NEWSLETTER

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Estate Litigation Newsletter

Welcome to our first Estate Litigation newsletter

This quarter we have included news on:

- contesting wills
- a case note on a testator family maintenance claim
- the role of an executor
- what happens if you die without leaving a will.

Please do not hesitate to contact us if you would like more information on any topic, whether covered in this newsletter or not. We hope you find the newsletter informative and useful.

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Contesting wills

Introduction

Have you or someone you know been pressured into changing a will?

Was the will of someone you know made when they may not have had the capacity to do so?

Did the person making the will lack knowledge about the contents of the will?

If the answer to these questions is 'Yes' or 'I'm not sure', there may be grounds for challenging the will.

If successful, a challenge can invalidate a will or part of it.

Grounds for contesting a will

In addition to the formal requirements for executing a valid will, courts have developed a number of further protections:

- the will must be made by a person with testamentary capacity;
- the will maker must have knowledge of the contents of the will and approve those contents; and
- the will maker must not be subjected to the undue influence of others.

Who can challenge a will?

The person challenging a will is usually someone who was provided for under an earlier will or who would be provided for under the legislation dealing with intestacy.

When should a challenge be made?

While a challenge to a will can be made after probate has been granted and an executor appointed, it is best if the challenge is made before this occurs.

Testamentary capacity

A will maker must have the required mental capacity at the time they make the will.

A court will look at whether a person was of sound mind, memory and understanding. This will include an understanding of the property that is being disposed of and the nature of the will-making process.

A will maker needs to have the ability to weigh up the considerations (such as whom property should go to) that would normally occur to a will maker.

Expert medical evidence of capacity is often relied upon in attempts to contest a will.

Knowledge and approval

The need to prove that the will maker had knowledge of and approved the contents of the will only arises when circumstances exist that cause suspicion.

When suspicions are raised that a will maker did not know of the contents of the will, the fact that the will has been properly executed is not enough.

The common circumstance when this arises is when a new will has been drafted and the will maker has not had the will explained properly to them or been given a proper opportunity to read it.

Testamentary undue influence

Testamentary undue influence is very difficult to prove.

The focus of the test is on actual coercion of the maker of the will, but that coercion does not need to be achieved by threat or force. Evidence of the ability to coerce or influence is not enough. In effect, what must be shown is that the will maker has been made to do something they did not want to do.

The onus of proving testamentary undue influence is on the person seeking to invalidate the will.

Successful attempts by people to persuade or make emotional appeals to will makers to provide for them, without more, are very unlikely to be found to have reached the level of undue influence.

What happens after a successful challenge to a will is made?

If a will is successfully contested and a prior will exists that has not been contested, the prior will prevails.

If no other will exists, the legislation dealing with intestacy will apply. Generally speaking, this means that the person's spouse, children and other next of kin will have priority.

Seek advice

Attempts to invalidate a will should be considered carefully before being commenced.

Case note: *In the Matter of the Will of Vourdoulidis* **[2013] VSC 34**

Background

The Victorian Supreme Court recently held that a testator had a responsibility to make proper provision for the support and maintenance of his cousin and had failed to discharge that responsibility.

Summary

Theodosis Moussageas made an application for further provision from the estate of his late cousin Nikos Vourdoulidis (**the deceased**) under the provisions of Part IV of the *Administration and Probate Act 1958* (Vic) (**Act**).

The Supreme Court can make an order under Part IV of the Act if it is satisfied that the deceased had a responsibility to provide for the applicant and the deceased's will did not make adequate provision for the applicant's maintenance and support.

An applicant bringing a Part IV testator's maintenance claim bears the onus of proving that they should have received a larger share of the estate. A Part IV application can be brought by an applicant even if the deceased died intestate (without a valid will).

In determining what provision should have been made, the court must consider what a wise and just person would have thought it their moral duty to provide if they had been aware

of all the circumstances. Each case will turn on its own facts and circumstances, but consideration must be given to the 12 discretionary factors set in section 91(4)(e)-(p) of the Act.

Mr Moussageas had assumed responsibility for the deceased's welfare over a 14-year period.

Associate Justice Zammit held that provision should be made for Mr Moussageas by providing a $150,000 legacy from the deceased's $217,000 estate.

Facts

The deceased had an intellectual disability and suffered from significant mental health issues. He was 51 years old at the time of his death and had never lived independently. He died intestate and his estate, which consisted largely of an inheritance he received from his mother's estate in 2005, passed in equal shares, under the rules of intestacy, to his nearest next of kin, his maternal uncle and aunts who resided in Greece. The beneficiaries were the siblings of Mr Moussageas' deceased father.

The deceased's only family in Australia, other than his parents, was his cousin, Mr Moussageas.

Mr Moussageas was born in Australia but lived in Greece for a period of 30 years, returning in 1991 when he developed a close relationship with his cousin.

Although the deceased's relationship with Mr Moussageas was based on familial ties, it was characterised by a series of obligations and expectations that Mr Moussageas take responsibility for the deceased's welfare, especially after the death of the deceased's father in 1992. Mr Moussageas willingly took on the responsibility and assisted the deceased's mother in caring for the deceased on a daily basis. When Mrs Vourdoulidis died in 2005, Mr Moussageas visited the deceased on a regular basis and liaised with social workers, the Department of Human Services and members of parliament to ensure that the deceased was being adequately cared for. When the deceased ran away from his lodgings, became violent or refused to leave the homes of family friends, members of the Greek community would contact Mr Moussageas, asking that he collect the deceased.

Mr Moussageas contributed to the deceased's welfare from 1992 until mid-2006, when the deceased became increasingly violent and irrational. At that time Mr Moussageas' own health was deteriorating and on his doctor's advice, he ceased his involvement with the deceased, seeing or speaking to him infrequently in the two-year period before his death in late November 2008.

Decision

Associate Justice Zammit gave the greatest weight to the first of the 12 discretionary criteria outlined in section 91(4) of the Act: the nature and length of the relationship between the deceased and the applicant.

The fact that the deceased and Mr Moussageas were first cousins did not give rise to any presumption regarding the application. Rather, it was the 'strong and enduring' nature of their relationship, as well as Mr Moussageas' contribution to the deceased's life, which went 'beyond acts of kindness or consideration' and demonstrated the 'particular quality' required to give rise to the responsibility on the part of the deceased.

In light of these circumstances, the deceased had a responsibility to make proper provision for Mr Moussageas in his will.

Comment

This case demonstrates that people close to the deceased, who are able to show some dependency on them, may to apply to the court if they believe they should have been provided for out of the deceased's estate.

The role of an executor

'Tis impossible to be sure of any thing but Death and Taxes.[1]

This famous quote has stood the test of time, arguably so to the corollary, that when making a will, a person is faced with the decision of appointing an executor.

[1] Christopher Bullock, *The Cobbler of Preston* (1716).

Introduction

Succession laws operative in Victoria include the *Wills Act 1997* (Vic) and the *Administration and Probate Act 1958* (Vic). They regulate how property is administered and distributed upon the owner's death.

Simply stated, once probate has been granted,[2] the role of the executor is to gather up the estate assets, open an estate bank account, sell assets, pay creditors and ultimately distribute the estate assets (after debts, taxes and administration expenses are paid) to the beneficiaries in accordance with the terms of the will. In carrying out this function, the executor (a fiduciary of the beneficiaries) has an obligation to act in good faith for and in the best interest of the beneficiaries.

Suffice to say, the decision to appoint an executor and the decision to accept the appointment are both very difficult.

Appointing an executor

The considerations of the will maker or incumbent executor fall largely into one of two categories. Those that relate to the characteristics of the candidate, and those that relate to the relationships between the candidate and the beneficiaries.

Bearing in mind that a simple probate may take 9 to 12 months to complete, an executor should be someone who: is available, willing and able to do the work; has attention for detail and record keeping; has sound communication skills; and has an understanding of investments and taxes. Logically, the role also requires someone who is trustworthy and unbiased; however these characteristics should be viewed upon the background of the candidate's relationships with the beneficiaries (the candidate may even be a beneficiary), thus identifying any circumstances that may prevent the candidate from remaining unbiased and impinge upon their ability to handle and resolve conflict.

The 'usual suspects' to perform the role of executor include a family member, trusted friend, solicitor, trustee company, accountant or other professional. In most cases, two executors are appointed to protect against circumstances where one of the named executors is unwilling or unable to accept the appointment.[3]

Regardless of whether you are in the shoes of the will maker and faced with the decision of who to appoint as executor, or in the shoes of the named executor and faced with the decision of accepting the appointment, the considerations are much the same, albeit with varying degrees of objectivity.

The role of an executor

The role of executor is complex and time consuming and encompasses many and varied tasks, including:

- locating, reviewing and considering the validity of the will;
- considering the effects of the marriage/divorce of the will maker, or the deaths of named beneficiaries;
- contacting the beneficiaries;
- arranging the funeral/memorial;
- contacting organisations, insurance agents, banks, professionals and service providers;
- determining the estate's assets and liabilities;
- submitting a probate advertisement for the Supreme Court website;
- applying for and obtaining a grant of probate from the Supreme Court;
- advertising a 'notice to creditors' in the newspaper;
- addressing any Testator Family Maintenance (**TFM**) claims;[4]
- assessing the validity of creditors' claims;
- arranging for payment of claims from the estate or legal defence to claims on the estate;
- managing the estate's assets (including real property, personal property, insurance and superannuation);
- maintaining detailed records of all transactions;
- preparing and lodging tax returns;
- transferring assets to the beneficiaries;
- preparing and lodging final estate tax returns; and
- preparing a financial statement of the estate for the beneficiaries.

[2] A grant of probate certifies that the will is the last and valid will of the deceased person and confirms the authority of the executor named in the will to administer the estate.

[3] If two or more executors are appointed, section 18 of the *Administration and Probate Act 1958* (Vic) provides that any one of them may exercise all the powers.

[4] TFM claims can be made within the six-month period after the date of grant of probate.

Comment

This list, while not exhaustive, supports the idea that the role of executor should not be given or received as an honorary role. The decision should be carefully considered, taking into account what is required to fulfil the role against the background of the respective relationships in play, and in light of these circumstances, whether the fiduciary duty owed by the executor is compromised.

Simply appointing an executor by default, and in turn blindly accepting the appointment by default, is problematic and ripe for litigation.

Will power

Do you have a will? If not, be wary because your estate may not be distributed in accordance with your wishes.

What is intestacy?

A person who dies without leaving a will, is known to have died 'intestate'. In that situation, an estate is distributed according to legislation rather than to a deceased's wishes.

Administration

In order for an estate to be administered and the assets of the estate to be transferred to those entitled to them, a court will appoint an administrator. An administration is required to collect the assets of the deceased and distribute them to the beneficiaries. This person can be someone known to the deceased or an independent person like an individual at a trustee company.

However, the administrator appointed by the court may be challenged by anyone who thinks that the person appointed is not capable or does not have the best interests of the beneficiaries at heart. For this reason, it is important to have a will in place that details the person or people you want to administer your estate after your death. This person is known as an executor.

Distribution

In the event of intestacy, the *Administration and Probate Act 1958* (Vic) details how an estate will be distributed. A broad summary of distribution may be as follows:

1 to the surviving spouse or domestic partner;

2 to the surviving children equally;

3 where there are no spouses, domestic partners or children, to any living next of kin;

4 where there are no surviving spouses, domestic partners, or children or next of kin, the estate may go to the government.

In some instances, searching for the next of kin can take months, resulting in the estate not being distributed in a timely fashion. Where the next of kin are found, they may be distant relatives who did not know the deceased but who are able to inherit based on their blood line. To avoid your estate being inherited by people whom you do not know or do not want to inherit your property, consider making a valid will.

Further provision

People close to the deceased, be they family members, friends, same sex partners, de facto partners or other people who can show dependency on the deceased, may make an application to the court if they believe that they should have been provided for by the deceased. This is a testator family maintenance claim. Even though such claims can be made regardless of whether the deceased left a will or not, there may be a higher chance of a claim being brought where no will exists and the deceased did not make their intentions known.

Seek advice

It is preferable that you have a valid will in place to ensure that distribution is made according to your wishes. If you already have a will, check to see that it is still relevant and reflects your intentions as they stand today.

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Team Member Profile

Peter Window, Partner, Estate Planning & Probate and Commercial Property

Peter's clients value his ability to identify issues quickly and his practical approach to solving any problems. His practice focuses on property law and, in particular, estate planning.

His expertise covers dealing with complex wills and estate issues and he advises on estate planning and business succession. His clients include individuals, public and private companies and statutory authorities, and he has particular experience in managing the affairs of high net worth individuals.

Peter also has expertise in general property law and acts for a range of individuals and businesses, including vendors, purchasers and landlords. His expertise covers the acquisition and disposition of all types of property, including leasehold, commercial, freehold, residential and developments. He is experienced with matters involving adverse possession and title disputes. He also advises property developers on broad-acre and multi unit developments for both residential and commercial use.