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Property & Probate

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Family Provision Paper

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James Catlin's CommBar profile

In 2012 the Victorian Law reform commission ("**VLRC**") commenced a review into Victoria succession laws and in particular the subjects of: Wills, Family Provision, Intestacy, Executors, Small Estates, and Estate Debts.

Consultation papers on each subject were circulated [1] and submissions to the public invited. The Property and Probate section ("**PP**") of *Commbar* made a 41 page submission after consultation with members. This may be viewed here.

By reason of the breadth of this review and *Commbar's* response this article sets out the "problems" with current law and practice identified by the VLRC on one of the subjects by reason of its significance as an area of work for the Victorian Bar, Family Provision. These "problems" indicate where complaints, lobbying and research has gained traction with the VLRC and signposts likely areas of pressure for future reform. The pressure could be substantial because, as the VLRC notes, the *Administration and Probate Act*, unlike the *Wills Act* has never been comprehensively reviewed

An additional article on the Commbar web site summarises the PP submission on the subject of Family Provision.

Recommendations previously made by the National Committee for Uniform Succession Laws with a view to uniform succession law and practice across Australia are referred to often as are the views of some academics. The National Committee, in the VLRC's words "*made a number of recommendations for reform which, if adopted, would result in substantial changes to family provision law in Victoria*". Otherwise, however, the identity of particular stakeholders whose views have been given weight is hidden. The Victorian bench is believed to have strong views on reform. The character and weight that has been given to these views is unknown. The problems highlighted were::

(a) the extent to which the current law enables people to make opportunistic or non-genuine claims on estates

(b) the problem of high legal costs that are often paid out of the estate

(c) the suggestion that people are dealing with their assets towards the end of their lives to frustrate the operation of family provision laws.

The paper states a clear predisposition to reform in two areas: limiting eligibility to make a family provision application and amending costs rules and principles.

The review cites the problem of "*opportunistic*" claims that entail "*gaming executors into settlement in order to protect the estate from litigation costs and delays*". The evidence or extent of the problem is not disclosed. It is merely stated to exist as a lead in the discussions of how the law on costs might be changed to ameliorate the problem. The review concluded that the norm is that unsuccessful client's bare their own costs [2] and the power to make orders against unsuccessful claimants is "*very rarely exercised*" and thus that s.97(7) of the APA has failed. It also concluded that the power to circumvent unmeritorious claims through application for summary judgment is rarely exercised while noting that determined by contests of fact when all the facts are not yet in.

1. insert a hyperlink to here
2 at [2.50]

And so the review asked the questions:

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

Does section 97(7) of the Administration and Probate Act 1958 (Vic), which permits the court to order an unsuccessful applicant to pay their own costs and the costs of the defendant personal representative, deter opportunistic applicants from making family provision claims? Does the power of the court to summarily dismiss claims deter opportunistic applicants from making family provision claims?

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

Disproportionate costs relative to the size of the estate are also expressed to be a problem as a matter of fact. The review relied on a NSW/Vic study by Prue Vines to conclude that costs were disproportionate-greater than 25% of the value of the estate-in a "*significant number of cases*". She identified the smallness of estates, use of senior counsel and longer trials as key drivers of disproportionality. The VRLC expressly sought more evidence on the issue.

A revolutionary change raised by the review is power over "notional estate" or transactions before death as currently exists in New South Wales and the UK. The VLRC "heard" transactions designed to defeat a family provision law are common with known methods being moving property into trusts, superannuation or joint ownership. On the other hand it concluded that in the absence of any evidence of such transactions taking place it would not recommended extending the Courts' power. This is a clear divergence from the position of the National Committee which recommends adoption of the New South Wales provisions across Australia if the experience of the New South Wales provisions was favourable. The position in New South Wales is that such provisions have gained widespread acceptance but the VLRC has queried the empirical basis for this conclusion hence the question:

FP7 *To what extent do people deal with their assets during their life in order to minimise the property that is in their estate and frustrate the operation of family provision laws? What are some examples of this?*

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

Perhaps the most significant change ventured by the VLRC would change the standard two-part test to eligibility for provision. The approach of the National Committee was that of four classes of application, the first three classes, spouses, defactos and non adult children would have automatic eligibility to make an application. The fourth category, those to *whom a testator owes a responsibility to provide maintenance, education or advancement in life* would be subject to the traditional list of statutory factors. The VLRC noted that the first three categories will almost always be subsumed within the fourth category and that while a number of states had reviewed their family provision laws none had adopted the National Committee's 3 classes and one criteria approach. Thus the VLRC asked:

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

FP12 Should Victoria limit eligibility to make a family provision application in the same way that New South Wales has?

FP14 Should Victoria retain its current 'responsibility' criterion for eligibility to make a family provision application, but require applicants to have been dependent on the deceased person? If so, should 'dependence' be limited to financial dependence?

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

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

Additional questions were

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

FP18 Should one of the following costs rules apply, as a starting point, when an applicant is unsuccessful in family provision proceedings?

(a) 'Loser pays, costs follow the event'—that is, both parties' costs are borne by the unsuccessful applicant as in other civil proceedings.

(b) 'No order as to costs'—the applicant bears the burden of their own costs.

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

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

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

The PP's response will be dealt with in a separate article on the Commbar website.