises. In 2010 the daughters sued Christopher alleging proprietary estoppel. His Honour held or found

- Proprietary estoppel comes into existence when an owner of property has encouraged to another to alter his or her position in the expectation of obtaining a proprietary interest and that other, in reliance on the expectation created or encouraged by the property owner, has changed his or her position to their detriment. If these matters are established equity may compel the owner to give effect to that expectation in whole or in part;

- The elements of this cause of action were established. The promises were not too uncertain [393]; Christopher was aware that the representations they might induce the plaintiffs not to institute such proceedings [407]; the promises were a reason, not necessarily the only reason, why the plaintiffs did not issue proceedings before final distribution [277]; his sisters acted reasonably in relying on the promises [407]; if they had sought to issue Part IV proceedings between April 2007 (the date of the first promise) and 29 July 2008 they would have obtained an extension of time; each daughter would **in a Part IV proceeding** have obtained an order for provision of a percentage of the deceased's interest in real estate with attached water rights, but subject to its debts, being Louise 15%, Sue 10%, Kathryn 5%, with Christopher receiving the balance of the estate.

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- Accordingly, as a consequence of Christopher resiling from the promises, his sisters had suffered a detriment, being their loss of entitlements under Part IV, and the appropriate relief would be the provision which would have been made in their favour under Part IV.

Applications For Probate Defeated By Lack Of Testamentary Capacity, Want Of Knowledge And Approval, Or Undue Influence

Each of the above grounds of defeat are illustrated by recent cases. Some occur **where probate is being sought for the first time, some** as a ground for revoking probate, **and some** arise in cases where probate has been revoked and the executor reapplies for probate. Where revocation is sought, the plaintiff has to explain the failure to caveat, establish a prima facie case in opposition to the validity of the will, and satisfy the court that its discretion should be exercised in favour of revocation: *Nicholson & Ors v Knaggs & Ors* [2009] VSC 64.

A recent case on lack of testamentary capacity is *Re the will of Dimitra Giofches* [2011] VSC 553. The deceased made a will in 2007 appointing as executors and trustees her son, the plaintiff, and her daughter, the defendant, and dividing the estate between them. On 9 September 2008 she made another will appointing the plaintiff her sole executor and trustee and leaving the whole estate to him. This will also included a declaration that she had not provided for her daughter and had "carefully considered her present financial circumstances and future prospects and the fact that she has sufficient income and assets to allow her to maintain an adequate standard of living". The plaintiff applied for probate of this will. The evidence included the affidavit of a Physician in Geriatric Medicine, who attended upon the deceased on 25 June 2008, and expressed the opinion that she then had capacity to make such decisions regarding her health, lifestyle and finances, and there was insufficient clinical evidence to sustain a diagnosis of dementia.

Habersberger J held or noted –

- When there were circumstances which give rise to suspicion about the testatrix's testamentary capacity, the propounder of the will assumes the burden of affirmatively proving, to the satisfaction of the Court, that she had the requisite capacity to make the will, that is, that she was of sound mind, memory and understanding when she executed it or, if instructions for the will preceded its execution, when the instructions were given.
    - The standard of proof is upon the balance of probabilities, but the Court is not to reach such a conclusion unless it has exercised the caution appropriate to the issue

in the particular circumstances by a vigilant examination of the whole of the relevant evidence.

- To prove that the testatrix was of sound mind, memory and understanding at the relevant time, the propounder must satisfy the Court that the testatrix: (i) understood the nature and effect of making a will; (ii) was aware of the general nature and value of her estate; (iii) was aware of those who would have a legitimate claim to the estate; and (iv) was able to evaluate and discriminate between such claims.

- Although it needs to be shown that the testatrix understood that she was executing a will and the practical effect of the central clauses in the instrument, including the dispositions of property made, it was not necessary to establish that she was capable of understanding every clause of the will.

- His Honour weighed the medical evidence, stating that it was not unequivocal, but that the best evidence was of **the Physician in Geriatric Medicine** because it was closest in time to when the deceased gave the instructions for the will.

- The statement in the will concerning her daughter's financial position explained her action and there was no evidence that it was obviously incorrect.

- His Honour was accordingly affirmatively satisfied of testamentary capacity.

Further recent cases on lack of testamentary capacity are –

- *Nicholson & Ors v Knaggs & Ors* [2009] VSC 64. The deceased made a will in 1999, a codicil in March 2000, another codicil in December 2000 and another will in January 2001. The executors obtained probate of the last will. Probate was revoked by the court and the executors then carried the same onus as they would otherwise have had in propounding the will and seeking a grant of probate [80]. Lack of testamentary capacity was alleged. Vickery J found: there was sufficient evidence to throw doubt on the deceased's competence to make the 1999 will and first codicil, and the burden of proof to establish testamentary capacity in these circumstances was cast upon the prospective propounders of these documents [575 – 576] but that they had proven to the requisite standard on the balance of probabilities, that the deceased did have testamentary capacity (also 579 – 584). As to the second codicil and the 2001 will there was also sufficient evidence to throw doubt on the deceased's competence to make them, (paragraphs 631, 640, 645, 666 - 668) in that: as to appointment of a solicitor as executor she was not capable of turning her mind to, or comprehending, the effect of her actions on the administration of her estate, and the level of the charges that could

potentially be levied against it [639]; and was no longer capable of appreciating the extent and value of her estate [645]. The propounders did not discharge the burden of proof of establishing testamentary capacity of the second codicil and 2001 will.

- *Brown & Anor v Sandhurst Trustees Ltd* [2009] VSC 212. Probate was revoked on the ground of lack of testamentary capacity, in particular that the deceased was subject to delusions.

Want of knowledge and approval is illustrated in the recent case of *Zivojin & Anor v Babic & Anor* [2013] VSC 57 (20 February 2013). Probate was granted of an 2005 will. The plaintiffs sought revocation of this grant on the ground of a will made in 2007 which revoked the 2005 will. The evidence of the making of the 2007 will included that of two persons allegedly present when the will was executed. The existence of the will only came to light in 2010.

Habersberger J **held or noted** –

- the onus of proof lies in every case upon the party propounding a will; and that party must satisfy the conscience of the court that the instrument propounded is the last will of a free and capable testator;

- where circumstances excite the suspicion of the court it is for those who propound the will to remove the suspicion and to prove affirmatively that the deceased knew and approved the contents of the document; and

- it is only when any such suspicion is removed that the onus is thrown on a person resisting a grant to the propounder to prove facts relied on to displace the prima facie case in favour of the propounder.

- that the circumstances surrounding the alleged August 2007 will were suspicious, and that the plaintiffs had failed to discharge the onus of removing those suspicions because: of errors, inaccuracies and omissions in the will; the will was inconsistent with the pattern of the deceased's previous wills and later instructions to a solicitor; no evidence about the preparation of the will – not only had it not been prepared by the deceased, it had not been prepared by a lawyer, but appeared to have been prepared by a layman using other wills or will forms as precedent - was the person who drafted the will someone who stood to gain under its provisions?; the evidence about the execution of the will was inherently improbable; the evidence about the storage and safekeeping of the August 2007 will was not credible. No expert handwriting evidence removed these suspicions.

(But in any event, having considered the handwriting evidence, his Honour also concluded on the balance of probabilities that the deceased did not sign the will).

Further recent cases on want of knowledge and approval are –

- *Nicholson & Ors v Knaggs & Ors* [2009] VSC 64. The facts are referred to above. The testamentary documents were also challenged on the ground of want of knowledge and approval. Vickery J found that all four testamentary documents were made circumstances were such as to raise a suspicion that the deceased did not sign these instruments with the requisite knowledge and approval but the defendants dispelled this suspicion in the case of the first two documents (paragraphs 610 – 614) but not in the case of the last two documents (paragraph 685, 686, 689). Accordingly, even if the testatrix had had testamentary capacity, the instruments would be have been set aside on this ground (paragraph 690).

- *Able Australia Services v Yammas* [2010] VSC 237. This was an application for revocation for probate. Because the will was prepared by this executor and he was is a substantial beneficiary under it, it was not seriously contested that the will was prepared in suspicious circumstances. However the executor satisfied the onus upon him to prove affirmatively that the testator knew and approved the contents of the will.

As to undue influence, the leading recent Victorian case is *Nicholson v Knaggs*, referred to above. The propositions established in that case were –

- Undue influence, in a probate context, is constituted by conduct that overbears the will of the testatrix so that she makes the will without intending and desiring the disposition made thereby. The circumstances must be such that the disposition is not regarded as the free and voluntary act of the testatrix. The volition of the testatrix must be overpowered so that her mind does not accompany her act in making the will [148].

    - A party alleging undue influence must demonstrate on the balance of probabilities that there has been such undue pressure which has been brought to bear that the will can be said to have been the product of this conduct [111].

    - Undue evidence was established with respect to the 1999 will and first codicil in that one of the beneficiaries, acting with the express or tacit approval of her husband, exerted undue influence over the deceased to secure his inclusion as a joint beneficiary of a one third share of the residuary estate under that will, and these pressures continued through subsequent testamentary documents (paragraphs 594, 595 - 600). Accordingly, although the 1999 will was admitted to probate, the portion

of it which conferred a benefit on the husband were severed (paragraphs 691, 704; also *Nicholson & Ors v Knaggs & Ors (No 3)* [2009] VSC 328 at [3] – [30]), this however producing the conclusion that the wife's share commensurately increased (paragraph 706).

Costs In Testamentary Capacity And Similar Cases

Costs in probate cases do not necessarily follow the event, in that a plaintiff who, while losing the case, shows sufficient reason for the court to investigate the will, may **obtain** costs out of the estate. See generally, *Clancy v Santoro* [1999] 3 VR 783 at 798 – 9 and *Di Cecco v Contini (No 2)* [2004] VSC 243. **Further, a** person who unsuccessfully alleges undue influence will often be ordered to pay costs. *Nicholson & Ors v Knaggs & Ors (No 3)* [2009] VSC 328 illustrates just how complex costs can be to determine in a case of multiple **testamentary documents** and allegations of testamentary capacity, want of knowledge and approval and undue influence, some of which succeeded against particular **testamentary documents** and others did not. The propounder of a will who fails will usually be awarded his costs out of the estate, provided it was reasonable in the circumstances to propound the will. An examples of this not occurring is *Brown & Anor v Sandhurst Trustees Ltd (No 2)* [2009] VSC 406, in which a trustee company was ordered to pay the plaintiff's costs and bear its own costs because: it planted in the deceased the idea of a charitable trust in perpetuity (with consequent financial benefits for itself); it failed to obtain proper medical evidence; while it was initially reasonable for it to defend the litigation this ceased after it was made aware of particular evidence without obtaining an expert opinion of its own [24].

Author: Philip Barton

Alterations Of A Will, Grants Of Probate With Words Omitted, And Removal Of Words From Copies Of The Probate

The recent case of *Chang v Chang* [2012] VSC 346 deals with revocation and a re-grant of probate of a slightly different document. A will contained a residuary disposition to three persons including Ming Chien Chang. This clause was subsequently altered by a crossing out in blue ink of the words "Ming Chien Chang and". No initials or other writing appeared beside the alteration to indicate when the alteration was made or whether it was approved by the deceased. Probate of the will was granted to the plaintiff as executrix. The defendant applied for revocation of probate.

McMillan J held or noted –

- The Wills Act 1997 did not specify any requirements for an alteration to be upheld if the alteration was made prior to the execution of the will. There is, however, a rebuttable presumption at common law that an unattested alteration to a will is made after the will was executed by the deceased. If the presumption was not rebutted then s. 15(1) provided that an alteration to a will after it has been executed is not effective unless the alteration is executed in the manner in which the will is required to be executed under this Act, and s. 15(3) permitted signature of the testator and witnesses to the alteration in the margin, or on some other part of the will beside, near or otherwise relating to the alteration.

- There was [12] no definite rule as to when a Court should or should not be satisfied that a will was altered prior to execution. No particular species of evidence was required and the Court may accept intrinsic evidence from the will itself or extrinsic evidence as to when the alteration was made.

- The plaintiff had the onus of proof on the balance of probabilities, subject to the principles in *Briginshaw v Briginshaw* (referred to in **page 20 above)**, the seriousness of a finding that the will was altered in the manner claimed by the plaintiff being that the defendant would have no entitlement to a share of his mother's estate.

- The executrix had not discharged the onus of overcoming the rebuttable presumption that the alteration was made after execution of the will. Probate was accordingly revoked, and, subject to the requirements of the Registrar of Probates, the judge ordered

that probate of the will, excluding the unattested alteration to cl 5 of the will, be granted to the plaintiff.

Fry v Georges & Ors [2009] VSC 220 dealt with the converse case to *Chang,* namely of an application to omit words from a will. At [67] Mandie J stated that if it could be clearly established that by inadvertence, mistake or deception some word had been written into a will, the court could grant probate omitting the word so inserted; but the court could not insert words omitted by inadvertence or mistake. Further the court could not omit words the result of which would be to alter the sense of those which remained. The application was dismissed because his Honour found that the very words that the plaintiff sought to have deleted from the will on a re-grant of probate were known and approved of by the testator [71].

Fast v Rockman [2013] VSC 18 concerns omission of words from a copy of the will admitted to probate. The will included words in which the deceased stated that he placed on record matters, including about his wife and marriage, for which reasons, and because she would receive a property settlement from the Family Court, he desired his trustees to fully resist any attempt by her to obtain any share of his estate. An executor deposed that Mr Rockman gave instructions to insert these words to "put them on the record" lest he not live to execute an affidavit in the Family Court proceedings. Mrs Rockman sought an order deleting these words.

Habersberger J noted that *In Re N* [1950] VLR 139 held -

- Words will not be struck out of the will itself;
- If the words complained of are scandalous and offensive and non- dispository in their nature (in the sense that they dispose of no property) and are not inserted as an alleged reason for making or not making certain dispositive provisions, the Court may exclude them from the probate; but if they state such reasons, then, at all events if there is prima facie evidence before the Court of their untruth, the Court may omit them; and probably if they are scandalous and offensive as being libellous of an individual, even without specific evidence of their untruth being placed before the Court, the Court may omit them;
- If the words may have some dispository effect, or assist as a matter of construction in the interpretation of actual dispository provisions, the Court may decline to expunge them;

His Honour held that the words were non-dispository and did not assist in construing the dispository provisions, and that part of the content was scandalous, offensive or defamatory and that part would be omitted from the copy of the will admitted to probate.

Wills Authorised By The Court For Persons Without Testamentary Capacity

The Wills Act provides -

"21.(1) The Court may make an order authorising a will to be made in specific terms approved by the Court or revoked on behalf of a person who does not have testamentary capacity.

(2) Any person may make an application for an order under this section if the person has first obtained leave of the Court to make the application.

…

26. Before granting leave to apply for an order under section 21, the Court must be satisfied that—

(a) the person on whose behalf the will is to be made or revoked does not have testamentary capacity; and

(b) the proposed will or revocation reflects what the intentions of the person would be likely to be, or what the intentions of the person might reasonably be expected to be, if he or she had testamentary capacity [Before amendment in August 2007, s 26(b) read: (b) the proposed will or revocation accurately reflects the likely intentions of the person, if he or she had testamentary capacity]; and

(c) it is reasonable in all the circumstances for the Court, by order, to authorise the making of the will or the revocation of the will for the person."

Section 28 lists information which the Court may require in support of an application for leave.

The most recent case is *Saunders v Pedemont* [2012] VSC 574. Garry Saunders, who was the nephew of the deceased wife of Ronald Macquire, applied for leave pursuant to s 21(2) to make an application for an order authorising a will to be made for Ronald. The proposed will provided that Garry and his brother be appointed executors and trustees and the estate be divided between them and their spouses. The proposed will was to replace a 1973 will under which Ronald left his whole estate to his wife or if she predeceased him to his son, Graeme, both now deceased. The defendant was Ronald's granddaughter who would take the estate under the 1973 will. Between the serving of the granddaughter's affidavit and the end of the proceeding the plaintiff put forward three further amended proposed wills which also provided a share (eventually a third) to the granddaughter to be held on trust until she was discharged from bankruptcy. Section 26(a) was satisfied by an affidavit by Ronald's doctor.

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Habersberger J held –

- To obtain leave an applicant must satisfy the Court of the three critical requirements in s 26 and, if required by the Court, give the information set out in s 28. Leave should only be refused after all of these matters have been taken into account. Once leave had been given, it was extremely unlikely that an order authorising a will to be made would be refused.

- Section 26(b) required satisfaction of its criteria on the balance of probabilities. The question was not whether the testator would probably have preferred the proposed will to intestacy. Nor was it sufficient if the proposed will was one of a number of possible proposed wills, all of which might be equally likely to reflect the testator's likely intentions. It was not the task of the a judge to approve a completely different will drafted by him or her. However, where the court was satisfied that a proposed will fundamentally fulfils the condition in s.26(b) but required adjustments, the Court could modify, alter or redraft it to perfect its conformity to the testator's likely intentions [122].

- In case of lost capacity, the Court's concern under s 22(b) was with the actual, or reasonably likely, subjective intention of the incapacitated person. There were two types of lost capacity cases, in each of which the incapacitated person is adult, has formed family and other personal relationships, and has made a valid will before testamentary incapacity occurred. These were –

  (a) where the person is now said to have expressed some testamentary intention in relation to the circumstances sufficient to warrant an application for a statutory codicil or new will. In that type of case the Court should determine: has the incapacitated person actually expressed the intention attributed; would the person have held that intention if possessed of testamentary capacity?;

  (b) where since losing testamentary capacity, the person has not expressed, or is incapable of expressing, any testamentary intention to deal with changed circumstances, such as, the birth of a child or the death of a beneficiary under the existing will. In such a case the Court may be satisfied as to what the incapacitated person is "reasonably likely" to have done, in the light of what is known of his or her relationships, history, personality and the size of the estate. The previous will may give a very good indication of the incapacitated person's testamentary choices and preferences such as to provide evidence of what it is likely he or she would now do in the changed circumstances.

- The phrases now used in s. 26(b) could mean “a fairly good chance that the proposed will reflects what might be the testator’s intentions”, or “some reasonable people could think that the proposed will reflects what might be the testator’s intentions”, or “some reasonable people could think that there is a fairly good chance that the proposed will reflects what might be the testator’s intentions”.
- Section 26(b) was not satisfied in this case and his Honour was not satisfied that Ronald would want to change his will to prevent his granddaughter from inheriting his estate [110 - 111].

In *Saunders v Pedemont (No 2)* [2012] VSC 601 the plaintiff was ordered to pay the costs of the defendant and of Ronald’s administrator on a party party basis, with the administrator being able to recoup itself from Ronald’s assets for the rest of its costs.

In *State Trustees Limited v Do & Nguyen* [2011] VSC 45 a will was authorized.

Admission Of Informal Wills To Probate

Section 9(1) of the Wills Act provides that the Supreme Court may admit to probate as a will:

"(a) a document which has not been executed in the manner in which a will is required to be executed by this Act; or

(b) a document, an alteration to which has not been executed in the manner in which an alteration to a will is required to be executed by this Act -

if the Court is satisfied that that person intended the document to be his or her will.

Section 9 continues -

(2) The Supreme Court may refuse to admit a will to probate which the testator has purported to revoke by some writing, where the writing has not been executed in the manner in which a will is required to be executed by this Act, if the Court is satisfied that the testator intended to revoke the will by that writing.

(3) In making a decision under sub-section (1) or (2) the Court may have regard to -

(a) any evidence relating to the manner in which the document was executed; and

(b) any evidence of the testamentary intentions of the testator, including evidence of statements made by the testator."

The law has been considered in the recent case of *Fast v Rockman* [2013] VSC 18. Mr Rockman died on 30 August 2010. He left a validly executed will dated 1 April 2010. Two documents also came into existence in August 2010. Habersberger J found that the circumstances surrounding the August documents were –

- In June 2010 the deceased underwent chemotherapy for cancer. He asked his friend and executor Mr Fast, who was a lawyer, to work with his solicitor to prepare a final will and other documents. From 20 June to August the deceased gave instructions to Fast or his solicitor about the contents of a new will and draft wills were prepared. On 16 August the solicitor sent an email with a copy of a will prepared in accordance with instructions and requesting the deceased to decide what would happen if there were three trustees and they failed to reach a unanimous decision. On 17 August Mr Rockman, who had seen this document, told his friend and other executor Mr Brown that he considered the will to be finalised, and was ready to sign it, but that as this will was prepared on the basis that his divorce would be absolute, it could not be signed until that had happened.

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- The divorce became absolute on 23 August. On 24 August Mr Brown visited Mr Rockman in hospital and they went through the document of 17 August again. There had been no alteration to Mr Rockman's intention, as indicated on 17 August 2010, to give legal effect to the first unexecuted will once his divorce became absolute. However Mr Brown asked Mr Rockman whether a clause should be amended which required unanimous decision if there were three trustees and queried why decisions could not be by majority. Mr Rockman said that Mr Fast and Mr Brown should decide whether to not the clause should be amended.

- On Mr Brown instructing the solicitor to amend the will to provide for a majority decision of trustees the solicitor prepared a further draft will with this amendment. On 24 August Mr Brown attended on Mr Rockman in hospital with this document. Mr Rockman was lucid but had a fever and his hands were shaking too much to write. He did not see a copy of the document. He died 5 days later.

Habersberger J noted –

- The person seeking to propound an informal will must establish the requisite elements on a balance of probabilities. Furthermore, because of the seriousness of the matter the evidence must be carefully evaluated in accordance with the *Briginshaw* principle (see **page 20** of this paper).

- Because s. 9 was remedial it should be given a broad as opposed to a narrow construction, one which will serve to achieve the broad objects and purposes which parliament had in mind, ie to avoid failure of the testamentary purpose caused by non-compliance with the formalities due to ignorance or inadvertence.

- It was necessary but not sufficient, that the document set out the deceased's true testamentary intentions.

- On whether Mr Rockman intended the second unexecuted will to be his will –

    - There was no absolute rule that a document must have been seen or read to a person before a court could be satisfied that the person intended the document to be his or her will.

    - Although after the discussion with Mr Brown on 24 August Mr Rockman did not know what form the trustees' decision clause would ultimately take it was clear to him that the document that was to be subsequently presented to him for signing was to be

either the same as the one he was prepared to sign, or that document with a possible minor amendment to the trustees' decision clause as to which he was indifferent.

- His Honour rejected the argument that this document was not intended by Mr Rockman to be his will because he knew that it needed to be signed and properly witnessed in order to be operative, ie he rejected the argument that his intention was that it would only become his will when he did something more, namely sign it [112].

- The second unexecuted will was accordingly admitted to probate. If, however, this conclusion had been incorrect, the first unexecuted will would not have been admitted to probate because [123] although he had on 17 August 2010 expressed his intention to sign it once his divorce became absolute that intention ceased to exist on 24 August 2010 after the issue of the amendment to the trustees' decision clause was raised with him.

Other recent cases are: *Re Pearson (dec'd)* [2008] VSC 582 (application granted); *Re Becroft* [2009] VSC 481 (application granted); *Prucha v Standing* [2011] VSC 1990 (application not granted); *Re Will and Estate of Brian Bateman* [2011] VSC 277 (application granted).

In the Will and Estate of Rupe [2010] VSC 142 is an example of revocation under s. 9(2).

Recent Cases On Construction Of Wills

The topic of construction of wills is vast and what follows is only Victorian cases decided in the past year. They reflect the **common issues of general interpretation, construction of a disposition of real estate, the Rule in *Saunders v Vautier* and issue taking in lieu of a deceased parent.**

Marks v Marks [2013] VSC 75 (1 March 2013).

This case deals with a general point of interpretation. A testator died leaving a widow and the four children of his first marriage. His will: gave his widow a life interest in his share of one piece of real estate or in further property purchased or funds resulting from its sale, after which it fell into residue (cl. 5); provided that, as to another piece of real estate held on trust for sale, in substance his widow could live there for as long as she wanted or in any property purchased with its proceeds of sale (cl. 7); provided in cl. 6 that he left the residue of his estate to his trustee upon trust for sale calling in and conversion into money and:

"6.1 …

6.2 **TO PAY** to my said wife during her life so much or the whole of the annual income thereof as she in her sole discretion may require **AND I DIRECT** that any income foregone by my said wife and not determined by my Trustees to be retained by my estate shall be divided equally between my children **…**

6.3 Upon the death of my said wife to stand possessed of my residuary estate and any income thereon then undistributed in trust for … my children … "

The question was what the words in cl. 6.2 "as she in her sole discretion may require" ("the words") meant.

Habersberger J held –

- A will should be construed in a manner that will give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will was made, ie the court was entitled to sit in the testator's armchair. This principle allowed evidence of the surrounding circumstances to be admitted to assist in ascertaining the testator's intentions without the need to first establish any ambiguity.
- However, at common law, evidence of a testator's dispositive intention was inadmissible except where where the terms of a will were applicable indifferently to

more than one person or thing. This was relaxed somewhat by s. 36 of the Wills Act 1997 which provided, inter alia, that "(1) In any proceedings to construe a will, if the language used in a will renders the will or any part of the will - … (b) uncertain or ambiguous on the face of the will; or … evidence may be admitted to assist in the interpretation of that language."

- Accordingly, if after taking into account evidence that was only admissible under the armchair principle, there remained uncertainty or ambiguity as to the meaning of clause 6.2, then s 36(1)(b) might be called in aid.

- In construing the words, the Court must consider the terms of the whole instrument, and against the factual matrix, in order to ascertain its meaning. The plain meaning of the words should be given effect unless the words had a technical legal meaning in which case they should prima facie be given their strict technical meaning.

- The proper construction of the words was so much of the income as the widow needed for her personal lifestyle and living expenses which amount was up to her to decide and without her having to exhaust all of her income before she can ask for extra income [97]. Apart from concentrating on the meaning of "in her sole discretion" and "require", his Honour regarded as important that: under the scheme of his will, the testator intended to provide for his widow and children, and strike a balance between them, through the utilisation of life and remainder interests; once that testamentary intention was understood, it was reasonably clear that it was not the testator's intention to allow his widow to use her discretion in clause 6.2 to expand the class of beneficiaries or increase her assets so that she could then through her own will indirectly benefit such expanded objects.

- The words "in her sole discretion" were used in conjunction with the word "require". Having found that the testator had [76] chosen to use "require" to mean something different from asking for the income merely because the widow wanted it, it was reasonably clear that the words "in her sole discretion" were inserted to ensure that she was to be the sole person to decide the level of lifestyle which she wished to enjoy without the need to justify or give reasons for that decision. There was also no requirement that she exhaust her income before she could exercise her discretion to call for the extra income to meet her lifestyle and living expenses. However [77] the trustees were not obliged to pay her a sum of money merely because she asserted that it was for her lifestyle and living expenses. Her discretionary power existed in parallel with the trustees' concomitant obligations to administer the trust in

accordance with the terms of the will. Accordingly, she had to respond to any reasonable requests by the trustees to demonstrate that the money was needed for a particular purpose connected with her lifestyle and living expenses. Any requests for such information, and the manner in which Mrs Marks is to respond, must be within the spirit of clause 6.2, which requires the parties to co-operate and exercise good sense. This interpretation was [78] also consistent with the way the testator inserted the words "in her sole discretion" in clause 7.1.

Shaune v Bourgouin [2012] VSC 619.

This case concerns how a disposition of property is to be construed. The deceased, who had migrated from Europe, left an estate including a residential property at 23A (referred to in her will as 23) Murray Valley Highway, Bandiana. The deceased had 6 children, one who had not migrated to Australia, one who died before her will was made, another (Halina Galliard) who died after the will was made, and the defendant (Christine), the plaintiff (Danielle) and a brother Richard. The will included: a note that the deceased had made adequate provision for Richard and Danielle (cl. 2); a gift of the balance of any bank accounts to Danielle "for her own use and benefit absolutely" (cl. 3); a gift of any vehicle to Christine "for her own use and benefit absolutely" (cl. 4); a residuary gift to all children who survived her (cl. 6); and -

"5. I GIVE DEVISE AND BEQUEATH my house and land situate at 23 Murray Valley Highway, Kallara Estate, Bandiana together with all furniture and household effects contained therein to my Trustee UPON TRUST for my daughter CHRISTINE BOURGOUIN for her own use and benefit absolutely. Charged with the payment to my daughter HELENE GAILLARD (should the said HELENE GAILARD be then alive) of one half of the net proceeds of any sale which the said CHRISTINE BOURGOUIN may effect of the property PROVIDED FURTHER THAT my said daughter CHRISTINE BOURGOUIN shall be entitled to reside in the said house during her lifetime and should the said CHRISTINE BOURGOUIN predecease me or die without having disposed of the said house and land, such house and land shall pass to such of the children of the said CHRISTINE BOURGOUIN as shall survive her and me and then attain the age of eighteen (18) years and if more than one tenants in common in equal shares. I DIRECT that my daughter, the said CHRISTINE BOURGOUIN will allow HELEN GAILLARD and her family to spend their annual vacations at the house with Christine and her family if Helen wishes to do so."

The plaintiff issued an originating motion concerning the interpretation of cl. 5.

Kyrou J held or noted, inter alia –

- Section 42 of the Wills Act provided that (1) a disposition of real property to a person without words of limitation is to be construed as passing the whole estate or interest of the testator in that property to that person; but (2) that subsection (1) did not apply apply if a contrary intention appeared (whether in the will or elsewhere).

- Where a testator had made an absolute gift of property followed by words which are consistent with a lesser interest having been given in the property, unless it is intended that the subsequent or superadded words are to cut down the absolute interest given, then the superadded words will be treated as uncertain or repugnant and will not be enforced.

- Section 22A(1) of the Wills Act provided that (1) In the construction of a will acts, facts and circumstances touching intention of the testator shall be considered and evidence of such acts, facts and circumstances shall be admitted accordingly but evidence of a statement by the testator declaring the intention to be effected or which had been effected by the will or any part thereof shall not be received in proof of the intention declared unless the statement would apart from this section be received in proof of the intention declared.

- The disposition in clause 5 constituted an absolute gift to Christine because the phrase 'for her own use and benefit absolutely' was a formulation for a disposition of an estate in fee simple, and if cl. 5 had stopped at this point there would be no doubt that it constituted a devise to the defendant of the fee simple. Support for this was found by the use of the same phrase in cls. 3 and 4 and by the reference to sale in the next sentence. Determining the meaning of cl. 5 as a whole did not alter this, in particular: the charge to Halina would not have conferred a direct proprietary interest in the property on Halina, but at most a charge in relation to the proceeds of any sale; although the proviso that Christine should be entitled to reside in the house during her lifetime purported to confer a mere life interest no intention could be discerned from cl. 5 of the will as a whole that these words were to negate the absolute gift; the direction of what as to happen to the property if Christine predeceased the testatrix or died without having disposed of the property, did not cut down the clear intention to dispose of the fee simple expressed in the first sentence of cl. 5 and accordingly the purported gift over to her children was void; the provision about Halina staying at the property during holidays, sought to derogate from the absolute gift and did not evince a contrary intention for the purposes of s 42.

- The foregoing construction of cl 5 was supported by the context: cl. 2 made stated that the deceased made adequate provision for two of her four Australian-based children and

cl. 5 sought to make provision for the remaining two Australian-based children, namely, the defendant and Halina.

- Because cl. 5 was ambiguous, extrinsic evidence was admissible to assist in its interpretation and it was supported by extrinsic evidence.

Krstic v State Trustees Ltd [2012] VSC 344.

This case is a straightforward application of the Rule in Saunders v Vautier (1841) 4 Beav 115; 41 ER 482, which was that an adult beneficiary (or a number of adult beneficiaries acting together) who has (or between them have) an absolute, vested and indefeasible interest in the capital and income of property may at any time require the transfer of the property to him (or them) and may terminate any accumulation. The testator was survived by two sons aged at the date of hearing 24 and 20. They had no children. The will provided that they receive $20,000 each (CPI adjusted) on attaining 21, and receive the residue of the estate on respectively attaining 40 and 36. McMillan J found that upon each of the plaintiffs attaining 18 years the deceased's residuary estate vested in each of them absolutely and (the older son having already received his $20,000) upon the younger son attaining 18 he became absolutely entitled to $20,000 CPI adjusted.

Kavanagh v Reardon & Ors [2012] VSC 174.

This case concerns whether the children of deceased **issue** take under the will. The testatrix had two children, Reginald who did not survive her but had children, and Jennifer who did survive her. The will provided –

"3. I GIVE DEVISE AND BEQUEATH all my right title and interest in the property situate at and known as 12 Hakatere Street, Northcote or any other dwelling which I have purchased to reside in to my son Reginald Howard Reardon.

4. …

5. I GIVE DEVISE AND BEQUEATH the residue of my Estate … to my children … PROVIDED THAT if any child of mine should die before me or before attaining a vested interest leaving children then such children shall take equally the share which their parent would otherwise have taken."

The proceeding concerned the construction of cl. 3. Section 45(1) of the Wills Act broadly provides that, if a person makes a disposition to any of his or her issue, where one or more of the issue do not survive the testator for thirty days the issue of the deceased issue who so

survive the testator take the deceased issue's share of the disposition. Subsection (3) provided that subsection (1) did not apply if a contrary intention appeared in the will. Habersberger J found that a contrary intention appeared in the will, in that cl. 5 suggested that the testatrix turned her mind to what was to happen to the residue, should any of her two children pre-decease her, but no such provision was contained in cl. 3. The principle expressio unius exclusio alterius applied. The gift in cl. 3 accordingly lapsed and the property fell into residue.

Passing Over A Named Executor

The facts of *Mataska v Browne* [2013] VSC 62 (22 February 2013) are stated more fully under the heading of the ability to claw back property. In that case, so that she could recover the property given to her sister by their mother, the plaintiff sought that the sister be passed over as executor and sought a limited grant of letters of administration with the will annexed. McMillan J granted the relief sought, subject to argument about an appropriate person to be administrator, stating -

- In general a person who is named as executor by a testator is entitled to a grant of probate. Special circumstances are required to pass over an executor and the Court does so having regard to the due and proper administration of the estate and the interests of the parties beneficially entitled to the estate.
- Careful investigation was merited of whether the property gifted should form part of the estate. It could be assumed that defendant would not take this investigation. But this plaintiff could not commence proceedings against the defendant on behalf of estate without the consent of the defendant.
- The defendant was is in a clear position of conflict between her duty to the estate and her personal interest.
- The plaintiff had standing to bring this proceeding for the reasons set out above under ability to claw back property.

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Intestacy – Appointment of Administrator

Re Estate of Carey (dec'd) [2011] VSC 682 deals with a conflict between two persons equally entitled to be administrator. The deceased died intestate survived by a son and daughter. The son executed an authority authorising State Trustees to apply for letters of administration, which it did. The daughter caveated and also applied for letters of administration. The estate was worth over $11 m. which included the right to recover a loan to the daughter of $170,000, with interest, secured by mortgage.

Habersberger J stated –

- The person who had the greatest interest as beneficiary was normally entitled to be appointed. Here the siblings had equal rights. In an appropriate case, where there was an equal entitlement and one person was willing to act as administrator that person would be given preference over a trustee company appointed by the other beneficiary.

- Although unfitness to act included the situation where an executor or administrator had a conflict of duty and interest, not every such conflict disqualified an executor or administrator. Although the loan to the daughter raised a potential conflict of duty and interest she was not in this case disqualified by it, particularly because she did not dispute the debt and put forward a full statement of what she said was the debt, giving details, plus some supporting documentation. The son would have an appropriate remedy by applying to the court if he thought his sister was not dealing properly with the debt.

- The fact that State Trustees had applied first was not, in the circumstances, of any real weight or importance. And, although the fees to be charged by State Trustees were relevant, this was reduced by the ability of the administrator to seek commission.

Author: Philip Barton

Sundry Administration Issues – The Right To The Deceased's Body

In *Threlfall v Threlfall & Anor* [2009] VSC 283 Byrne J held: the executor of the deceased's will, or those in order of precedence entitled to letters of administration, have the right to receive a body for burial; this, however, is not an inflexible rule so that this order of precedence will yield to the circumstances of the case; accordingly, there being an intestacy, the coroner should have determined to release the body to the deceased's widow instead of his brother.

Author: Philip Barton

Sundry Administration Issues – Judicial Advice

In *Morris v Smoel & Ors* [2013] VSCA 11 the deceased's widow was given a life interest in a seaside property. Under Rule 54.02 McMillan J authorised the executors to sell the property to pay estate debts – the estate had debts of approximately $300,000 but no liquid assets. The largest debt was approximately $147,000 owed to the solicitors for the executors as to which there was a dispute whether some fees were properly incurred. A term of the order under appeal was that the proceeds of sale could not be used to pay costs and disbursements which were "disputed on reasonable grounds".

The appeal was dismissed. Maxwell P –

- Noted that s 37 of the Administration and Probate Act made clear that all of the assets of the estate are available for the payment of debts of the deceased, and that no disposition by will can stand in the way of payment of creditors.

- Stated that Order 54 enabled a personal representative or trustee to seek the advice and direction of the court. It was a summary procedure, intended to enable questions arising in the administration of an estate or a trust to be resolved cheaply and simply. It enabled the court to give advice which would protect the trustee or executor in respect of the course of action sought to be authorised. It was not the court's function to pass judgment on whether what the executors (or trustees) proposed to do was wise or unwise; rather the question for the court was whether the administrator had power to do what was proposed and whether it was improper for it to exercise that power in the postulated manner. The power was discretionary.

- As to the argument that the judge should have considered the manner in which the liabilities for legal costs had been accumulated or whether they had been properly incurred, it was open to the judge not to investigate disputed facts, although the court had power to do so. These were hotly contested questions to investigate which would be outside the scope of the proceeding. The narrow question was whether there was there anything improper about the proposed sale.

Author: Philip Barton

Sundry Administration Issues – Court Approval Of A Settlement

In *Brown-Sarre v Waddingham* [2012] VSC 116 an administrator conditionally compromised an appeal to the Supreme Court by a finance company from a VCAT decision in favour of the estate. He sought an order pursuant to Rule 54.02(2) to approve him entering into the Settlement Deed. The deceased's widow opposed this. Habersberger J approved the compromise, holding –

- The Court's role was not to consider the wisdom of a trustee's (including administrator's) exercise of discretion but to grant the application for an order approving the trustee's agreement to the compromise, if the Court was satisfied of the propriety of the application. In this case, that approach involves the Court considering whether: (a) the administrator's decision to agree to the compromise was within power; (b) there was any impropriety in the administrator's decision; (c) the administrator exercised his discretion in good faith; and (d) the administrator gave fair consideration to the relevant issues. It was not for the Court to tell the administrator how to exercise that discretion or whether a proposed exercise of discretion is necessarily correct.

- As to (a) the plaintiff, pursuant to s 19(1)(f) of the Trustee Act 1958, had the power to enter into the compromise. He also had other relevant powers;

- The administrator acted on the advice of counsel and solicitors and exercised his own judgment in a proper way including considering the particular interests of the sole beneficiary. Accordingly (b) – (d) were established.

See also *Commonwealth Bank of Australia v Sky Empire Pty Ltd* [2011] VSC 591 at [9] – [12].

Author: Philip Barton

Sundry Probate Issues – Order Of Death

Re Rowlings; Fraser v Thom [2010] VSC 626 is a basic application of s. 184 of the Property Law Act. A married couple died in a car crash, intestate, the wife being younger than the husband. The ultimate destination of their property would be different depending on who died last. Section 184 provided -

"… where, …, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the Court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, … "

Macaulay J held –

- Section 184 did not absolve the Court from its task of weighing all the evidence to endeavour to ascertain, without recourse to the presumption, which of the two persons died first.

- The word 'uncertain' in s. 184 meant that the court was not able to come to a conclusion on all the facts on the balance of probabilites as to who died first. If uncertainty was found to exist then the court must determine that the younger person survived the older, ie there was no discretion in the matter. In this case s. 184 was engaged and so Mrs Rowlings was declared to have survived her husband.

Author: Philip Barton

Removal Of Executors And Trustees

Pursuant to s 34(1)(c) of the Administration and Probate Act 1958, the Court has power to remove an executor where the executor "is unfit to act in such office". There is a similar power to appoint a new trustee in substitution for an existing trustee under s 48(1) of the Trustee Act 1958 and an inherent power in the Court to remove either an executor or a trustee.

A typical case is where an executor or trustee will not agree to a sale of property, illustrated by *Manocchio v Wilson* [2012] VSC 76. The deceased died on 14 May 2009. Probate of his will was granted to the plaintiff and defendant in October 2009. The estate was divided equally between the deceased's three children, being the plaintiff, defendant and a sibling. The main asset was a residential property in which the defendant lived. Between August 2009 and the issue on 25 November 2011 of an originating motion seeking his removal the defendant prevaricated about a sale including: refusing to clear out the house and prepare it for sale, shouting "not selling" and "family dispute"; not replying to correspondence or offers; and breaching a written agreement with the plaintiff concerning the sale. Throughout this the property was falling in value.

Habersberger J stated –

- The selection of the deceased's choice of executor should not lightly be set aside. However, the paramount considerations in the exercise of the Court's discretion are the welfare of the beneficiaries and the protection of their interests in the estate.

- Unfitness to act can be constituted not only by matters such as unwarranted delay in administration of the estate, failure to communicate with beneficiaries, failure to account, and unreasonable delay in paying beneficiaries their entitlement but also by a situation in which an executor has a conflict of duty and interest in carrying out his executorial duties. Not every conflict of duty and interest should result in removal of an executor, but an executor's conflict of duty and interest of a kind likely to affect the efficient and satisfactory administration of the estate is a proper basis for removal.

- The defendant as a co-executor and the sole occupant of the property for over two years without paying any rent was in a position of conflict of duty and interest. The only way in which the Court could have any confidence that the interests of all of the beneficiaries would be equally protected was by removing the defendant as a co-executor, on the

Author: Philip Barton

ground that he was unfit to act, so that the plaintiff would be able to obtain vacant possession and proceed to sale.

- The defendant was required to pay the costs of the proceeding on a solicitor-client basis.

Other recent cases include –

- *Mansour & Anor v Mansour* [2009] VSC 177. The trustee remained in possession of an estate property and so prevented the estate from receiving an income from, or selling. He also refused to permit his fellow trustees access to effect maintenance and repairs and so allowed the property to deteriorate. He refused to pay rent and other expenses in connection with the property and refused to vacate it. He was accordingly removed.

- *Matthews v Matthews* [2009] VSC 308. An executor was removed due to a combination of: this not being opposed; he having been overseas for some time; his failure to get in the estate assets; evidence that he owed money to the estate; his failure to distribute while applying estate funds for his own purposes; and delay.

- *Klement v Randles* [2009] VSC 320. An application for removal was dismissed. An appeal was dismissed in *Klement v Randles* [2010] VSCA 160.

- *Clarke v Clarke* [2010] VSC 143, being an unopposed application to have an administrator removed on medical grounds.

Executors' Commission

The Administration and Probate Act s. 65(1) provides that it shall be lawful for the Court to allow out of the assets of any deceased person to his executor administrator or trustee for the time being such commission or percentage not exceeding 5% for his pains and trouble as is just and reasonable. There have been four recent cases on calculation of amounts under s. 65, a case on a provision in a will enabling payment of non statutory commission, and a case on an agreement between a solicitor – executor and beneficiaries concerning commission.

Re the estate of Zsuzanna Gray (dec'd) [2010] VSC 173.

This was a claim under s. 65. The will appointed a solicitor as executor and provided –

"Any of my executors who practise a profession shall be entitled to be paid fees for work done by him or his firm on the same basis as if he were not one of my executors but employed to act on behalf of my executors and shall be entitled to apply to the Court for commission for his pains and trouble in addition."

The corpus of the estate was just over $1 m.

Daly AsJ held –

- The usual considerations governing the award of executors commission were set out in *Re Will and Estate of Stone (deceased); Patterson v Halliday* [2003] VSC 298. Although her Honour did not repeat these it appears that she was referring to paragraphs 27 – 30 of Smith J's judgment which stated -

  "[27] In assessing commission it was common ground that the Master had to consider at least the following:

  (a) the work and judgment involved in the realisation of assets and earning income,

  (b) the extent of administrative activities,

  (c) the responsibility generally,

  (d) the amount of work done not reflected in financial terms,

  (e) how long the estate was administered,

  (f) the size of the estate and its capacity to pay,

  (g) the work of a non-professional character not undertaken by the applicant and performed by professionals, and

  (h) executors' pains and troubles relative to the result.

  ...

29. …

30. In Vance, "Executor's Commission", citing re *Allan McLean deceased* (1912) 31 NZLR 139 at 144, the learned author states that:

"the expressions 'pains' and 'trouble' have been defined in the New Zealand case of *re Allan McLean deceased,* 'pains' - as responsibility, anxiety and worry, and 'trouble' - as covering the work done."

- If the solicitor received commission of 2.0% (which was roughly the value of his work as assessed by a costs consultant) that would provide reasonable compensation for his work in the administration, that is, his "troubles". However, limiting his commission to that amount would make no provision for his "pains": that is, the responsibility, anxiety and worry generated by his executorial function.

- As to pains the solicitor received nothing, because these "pains" in the discharge of his executorial function were substantially of his own making, ie: the solicitor wrote a letter in the form criticised in *Walker v D'Allesandro* (see below); he refused to provide a detailed bill of costs for his executorial work; he used the estate's funds for the payment of his legal costs to bring his claim for executors commission without consent or prior court order, and these well exceeded an estimate provided to the beneficiaries (however in *Re the estate of Zsuzanna Gray (dec'd) (No. 2)* referred to below her Honour softened this by stating at [14] that it was her view –

  "that in many cases it is unwise for executors to utilise estate funds to fund their claims for executors commission. Ultimately, the appropriateness of such conduct depends upon the circumstances of this case.")

- Her Honour added at [38] -

  "Further, while some of those "pains" were attributable to other matters outside his control, … I consider that he has been adequately compensated for those pains by being able to charge for his attendances in relation to those matters at a professional rate rather than at a clerical or administrative rate."

In *Re the estate of Zsuzanna Gray (dec'd) (No. 2)* [2010] VSC 269 Daly AsJ held that: in general an executor's costs of applying for commission should be treated as part of the costs of administration, and the costs of each of the parties, including the plaintiff, should be paid out of the estate; and this would have applied here, however they were greatly diminished by an effective Calderbank offer.

Re the will and estate of Mary Stewart Boundy (dec'd) [2010] VSC 648.

Gardiner AsJ dealt with a claim for commission under s. 65 on an estate of approximately $4 m. net in corpus and $110,000 net in income. The relevant factors were –

- Acrimony and tension between the applicants and their sister, who they had successfully applied to the Court to be removed as executrix, the litigation not being protracted;
- Ten properties had to be auctioned, involving a good deal of administrative work required in liaising with estate agents solicitors and others.
- However, $100,000 had been paid in legal fees to the solicitors for the estate, but there was little particularisation of what specific legal services were provided. His Honour took this into account with the words: "if a great deal of work has been carried out by solicitors in and about an executorship, the executors themselves should not be rewarded also for that work by way of commission." In the absence of explanation enabling an assessment of what part of the work, if any, for which the solicitors charged which could just as well have been performed by the applicants, his Honour discounted the amount otherwise awarded.

Applying *Re Will and Estate of Stone (deceased); Patterson v Halliday* his Honour allowed $60,000 commission on corpus (ie 1.45%) and $4,000 on income (ie 2.56%).

Re the will and estate of June Beryl Buckland (dec'd) [2010] VSC 649.

This was a claim under s. 65. The evidence of the executrix's work was in substance: the assets were located in four States of Australia and the executrix lived in Adelaide; she arranged the deceased's funeral and removed her personal effects from her nursing home room; she cleaned and prepared the deceased's house before its sale and arranged for its sale using agents; she prepared an analysis as to which of the deceased's assets were pre and post CGT; after considerable discussion with beneficiaries she arranged for the sale and reinvestment of the estate's investments; she arranged for the sale of the deceased's books and paintings, and the payment of her accounts; she appointed the deceased's solicitor and financial adviser, and appointed her own accountant, to assist her – this was not a situation whereby the legal and accounting advisors of the estate had effectively done much of the work; she made considerable investigations to, with consent, enable some payment to beneficiaries whose bequests were adeemed.

- As to the law the judge noted –

    - That, although a discretion was being exercised, Smith J's list of relevant factors in *Stone* covered the relevant criteria.

    - He referred to a statement in *Peter Henry Atkins as Executor of the Estate of Robert Charles Godfrey v Godfrey & Ors* [2006] WASC 83 that:

      "The Court may refuse commission on a number of grounds where there has been some misconduct in the execution of the executor's duties. If the misconduct is serious or amounts to fraud, commission will probably be refused. If the misconduct amounts to an honest or inadvertent breach of duty, commission may still be allowed. Commission may be reduced or, in serious cases, refused where there has been negligence in the carrying out of the executor's duties; …

      …

      … As to acts or neglects falling short of fraud or dishonesty, whether executors' commission should be refused or reduced will depend upon the severity of the breach, assessed according to its consequences and the culpability of the executor."

    - Whether a bequest under the will to the executor disentitled commission depended on discerning the testator's intention.

- His Honour awarded commission on corpus of $56,000 being approximately 2% and $4,000 commission on income being slightly under 2%.

Re Will and Estate of Foster (dec'd) [2012] VSC 315.

This is the most recent case under s. 65. In the circumstances which eventuated the will appointed the senior partner of a legal firm as executor. The will left some modest bequests and left the residue to a disabled grandchild. The executor had no prior contact with the family before the deceased's death and (paragraph [3]) "in the course of his executorship, he assumed (or, perhaps had thrust upon him) the role of being a major source of advice and support to [the grandchild]". The net value of the estate was about $290,000. The solicitor sought commission of 3% on corpus and income. He swore an affidavit detailing many pieces of work. These included -

- the residuary beneficiary placed special reliance upon him in the course of his administration of the estate, he had difficulty obtaining instructions from her, and he attended on her monthly for 2½ years. He had 11 conferences with her and she attended his office on 118 occasions to pay rent for her occupation of estate property;

- having to deal with a Part IV proceeding which settled just before hearing. As a direct result of preparing the Part IV defence the granddaughter received a medical diagnosis and he had to provide support for her and organise appointments and travel for her;

- he had to do substantial work to implement the terms of settlement and to sell a property which was in poor state;

- he had to redeem a number of assets;

- his firm was paid for the application for probate and administration of the estate but there was no overlap between this and the defence of the Part IV claim and the pains and troubles that were the subject of claim for commission.

The judge upheld the amount claimed and complimented the solicitor on the discharge of his duties.

Szmulewicz v *Recht & Another; Re the will and estate of John Szmulewicz (dec'd)* [2011] VSC 368 is a notable case concerning a provision in a will related to commission. Probate of a will was granted to the executors named therein, the defendants, being respectively the deceased's solicitor of some years standing and his accountant. The solicitor was a partner in the firm which prepared the will. Clause 22 of the will provided:

"Entitlement to Charge

(a) Any trustee being a legal practitioner or accountant may act in a professional capacity and shall be entitled to charge and be paid all professional charges for any business or act done by him in a professional capacity in connection with my Will.

(b) In addition to 22(a) above if any of the named executors proves this my Will then, in addition to being paid for professional fees, he/they shall be entitled to retain from my estate commission equal to 3.5% of the gross capital value of my estate and an amount equal to 5% of the income received by my executor, such charges are to be for the provision of non legal and non accounting work and in connection with the Trusts established by my Will."

The Inventory totalled $6,515,339.18. The defendants paid themselves approximately $260,000 for commission as well as the firm being paid approximately $21,000 for legal work. The beneficiaries under the will challenged **cl. 22**. The solicitor gave evidence concerning the making of the will.

Habersberger J held:

- The preparation of the will containing cl. 22(b) was a breach of fiduciary duty, because of the conflict between that duty and the solicitors' personal interests, unless the defendants could show that cl. 22(b) was included with the informed consent of the deceased. Informed consent meant that the testator had to be informed of all the options open to him before he gave his consent. What the testator was not told by the solicitor was that: there was no automatic right for executors to receive commission; without cl. 22(b) the executors could still apply under s. 65; if clause 22(b) was included, then the executors would be entitled to receive the percentages stated therein irrespective of the amount of work, and without any independent scrutiny, such as by the Court under s 65; if clause 22(b) was included, then the beneficiaries would be unable to challenge the executors' remuneration or subject it to independent scrutiny; the rates included in clause 22(b) were those decided by the solicitor and his partner and were not fixed by law and could be reduced by the testator.

- A solicitor putting forward a will to a client to sign with a clause such as this must explain to the client all of the pros and cons of the inclusion of the clause, even if it was the client who suggested the clause.

- Habersberger J accordingly found (at [49]) a breach of fiduciary duty by the solicitor. The other executor was also caught by this. He also -

    - Rejected the argument that cl. 22(b) was really to be characterised as an (acceptable) gratuitous gift (at [28] – [29], [42]).

    - Rejected the argument that the plaintiffs were estopped on the alleged ground of their conduct in allowing the defendants to administer the estate knowing the defendants were relying upon clause 22(b).

    - Noted that the solicitor had breached Rule 10.1.3 of the Professional Conduct and Practice Rules 2005 which provided:

      "10 Receiving a Benefit Under a Will or Other Instrument

      10.1 A practitioner who receives instructions from a client to draw a will appointing the practitioner or an associate of the practitioner an executor must inform the client in writing before the client signs the will –

      …

      10.1.3 if the practitioner or the practitioner's firm or associate has an entitlement to claim commission, that the person could appoint as executor a person who might make no claim for commission."

- His Honour accordingly declared in substance that the defendants held what was paid to them on trust for the estate and an order for repayment, but this amount was then to be held pending a determination of applications now made by the executors under s. 65.

Walker & Ors v D'Alessandro [2010] VSC 15 **has some similarity to *Szmulewicz* in its reiteration of fiduciary duties, but it concerns not a will but the relationship between executor/solicitor and beneficiaries in the context of** an agreement between a solicitor and beneficiaries for payment of commission. The defendant solicitor obtained probate of a will. The estate was worth over $1.6 m. Probate was granted in 2007. Although the estate administration was uncomplicated, the solicitor on 1 March 2008 informed one beneficiary, in answer to the question of when payment to the beneficiaries might be expected, that the estate was complicated and that he was entitled to 5% commission as executor but was only going to take 3%, and that if there was a dispute about commission it would have to go to the Supreme Court and "it would hold up settlement for some time."

On 12 March the solicitor's firm sent a letter to all beneficiaries in substance stating that if they wanted a quick interim distribution, they should agree to the 3% commission, and that if they did not agree to that, then any distribution would be delayed, perhaps considerably. The letter also included the following –

> "The issues which have yet to be finalised are-
>
> 1. Taxation returns …
> 2. My firm's legal costs have to be paid. At this stage I am able to say that they should be in the range of $16,000 - $17,000.
> 3. Executor's commission. The law allows executors to be recompensed for their time and trouble to administer the estate of the person who has died and distribute the estate in accordance with the terms of the will. The Supreme Court can allow up to 5% of the estate to be paid to the executor. There are two options-
>
>   1. Mr D'Alessandro makes application to the Supreme Court and he will accept whatever the Court grants to him;
>
>   2. because all the beneficiaries are adults, you and the other beneficiaries may authorise the payment of executor's commission to Mr D'Alessandro without resorting to court action which will take time and all costs incurred will be payable by the estate. The figure Mr D'Alessandro has in mind to claim is 3% of the estate which in the circumstances is considered to be a fair claim.
>
> I enclose a form of authority. Please indicate what your preference is, …
>
> Please note that the estate cannot be distributed until all of the above issues are resolved.

I am prepared to recommend a partial distribution of, say, $1,400,000.00 to be made by the end of this month (when the term deposit matures) **if you and the other beneficiaries are all of the same opinion on the question of executor's commission, i.e. allow Mr D'Alessandro to be paid executor's commission at the rate of 3% of the total estate and return to me the signed authority.** I will then be able to arrange a partial distribution.

If the beneficiaries require Mr D'Alessandro to make an application to court, I can't say with any degree of accuracy when a distribution will be made, perhaps later in the year.

… "

In laJte March 2008 each beneficiary signed the authority referred to in the letter, inter alia directing the solicitor –

"1. To pay [the executor] executor's commission calculated at the rate of three (3) per rent (sic) of the corpus and income of the estate.

2. Advise [the executor] to make Application to the Supreme Court of Victoria for a grant of executor's commission."

T. Forrest J. construed this document as containing alternative methods of calculating the executor's commission and stated that all beneficiaries elected to accept the first option. The three plaintiffs gave evidence that they felt pressured into signing this document.

His Honour found or held -

- The implication in the letter that an interim distribution could not be made until the beneficiaries agreed on his commission was false, and was calculated to, and did, exert influence on the plaintiffs.

- Neither the plaintiffs nor the other beneficiaries sought legal advice before signing the consent documents. In answer to a submission that after the receipt of the letter of 12 March the plaintiffs could have sought independent advice, and so the solicitor was relieved of his obligation to fully inform the plaintiffs, the judge answered at [36] that a "fiduciary is not some canny contracting counterparty to be watched like a hawk. He is the principal's representative."

- Before signing these documents the beneficiaries were given no advice beyond what the letter of 12 March stated.

- As executor and trustee the solicitor owed a fiduciary duty to the beneficiaries. Executors' commission was an an exception to the general rule that a fiduciary cannot

profit from his position as executor/trustee, but only in appropriate circumstances and after close scrutiny. His Honour concluded at [30] -

"I consider that an executor who is also solicitor for the estate and who is seeking to procure the beneficiaries' consent to charge an executors commission, at a bare minimum ought disclose the following, in order for that consent to be informed:

(a) The work that he has done to justify the commission. This should be done with particularity.

(b) If he is invoicing the estate for legal fees and disbursements he ought identify with particularity what constitutes the basis for same. Only then can a beneficiary accurately measure the 'pains and troubles' occasioned to the executor beyond the subject matter of those legal fees and disbursements.

(c) That the beneficiaries are entitled to have this Court assess his commission pursuant to s 65 of the Act. This needs to be explained fully.

(d) That it is desirable that the beneficiaries seek independent legal advice as to their position on this issue of consent. In many cases where the beneficiaries are unsophisticated people and the issues are complex he ought insist upon them receiving independent legal advice and ought not enter into any commission agreement until they have."

- The solicitor failed to discharge his fiduciary duty by not obtaining informed consent.

Professional Negligence – A Solicitor's Duty To A Person Seeking Probate

This duty is expounded in *Lederberger & Anor v Mediterranean Olives Financial Pty Ltd & Ors* [2012] VSCA 262. A testator established a company which carried on a business. His will left a third of his business each to two sons and a third on trust in the estate with the income of that share to go to his wife the executrix. He died in 2000. The widow retained the 6th respondent firm (the solicitors) to advise and act for her in proving the will. In August 2003 one son Samuel bought his brother's share of the business. In September 2003 probate was granted to the widow whereupon she became the sole executrix and trustee. In October 2003, **but resolved on before probate was granted,** the business structure changed, one element of which was that a partnership was established the members of which were the widow in her capacity as trustee of the estate and Samuel.

In 2006 and 2007 Samuel signed a number of documents to which the first four respondents were parties, being agricultural contracts related to tax effective schemes. The first four respondents alleged that contracts were entered into with members of the partnership. They sought to recover from the individual partners debts arising from those contracts. The trial judge found that the widow, as trustee of the estate, was liable for the partnership debts owing to the first four respondents. The judge dismissed third party proceedings by her against the solicitors. She appealed.

The Court of Appeal found that the acts of Samuel had been insufficient to render the widow liable for the partnership debts and accordingly the appeal succeeded on this ground. However the court also stated that, if it had found the widow liable, it would have found the solicitors liable to her. It reasoned as follows –

Not at issue at trial, or conceded by the solicitors' counsel were:

- the solicitors knew that the executrix was aged 82, with no prior business experience and with no capacity to work in the business;
- it was an implied term of the retainer, under which she retained the solicitors to advise and act for her in proving the will and in obtaining probate, that the solicitors would act with due skill and care;
- the solicitors failed to advise her that by obtaining probate of the will she would expose herself to personal liability for the debts of the business and neglected to

Author: Philip Barton

advise her that, if she wished to obtain probate, she ought take steps to exclude herself from personal liability for the business debts by means of suitable contractual provisions. The solicitors thereby breached the implied term of due skill and care and further or alternatively were negligent.

On appeal counsel for the solicitors attempted to escape from the concessions made at trial. The court rejected this and stated -

"99 In case the matter goes further, however, we add that, if duty were in issue, we would in any event be disposed to hold that Sterling & Sheink owed Mrs Lederberg a duty of care in the circumstances alleged, to advise her that, by accepting appointment as executrix, she would be exposing herself to personal liability for the debts of the Business and that, because of the arrangements into which Samuel Lederberger had entered, she would be the only natural person directly exposed to those liabilities.

100 … it has long been accepted that a solicitor should make clear to his client the legal effect of a step which the client is proposing to take. Accordingly, if, as in this case, a solicitor is retained generally to act in a client's interests in relation to a transaction into which the client is proposing to enter – here, obtaining probate and consequently accepting appointment qua trustee as a member of the partnership – the solicitor is bound to go through the contractual documents – here, at least the will read in light of the circumstances which were known to obtain – and explain to the client in terms she is likely to understand the rights and obligations to which it will subject her. Especially is that so where, as here, the client is inexperienced in the relevant area or the documents are in unusual form. …

101 It is sometimes said that the duty is confined to warning on the hidden pitfalls and legal obscurities of the transaction in view and that a solicitor is not required to offer any advice as to its perceived business efficacy. But it depends on the circumstances of the case. Where, as here, in the course of performing a retainer a solicitor becomes aware of information which is not confidential and is of potential significance, it is to be expected that the solicitor will draw it to the attention of the client and point out its ramifications.

102 In this case, Sterling & Sheink acted for the deceased and drew his will. They also acted for Samuel Lederberger and drew the documents for the implementation of the arrangements which he undertook on the advice of Mr Lebovits. …

103 … This is a case in which a client plainly lacking in sophistication, and so not knowing what specific advice to ask for, was ex facie reliant on her solicitors to advise her in relation to the hidden pitfalls and legal obscurities of accepting appointment as executrix, and thereby entering into a partnership for the debts and liabilities of which she alone would be personally liable.

104 … On its facts, it falls within the ambit of the established duty of a solicitor to make clear to his client the legal effect of a transaction into which the client is proposing to enter and so to explain the hidden pitfalls and legal obscurities of what is proposed."

The court also held that this negligence was causative of any loss.