TESTAMENTARY DISPUTES

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Part IV of the Administration and Probate Act 1958

1 The *Wills Act 1997* (Vic) makes provision for the making and construction (that is, interpretation) of wills. Generally, a will is revoked by marriage or divorce,[1] or a decree for judicial separation,[2] but not, it appears, by mere separation.

2 The *Administration and Probate Act 1958* (Vic) makes provision for the granting of probate of wills and the administration of estates of deceased persons.[3] Such persons can die leaving a valid will; that is, they can die testate, or without such a will; that is, die intestate. The *Administration and Probate Act 1958* provides for the administration of the estate by an executor, generally in accordance with the will. The Act provides also for the distribution by an administrator of the estate of a deceased person who dies intestate. In this case (where there is no will), the administrator is bound to distribute the estate in accordance with a statutory scheme for distribution. That scheme is set out in the Act.[4] The scheme provides for the distribution of the estate amongst the next of kin (including the spouse (if any) of the deceased.)

3 Part IV of the Act enables persons to apply for provision out of the estate, where such provision is in accordance with neither the will nor the statutory scheme.

4 Pursuant to s97 of the Act, every order made by the court under Part IV (subject to the provisions therein) operates and takes effect, where the deceased dies

[1] See ss13 and 14 of the Act.
[2] See s159(3) of the *Marriage Act 1958* (Vic).
[3] See s6 of the Act.
[4] See Div 6 of Part I of the Act.

leaving a will disposing of the whole or any part of his estate, as if the provision made by the order had been made by the deceased by executing a codicil to his will immediately before his death; or where the deceased dies without leaving a will, as a modification of the statutory scheme for distribution of the estate in respect of so much of the estate of the deceased as is affected by the order.

5 In 1997, Part IV was amended, principally in order to broaden the class of persons who might make an application under it.

6 Under s91(1) contained in Part IV, 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. Under s91(2), the application may be made in favour of the applicant or a person on whose behalf he or she applies.

7 Under s91(3), the court must not make an order in favour of a person unless the Court is of the opinion that the distribution of the estate of the deceased person effected by the will, or the operation of the statutory scheme (on an intestacy) or the operation of both does not make adequate provision for the proper maintenance and support of the person. The question is whether, in all the circumstances of the case, it can be said that the respondent has been left by the testator without adequate provision for his proper maintenance, education and advancement in life.[5]

8 Hence, in many cases, **when a testator is making a will, it is prudent to draw his or her attention to the advisability of making adequate provision for the proper maintenance and support of any person for whom the testator is likely to have a responsibility to make provision.** Failure to make such provision may lead to that person's making an application under Part IV, with the consequent trouble, bitterness, and expense for the estate.

9 "Proper" means 'proper' in all the circumstances of the case.[6] But what are the relevant circumstances of the case?

[5] *Leyden v McVeigh* [2009] VSC 164 (30 April 2009).
[6] Op cit.

10 Under s91(4), the court in determining whether or not the deceased had responsibility to make provision for a person; and whether or not the distribution of the estate of the deceased person in the absence of an order makes adequate provision for the proper maintenance and support of the person, must have regard to a number of factors.

11 **These factors are numerous**. They are: 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; any obligations or responsibilities of the deceased person to the applicant, any other applicant and the beneficiaries of the estate; the size and nature of the estate of the deceased person and any charges and liabilities to which the estate is subject; 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 (by the court) and for the foreseeable future; any physical, mental or intellectual disability of any applicant or any beneficiary of the estate; the age of the applicant; 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; any benefits previously given by the deceased person to any applicant or to any beneficiary; 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; the liability of any other person to maintain the applicant; the character and conduct of the applicant or any other person;[7] and any other matter the court considers relevant.[8]

12 In one case,[9] it was said that

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[7] Before the coming into operation of the *Wills Act 1997*, s.96(1) of the Act empowered the court to consider, when deciding whether or not to grant an application, whether the conduct of the applicant was such as in the opinion of the court to disentitle him or her to the benefit of any provision.

[8] See s91(4). Save for the absence of any reference to the sex of the applicant, the twelve matters which are listed, cover those that a court would in any event ordinarily have taken into consideration. Thus in *Richard v. Axa Trustee Ltd* [2000] VSC 341, Eames J accepted that the effect of the changes in the legislation was to codify that which had been well established as the relevant principles, but to expand the category of persons for whom applications for family provision might be made.

[9] *Pontifical Society for the Propagation of the Faith v. Scales* (1962) 107 CLR 9 at 19 per Dixon CJ.

> ‘Adequate’ and ‘proper’ in particular must be considered as words which must always be relative. The 'proper' maintenance and support of a son claiming a statutory provision must be relative to his age, sex, condition and mode of life and situation generally. What is 'adequate' must be relative not only to his needs but also to his own capacity and resources for meeting them. There is then a relation to be considered between these matters on the one hand, and on the other, the nature, extent and character of the estate and the other demands upon it, and also what the testator regarded as superior claims or preferable dispositions.

13 It follows that a sum may be quite insufficient for the ‘adequate’ maintenance of a child and yet may be sufficient for his maintenance on a scale which is ‘proper’ in the circumstances; and a small sum may be sufficient for the adequate maintenance of a child, for instance, but having regard to the child’s station in life and the fortune of his father, it may be wholly insufficient for his ‘proper’ maintenance.[10] Hence, ‘adequate’ provision may go well beyond mere subsistence.

14 In one case, applying earlier legislation, it was said that the provision which the court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances.[11] Applying the current legislation, one can substitute for ‘father’, testator, and for ‘wife and children’, the person making the application or on whose behalf the application is made.

15 In another case,[12] the Court held that the question whether a widow or child of a testator has been left without adequate provision for his or her proper maintenance, education or advancement in life must be considered in the light of all the competing claims upon the bounty of the testator and their relative urgency, the standard of living his family enjoyed in his lifetime, in the case of a

[10] See *Leyden v McVeigh* citing *McCosker v McCosker*.
[11] See *Leyden v McVeigh* citing the well known statement of Salmond J in *Re Allen (deceased); Allen v Manchester* and also *Blair v Blair*.
[12] See *McCosker v McCosker* cited in *Leyden v McVeigh*.

child his or her need of education or of assistance in some chosen occupation, and the testator's ability to meet such claims having regard to the size of his fortune. If the court considers that there has been a breach by a testator of his duty as a wise and just husband or father (for example) to make adequate provision for the proper maintenance, education or advancement in life of the applicant, having regard to all these circumstances, the court has jurisdiction to remedy the breach and for that purpose to modify the testator's testamentary dispositions to the necessary extent.

16 In another case,[13] (speaking of the duty of a parent to its child), the Court said

> The moral claim may involve a consideration of the whole history of the child in relation to the parent, its services to the parent, its disabilities, if any, and the cause of them, the expectations which the parent fostered in the child and many other matters which will depend on the particular circumstances. It will often happen that the court can do only imperfect justice, because of its inability completely to put itself in the place of the parent.

17 In another case,[14] the Court posited the case of

> a wise and just testator, who has as one of his assets a farm on which he has resided or occupied for the greater part of his life and personally conducted and which is subsequently being conducted by one of his children

and who

> would wish to make provision to preserve that farm even if it gives a greater benefit to the beneficiary conducting the farm. This would, a fortiori, be the position if the farm has been in the family for a number of generations.

18 The court said that in this case, it would still be necessary to make proper provision for other members of the family.

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[13] *Re Butler* [1948] VLR 434 at 435 per Lowe J.

[14] *Roberts v. Roberts* (1992) 9 WAR 549 at 558-9 per Pidgeon J quoting from a judgment of his own when sitting as a member of the Full Court of the Supreme Court of Western Australia in *Young v. Young* (unreported, Library No. 8175, 3 April 1990).

19 Although the court is bound to take into account what could be described as the moral claims on the estate of the person seeking provision, and his or her financial needs, these considerations do not have to be established as a prerequisite to a successful application.[15]

20 For some decades, at least since the 1940s, it had been considered that an able bodied adult son was required to demonstrate some "special need", or "special claim", in order to succeed in a claim under Part IV of the Act. That principle was ultimately repudiated.[16]

21 Nowadays, in order to succeed in an application under Part IV of the Act, an able bodied adult son need not necessarily show that he would be in necessitous circumstances, if he were left without any provision from his surviving parent's will. On the other hand, it has been recognised that **an adult son, who is capable of supporting himself comfortably, may have difficulty demonstrating any breach by his parent of a moral obligation to make adequate provision for his proper maintenance and support.**[17]

22 Part IV does not entitle a court to re-write the will of the testator, in order better to accommodate it to the court's individual view as to how the testator should, or might, have exercised his testamentary power.

23 In determining whether the testator owed the person seeking provision, a duty to make provision for his maintenance and support in his will, the courts have long recognised the importance of **the basic right of a testator to exercise freedom of testamentary disposition in respect of his or her estate**.[18] That right is only subordinated where, and to the extent, that the applicant can demonstrate that the testator has failed to discharge his moral duty to make provision in the plaintiff's favour pursuant to Part IV of the Act.

24 It has been said that,[19]

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[15] Op cit.
[16] See *Leyden v McVeigh* [2009] VSC 164 (30 April 2009) citing Blair v Blair.
[17] See *Leyden v McVeigh*.
[18] Op cit.
[19] *Grey v. Harrison* 1997] 2 VR 359 at 366 per Callaway, JA, with whom Tadgell and Charles, JJA agreed. This case was decided before the amendments widening Part IV.

> It is one of the freedoms that shape our society, and an important human right, that a person should be free to dispose of his or her property as he or she thinks fit. Rights and freedoms must of course be exercised and enjoyed conformably with the rights and freedoms of others, but there is no equity, as it were, to interfere with a testator's dispositions unless he or she has abused that right. To do so is to assume a power to take property from the intended object of the testator's bounty and give it to someone else. In conferring discretion in the wide terms found in s.91, the legislature intended it to be exercised in a principled way. A breach of moral duty is the justification for curial intervention and simultaneously limits its legitimate extent.

25 In another case,[20] it was said

> The words 'proper maintenance and support', although they must be treated as elastic, cannot be pressed beyond their fair meaning ... All authorities agree that it was never meant that the court should rewrite the will of a testator. Nor was it ever intended that the freedom of testamentary disposition should be so encroached upon that a testator's decisions expressed in his will have only a prima facie effect, the real dispositive power being invested in the court.

26 So far, we have been considering jurisdictional issues. To summarize thus far, if the court determines that the deceased had responsibility to make provision for a person; and that the distribution of the estate in the absence of an order makes inadequate provision for the proper maintenance and support of the person, then the court may make an order. The jurisdictional question is a question of objective fact to be determined by the judge at the date of hearing.[21]

27 Assuming that the jurisdictional question is answered in favour of the person seeking provision (or for whom provision is sought), the court is then given not

[20] *Pontifical Society for the Propagation of the Faith v. Scales* (1962) 107 CLR 9 at 19 per Dixon, CJ.
[21] *Singer v Berghouse* (No 2) (1994) 181 CLR 201, 211.

only a discretion as to the nature and amount of the provision it directs but, what is even more important, a discretion as to making a provision at all.[22]

28 Thus, the question arises as to the amount of the provision (if any) that should be made for the person's proper maintenance and support.

29 As with its determination of the jurisdictional question, in determining the extent of the provision to be made for the maintenance and support of the person, the courts have long recognised the importance of the basic right of a testator to exercise freedom of testamentary disposition in respect of his or her estate. That right is only subordinated where, and to the extent, that the applicant can demonstrate that the testator has failed to discharge his moral duty to make provision in the person's favour pursuant to Part IV of the Act.[23]

30 Under s91(4), in determining the amount (if any), the court must have regard to the twelve factors mentioned above.

31 In determining the measure of such provision to be made in favour of the person, it is important to bear in mind that the court only has jurisdiction to order such provision as is "adequate" in the circumstances.[24]

32 There is an element of the artificial in saying that it is only after jurisdiction is established that the exercise of discretion begins, for the twin tasks which face the primary judge are similar.[25]

33 In determining what order should be made, the provision in favour of the person must be no more than what is adequate to fulfil the responsibility which the testator had to the person. That is the limit to the adjustment which the law permits, by way of intrusion on the freedom of the testator to choose how he wished to dispose of his estate on his death.[26] What would a wise and just testator, mindful of his responsibility to the applicant, have left the person? An order thus determined will vindicate the responsibility of the testator to the

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[22] See *Leydon v McVeigh* citing *Pontifical Society for the Propagation of the Faith v. Scales* (1962) 107 CLR 9 at 19 per Dixon, CJ.
[23] See *Leydon v McVeigh*.
[24] Op cit.
[25] *White v. Barron* (1980) 144 CLR 431 at 443 per Mason J. Cf *Singer v Berghouse* (No 2) (1994) 181 CLR 201; 123 ALR 481.
[26] Op cit.

person, while respecting the testator's freedom to make a testamentary disposition of such part of his estate as is not required to fulfil that responsibility.[27]

34 Thus in one case,[28] (applying earlier legislation) it was said that

> The Testator's Family Maintenance Act is legislation for remedying, within such limits as a wide discretion would set, breaches of a testator's moral duty to make adequate provision for the proper maintenance of his family - not for the making of what may appear to the court to be a fair distribution of a deceased person's estate among the members of his family. As has been said in another context, the Act is to provide maintenance, not legacies. **Equality is not something to be achieved by the application of the Act, although in some cases equality may set a limit to the order to be made** - for instance, where there is not enough to provide proper maintenance for all entitled to consideration whose need is the same.

35 So, for example, it may be important to take into account the size of the estate, and the fact that the applicant seeking provision for himself, is an able bodied young man who is gainfully employed in a trade.

36 Under s91(4), in determining any other matter related to the order, the court must have regard to the factors mentioned above. Other matters related to the order, might be for example, when payment should be made out of the estate,[29] and whether the order should be conditional, for example, on the receipt of funds by the estate.

37 Under s96 of the Act, the court in making an order under Part IV may impose such restriction and limitations whether to prevent, restrict, or defeat any alienation or charge of or upon the benefit of any provision made under the order or otherwise as it thinks fit, and may order that the provision consist of a lump sum or periodical or other payment.

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[27] Op cit.
[28] *Blore v. Lang* at 135 per Fullagar and Menzies JJ (a judgment which, although dissenting as to the result, has been accepted as an accurate exposition of the law.)
[29] Op cit.

38 By s94 of the Act, at the hearing of the application, the **court is directed to inquire fully into the estate of the deceased** and for that purpose given various powers. These are the power to summon and examine necessary witnesses, to require the executor or administrator to furnish full particulars of the estate, and the power under s94(c),[30] to accept any evidence of the deceased person's reasons for making the dispositions in his or her will (if any), and for not making proper provision for the person, whether or not the evidence is in writing.[31] Even under the common law, evidence of the reasons given by a testator or testatrix for making or not making a provision by will were admissible as evidence of those reasons.[32]

39 Parties to applications under Part IV should consider applying for orders for **discovery** under the relevant rules of court, although such orders are not given as of course.[33]

40 The enactment of provisions like s94(c), is probably influenced by a desire to be informed of the reasons which actuated the testator to make the dispositions made, and by the consideration that in cases of this kind a claim is made against the estate of a person who is deceased and can no longer give evidence in support of what he or she has done.[34]

41 When attempting to decide what a particular testator ought as a just and wise testator to have done, those reasons which that testator actually entertained for his or her decision cannot justly be ignored, but if the evidence in the matter does not support such reasons, they cannot be acted upon simply because the deceased asserted or entertained them.[35]

42 Hence, the weight to be given to such reasons may be slight where they were ill founded. As was said in one case,[36]

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[30] Inserted by the *Wills Act 1997*.
[31] As Gibbs, J noted in *Hughes v. National Trustees, Executors and Agency Co. of Australasia Ltd* (1979) 143 CLR 134 at [18], legislation of that kind had by 1979 been enacted in the United Kingdom, New Zealand, and some parts of Australia, but not in Victoria or indeed in most of the Australian States.
[32] *Hughes'* case, per Barwick CJ at [6]
[33] See *Reed v Reed* [2001] VSC 54 at [21].
[34] *Hughes'* case at 150 per Gibbs J.
[35] *Hughes'* case at [7] per Barwick CJ. See also Gibbs J at 153.
[36] Op cit.

> If she made her will because she believed that her son had been guilty of unfilial conduct, and the belief is shown to have ill-founded, that may support the appellant's claim, but if the belief is shown to have been well-founded, it is the fact that the appellant was guilty of disentitling conduct, rather than what the testatrix believed, that is relevant.

43 Evidence accepted under s94(c) may also be especially relevant where the will has been made because of some mistake or oversight on the part of the testatrix.[37]

44 Evidence of statements of the deceased may be admissible under ss62 and 63[38] of the *Evidence Act 2008* (Vic), which relaxes the rule against the admission of hearsay evidence in various circumstances.

45 Thus evidence of the subjective attitudes or beliefs of the testator may be proof of the truth of facts on which they are based.[39]

46 Under Order 16 of Supreme Court (Miscellaneous **Procedure**) Rules 2008 ('the Rules'), evidence in chief in the application is given on affidavit. The affidavit in support of the application, which (in the Supreme Court) is made by way of originating motion, is to state the facts on which the applicant relies to establish that the person on whose behalf the application is made is a person for whom the deceased had responsibility to make provision.

47 Notice of the application must be served on the personal representative of the deceased and such other persons as the court orders: s93 of the Act. The court gives **directions** before the hearing.[40]

48 The usual **parties** to the application are the applicant and the defendant executor(s), whose duty it is to uphold the will, or defendant administrator, whose duty it is to uphold the statutory scheme for distribution of intestate estates.[41]

49 Because they owe these duties, **a person should apply for letters of administration only if they have no intention of making an application, and**

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[37] Op cit.
[38] As to which, see also ss66A, 67, 170 and 171 of that Act.
[39] In this respect, the *Evidence Act 2008* appears to have altered the common law as explained in *Hughes'* case.
[40] See Rule 16.07 of the Rules. In the Supreme Court, on a summons for directions.
[41] See *Re Klease* [1992] QWN 44; *Re Burton dec'd* [1958] QWN 27.

an executor should renounce probate if he or she intends making an application. In such a case, it may be necessary for an independent, uninterested person to apply for administration with the will annexed.

50 **Beneficiaries and next of kin should be separately represented only if** they do not have a common interest with other parties. If such parties are separately represented, they run the risk of having to bear costs.[42]

51 Under s97(1) of the Act, the order of the court making provision for the applicant is to specify the amount and nature of the provision; the manner in which the provision shall be raised or paid out of some and what part or parts of the estate of the deceased; and any conditions restrictions or limitations imposed by the court.

52 Under s97(2) of the Act, unless the court otherwise orders, the burden of any such provision shall as between the person beneficially entitled to the estate of the deceased, be borne by those persons in proportion to the values of their respective estates and interests in such estate.[43]

53 Under s97(5), the court may at any time and from time to time on the application of the executor or administrator or of any person beneficially entitled to or interested in any part of the estate **rescind or alter any order** making provision for any person. Notice of the application must be served on all persons taking any benefit under the order sought to be rescinded or altered.

54 Although, under s99 of the Act, no application shall be heard by the court at the instance of a party claiming the benefit of Part IV unless the application is made within **six months** after the date of the grant of probate of the will or of letters of administration (as the case may be), the time for making an application may be extended for a further period by the court.[44] The court may grant such an extension after hearing such of the parties affected as the court thinks necessary.[45] The power to grant an extension of time extends to cases where the time for applying has already expired, but in all such cases the application for extension is to be made before the final distribution of the estate and no distribution of any

[42] Op cit.
[43] Although for this purpose, the estates and interests of persons successively entitled are not separately valued, but the proportion of the provision to be made is raised out of or charged against corpus.
[44] Section 99 of the Act.
[45] Op cit.

part of the estate made prior to the application is to be disturbed by reason of the application or of any order made on the application.[46]

55 The jurisdiction of the court to extend the time for making an application is discretionary. An extension of time will not automatically be granted on the making of an application.[47]

56 The applicant bears the burden of establishing that the granting of the indulgence sought is justified.[48] The applicant must provide sufficient explanation of the delay.[49] Time has been extended in cases where a solicitor has failed to commence proceedings in time,[50] and where there have been negotiations between an applicant and the beneficiaries in relation to a claim.[51]

57 If it is improbable that an application for provision would succeed, an extension should not be granted.[52] An applicant should demonstrate an arguable case that the deceased had a responsibility to make provision for his or her proper maintenance and support and failed to do so.[53]

58 Under s99A(1) of the Act, **no action shall lie against the personal representative** by reason of his having distributed any part of the estate, and no application or order under Part IV shall disturb the distribution, if it was properly made by the personal representative for the purpose of providing for the maintenance, support or education of the partner or any child of the deceased totally or partially dependent on the deceased immediately before the death of the deceased, whether or not the personal representative had notice at the time of the distribution of any application or intended application under Part IV in respect of the estate.

59 Under s99A(2), no person who may have made or may be entitled to make an application under Part IV shall be entitled to bring a proceeding against the personal representative by reason of his having distributed any part of the estate if

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[46] Op cit.
[47] *Re Barrot*[1953] VLR 308, 312 per Sholl J.
[48] *Re Guskett (dec'd)* [1947] VLR 212.
[49] *Henderson v Rowden* [2001] VSC 267 per Beach J.
[50] *Re Murie, deceased* (Full Court unreported 21 June 1963); *Shannon v Public Trustee* [1970] VR 876.
[51] See *Amos v Amos* [1966] VR 442.
[52] *Re Walker* (1967) VR 890 at 892 *per* Lush J.
[53] *Clayton v Aust* (1993) 9 WAR 364 *per* Malcolm CJ; *Sherlock v Guest* [1999] VSC 431 at [14] per Bongiorno J; *Valbe v Irlicht* [2001] VSC 53 at per Gillard J.

the distribution was properly made by the personal representative after the person (being of full legal capacity) has notified the personal representative in writing that the person either consents to the distribution; or does not intend to make any application that would affect the proposed distribution.

60 Under s99A(3), no action shall lie against the personal representative by reason of his having distributed any part of the estate if the distribution was properly made by the personal representative after the expiration of six months after the grant of probate of the will or of letters of administration (as the case may be) and without notice of any application or intended application under Part IV in respect of the estate.

61 Hence, **in many cases, it is prudent for the personal representative to wait until the expiration of this six month period before entering into any deed of family arrangement which alters the dispositions made under a will or by the statutory scheme.**

62 Under s99A(4), for the purposes of section 99A, **notice to a personal representative of intention to make any application** under Part IV shall be in writing signed by the applicant or his legal practitioner and shall lapse and be incapable of being renewed, and the personal representative may act as if he had not received the notice, unless, before the expiration of three months after the day on which he first receives notice of intention to make the application, the personal representative receives notice in writing that the application has been made to the court. This does not, however, prevent the subsequent making of an application within any other period allowed by the Act.

63 Under s97(6) and (7), the court may make any order as to the **costs** of an application under section 91 that is, in the court's opinion, just; but if the court is satisfied that an application for an order has been made frivolously, vexatiously or with no reasonable prospect of success, the court may order the costs of the application to be made against the applicant.

64 Section 97(6) gives the court a very wide discretion in regard to the costs of a proceeding, but the discretion is not unfettered.[54]

65 If the claim is required to be made for the due administration of the estate and is fairly arguable, the applicant's costs should be taxed as between solicitor client and paid out of the estate.[55] A costs order in favour of an applicant is ordinarily on a solicitor client basis.[56]

66 Having regard to s97(7), an order for costs should not be made against an applicant simply because the application failed.[57] Thus, it has been held that, in a borderline case, where the applicant fails, it may be appropriate not to order costs against the applicant.[58]

67 It has been said,[59] however,

> that there is [not] any universal practice in this court [Supreme Court of Victoria] in a case where the plaintiff fails in her claim under Part IV that the costs of all parties should be paid out of the estate. It may be closer to the mark to say that in many cases a plaintiff who loses will not be ordered to pay the defendant's costs. Even then, … there can be no practice which could be regarded as displacing the discretion which the statute reposes in the court.

68 The degree to which a costs order might detrimentally affect an unsuccessful applicant's financial position, may justify no order for costs against the applicant's being made.[60]

69 If the estate is small, there is a heavier onus on an unsuccessful applicant to persuade a court that costs should be paid out of the estate.[61]

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[54] *Dehnert v Perpetual Trustees* (1954) 91 CLR 177; [1954]; *Singer v Berghouse* (No 2) (1994) 181 CLR 201; 123 ALR 481.
[55] See Bailey and Arthur, 'Civil Procedure Victoria', at [63.26.20.]
[56] But see *Harris v Bennett* (No 2) BC200202244; [2002] VSC 163.
[57] *Re Bull, dec'd* (No 2) [2006] VSC 226.
[58] *Thompson v Kelcey* (SC(NSW), Young J, No 1763/85, 14 April 1986, unreported).
[59] *Krause v Sinclair* [19831 1 VR 73, 77 to 78 per Tadgell J. See also *Re Kennedy* [1920] VLR 513; *Re Dc Feu* [1964] VR 20 at 428. *In Singer v Berghouse* (1993) 114 ALR 521; Gaudron J at 521-2 suggested that costs in a family provision claim depended on the "overall justice of the case". See also Re *Sherbourne Estate: Vanvalen v Neaves* (No 2) [2005] NSWSC 1003 (normal rule that costs follow the event displaced); *Re Such* (dec d) (No 2) [2005] VSC 383 BC200507079 (Calderbank offers); *Kolar v Dernovsek* [2005] NSWSC 838; BC200506 195 (case where indemnity costs awarded against unmeritorious applicant).
[60] See Re *Sherbourne Estate* and *Re Bull, dec 'd* (No 2) [2006] VSC 226.
[61] See Fullard dec'd [1982] LR Fam 42.

70 In one case, it was said that no clear pattern emerged from the cases on the question of costs, but the factors to consider include the applicant's financial circumstances, whether the applicant's "moral entitlement" was defeated by an interpretation of the Act, the size of the estate, whether there has been any lack of frankness to the court by the applicant, the manner in which the proceedings were conducted, whether the competency of the application was unclear, and the merits of the applicant's case.[62]

71 It has been said that[63] an unsuccessful defendant personal representative would not be deprived of costs unless there was unreasonable behaviour in the defence of the proceeding. Such a defendant will usually obtain an order for his or her costs out of the estate irrespective of the outcome of the proceedings.

72 Under Rule 63.26 of the Supreme Court (General Civil Procedure Rules) 2005, unless the Court otherwise orders, the personal representative of the estate would be entitled to his costs of the proceedings out of the estate in so far as the costs were not paid by any other person. Under Rule 63.32, the Court may order costs to be taxed on a solicitor client basis.

73 Under Rule 63.33, were the legal representative entitled to be paid costs out of estate, those costs would, unless the Court otherwise orders, be taxed on a solicitor client basis. As a matter of practice, in Part IV applications, the defendant personal representative's costs may be awarded on an indemnity basis.

74 A party (including a legal representative) may be deprived of costs where the litigation arose out of his or her mistake, or where proceedings were brought unnecessarily. A party (including a legal representative) may not only be deprived of costs but be ordered to pay them if by his misconduct he has put the estate to expense. In such a case, he is not entitled to his costs out of the estate.[64] It may ultimately be determined that the personal representative should be deprived of costs out of the estate on the grounds that the proceedings arose because of misconduct on his part as personal representative. For example, it may be found that the costs would not have arisen if the legal representative had

[62] *Basteifield v Gay* (SC (Tas), No M388/93, 20 September 1994.)
[63] *Dobb v Hacket* (1993) 10 WAR 532.
[64] See Bailey and Arthur, 'Civil Procedure Victoria', vol 1, [63.26.10] and cases there cited.

acted fairly and reasonably, had not been actuated by hostility and malice, had had due regard to the preservation rather than the depletion of the estate, and if he had renounced or resigned as he should have.[65]

75 There may be other exceptional circumstances in which an order is not made for a defendant personal representative's costs not to be paid out of the estate.[66]

76 In one case,[67] the executor was only awarded costs on a party-to-party basis as the costs incurred were disproportionate to the size of the estate and the defence of the case had been conducted with some animus against the plaintiff.

77 The liability of the personal representative to pay costs ordered to be paid out of the estate is a "debt" for the purposes of the administration of the estate under the Act. The proper costs of the personal representative as defendant in an application under Part IV is ordinarily a "testamentary expense" for the purposes of the Act.[68]

78 In these and in many other cases where an application is anticipated or made, early **compromise** may be advisable. Since, however, at least one party to such a compromise is likely to be acting in a representative capacity (eg, as executor or trustee), it is important for that person to ensure that he acts consistently with his fiduciary duties and obtains indemnities and releases from those to whom he owes duties. Depending on the circumstances, he may also need to ensure that persons whom he represents get their own independent legal advice. At least where a compromise is made without court order, it may be necessary to apply for the discharge or variation of trusts, for example, under the *Trustee Act 1958* (Vic).

79 In such cases, it may be important to take into account provisions in the *Duties Act 2000* (Vic) (or similar legislation interstate), which impose **duty** on dutiable transactions, such as on transfers and declarations of trust of land or interests therein. GST is less likely to apply, but should not be overlooked. Capital gains **taxation** may also be relevant.

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[65] See, for example, *Monty Financial Services Ltd v Delmo* [1996] 1 VR 65, 72.
[66] See, for example, Van Eimeren v Thiemann [2005] NSWSC 686; BC200504988 and Fiorenza v Fiorenza [20051 NSWSC 713; BC200505318.
[67] *Wang v D'Ambrosio* (SC(NSW), Hodgson CJ, No 1140/95, 18 March 1999, unreported, BC99O1 163.
[68] *Sharp v Lush* (1879) 10 Ch D 468; *Re Prince* [1898] 2 Ch 225; *Re Woodman* (1940) 11 ABC 159, 175; *Re Lowe* BC200007622; [2000] NSWSC 1180.

Grounds for removing an unsuitable legal personal representative or resisting his or her appointment

80 If it is sought to remove a legal personal representative, his or her proposed replacement must be a fit and proper person. Sometimes that will have to be a trustee company, although they charge a commission.

81 A legal personal representative may be unfit to act or be appointed, for any one or more of the following reasons:

(a) breach of his or her trust: see *Jacobs' Law of Trusts in Australia*, 6th ed, [1555, 1556, 1558-9, 1565, 1584-5].

(b) Where his personal interests conflict with those of his duties as personal representative: see *Monty Financial Services Ltd v Delmo* [1996] 1VR 65, 72, 73, 81.35ff, 82.9ff and cases there cited.

(c) Where he is not impartial in his treatment of those to whom he owes a duty: see Jacobs [1585] and *Delmo's* case.

(d) Where he has abused his office: see Jacobs [1586] and *Delmo's* case.

(e) Where he has threatened to withhold entitlements from the beneficiaries and thereby commit breaches of trust.

(f) Where he breaches his obligation to preserve the estate and safeguard the interests of those to whom he owes duties.

(g) Where his removal would be likely substantially to reduce legal costs of the administration of the estate. The welfare of the estate and of the beneficiaries is paramount: see *Delmo's* case at 72 and 78 and cases there cited.

(h) Where his continuance in office will be detrimental to the estate, even if for no other reason than disharmony with persons beneficially interested: see *Delmo's* case at 78.30ff to 79 and 80 and cases there cited.

Note that a court may be more reluctant to remove an executor than an administrator because to do so may override the testator's intentions: see *Delmo's* case at 75.10ff and 83.18ff. Note also that the fact that his

appointment was not originally contested does not mean that he should not be removed subsequently: see *Delmo's* case at 72 and cases there cited.

18 March, 2010