TITLE: **The Growth In Wills & Estates Law**[1]

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Introduction

In the years since I have been appointed to the Bench, there have been some notable developments in wills and estates law. In preparing for this conference, it occurred to me that the number of practitioners in this field has expanded somewhat since that time. In fact, where this room last year would have held more than 200 lawyers, today there appears to be more than 300 of you sitting before me.

So I thought to begin today with the question: just what are the focus areas of growth in this field? It appears appropriate to briefly review these areas as an introduction to today's conference. With this in mind, I intend to consider four areas of significant development: firstly, informal wills; second, the issue of domestic partners (prior to grant of probate); and third, changes to the testator's family maintenance laws. Finally, I intend to touch on the subject of statutory wills and in light of recent developments in this area, review the controversy surrounding the recent case of *Boulton v Sanders*.[2]

Informal Wills

Informal wills have only recently been recognised in the Victorian jurisdiction as per the *Wills Act* 1997.

The section relevant to informal wills is s9(1) of the *Wills Act*. That section states that that the Supreme Court may admit to probate as the will of a deceased person one not correctly executed and/or altered, provided that the Court is satisfied that the person 'intended' that document to be his or her own will.

There have been only a few decided cases in this jurisdiction, although the Registrar of Probates reports that he has dealt with numerous applications under his delegated powers.[3] *In re the Will and Estate of McComb*[4] is one such case. In *McComb*, the

[1] The author acknowledges the assistance of her Research Associate, Ms Natalya Dingley.
[2] *Boulton v Sanders & Ors* [2004] VSCA 112.
[3] Registrar of Probates, Supreme Court of Victoria (Mr Michael Halpin) at 15 Oct. 2004.

informal will was one made by the deceased himself (using a sort do-it-yourself will kit). It was accepted that there was evidence that the deceased had meant for this will to be what he called his last surviving 'will and testament'.[5]

One of the first questions was whether the deceased had 'intended' the document to be his will (the Court concluded that he did). A second point of contention was whether the Supreme Court had the jurisdiction to grant Letters of Administration where the will makes no reference to an executor. As to this latter question, the Court determined that the requirements as set out in s9 of the *Wills Act* were not so confined.

Of the applications made to the Registrar on the other hand, two particular types are becoming more prevalent these days. Suicide notes that are not executed as wills (i.e. most likely due to invalid execution which occurs where one or more of the steps in s7 of the *Wills Act* are not adhered to) are one such category. As well, the Court notes numerous cases where alterations and additions to wills which initially failed to follow the correct procedures for execution.

Domestic Partners

With informal wills, since November 2001 has the Court been able to grant administration to what are now termed 'domestic partners'.[6] Similar legislation existed in other jurisdictions for some time prior to the Victorian enactment.[7]

The changes essentially mean that any person meeting the definition of 'domestic partner' as set out in s275(1) of the *Property Law Act* 1958 (Vic.) is entitled to the same division of property as a spouse. Significantly, the changes extended to include the same benefits previously only available to heterosexual de-facto couples to homosexual partners.

Four or five of these same sex applications have now been granted. This law surrounding domestic partners continues to grow.

Testator's Family Maintenance (TFM)

One of the most obvious changes in recent years is the amendment to Part IV of the *Administration and Probate Act* 1958 (Vic). In particular here, I refer to s91 of the Act

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[4] *In re the Will and Estate of McComb* [1999] VSC 311.
[5] *Ibid.*
[6] The *Statute Law Amendment (Relationships) Act* 2001 (Vic.) was passed in November 2001.
[7] Prior to the Victorian enactment in November 2001, the ACT act included two definitions of 'domestic partner' (*Legislation Act 2001* ACT, s169); the New South Wales act rejected the broad definition and went for the narrow definition - genuine 'domestic relationships' (defined in the *Property (Relationships)*

as inserted by s55 of the *Wills Act* 1997 which relates to the power of the Court to make a maintenance order.

These amendments were doubtless a legislative response to reflect changes in community standards and mores. In the second reading speech on introduction of the amending Bill to Parliament, the Attorney-General stated that the object was to:

> … [introduce] amendments to the act to enable a wider group of people to apply to the court for testator's family maintenance.[8]

Prior to the legislative amendments coming into operation in 1998, the Act required the court to review, firstly, whether the deceased had failed in his or her duty to meet the applicant's needs if left without adequate provision for their maintenance and support; and secondly, if failing in this duty, to make provision out of the estate as would have been made by a 'wise and just' (rather than 'fond and foolish') testator.[9] This widely quoted expression is the classic formulation as first enunciated by Salmon J in *Re Allen; Allen v Manchester*.[10]

Post-amendment, it may be seen that the court now has the power to make an order for maintenance where it is decided that the deceased had a 'responsibility' to make adequate provision for the proper maintenance and support of the provision – whether or not they inadequately did so, or failed to make provision altogether.

Importantly also, in making a determination, the court must now turn its mind to certain criteria listed in s91(4). Previously, these specific criteria were referred to in leading authorities and were not always strictly relevant to the case law. Now of course, the court has no choice but to take them into consideration. If relevant, these include an examination of the family relationship, obligations or responsibilities of the deceased to the applicant, financial resources and financial needs of the applicant and so on.[11]

What is clear from the post-amendment cases is that the insertion of s91 in fact codifies the common law formulation of moral duty or obligation of the deceased to make provision for those for whom he or she is responsible.[12] These changes have been significant in at least two respects. Firstly, broadening the class of persons who may apply for testator's family maintenance. Secondly, the application of those criteria as strictly relevant to a determination on whether or not the claimant's petition should succeed.

Act 1984 (NSW)). See the Second Reading Speeches of the Attorney-General in relation to the *Statute Law Amendment (Relationships) Bill*, 1 May 2001; 17 October 2001.

[8] Second Reading Speech of the Attorney-General in relation to the *Wills Bill* 1997.

[9] *Re Allen; Allen v Manchester* [1922] NZLR 281 at 301.

[10] *Ibid.*; see *Lee v Hearn* [2002] VSC 208 at 37.

[11] s94(e)-(p).

Indeed, since the amendments, there has been a series of applications to the court, though it is noted that the majority settle at mediation or before the trial ends.[13] A general survey of persons in this field indicate that about one in four cases presently before the courts would not have previously been able to commence litigation because the claimants were neither offspring nor partners of the deceased.[14]

A case illustrating the type of TFM applications now presented to the courts is *Lee v Hearn*.[15] In that case, the deceased left an estate worth more than $2 million dollars largely to a charitable cause. The plaintiff had known the deceased for a number of years, however, was not related to the deceased in any way. Although the applicant's claim failed, it invariably opens the door to claims by a person who can provide evidence of a sufficient relationship.

Nevertheless, s91 is not so wide as to admit just anyone who knew the deceased well. In *Leahey v Trescowthick*[16] I considered the point. In that case, the plaintiffs sought an extension of time pursuant to s99 and for a maintenance order to be made pursuant to s91 of the Act. *Trescowthick* highlighted the firm principle – reinforced by several successive judgments (including *Sherlock v Guest*)[17] – that even the making of generous gifts, such as for the education of one's grandchildren, will be insufficient to find responsibility of the testator without some further connection or information. In other words, mere family ties are not sufficient; further evidence of some sort of 'special' relationship is necessary.

Statutory Wills

In Victoria until quite recently it was not possible for a person lacking 'testamentary capacity'[18] to make a will. However, amendments introduced in 1998 to the *Wills Act* 1997 now permit the execution of a court-authorised 'statutory will' on behalf of the persons without testamentary capacity.

Recently in *Boulton v Sanders*,[19] the Court of Appeal refused an appellant's application for a statutory will on the basis that none of the evidentiary material was sufficient to convince the Court that it would accurately reflect the intentions of the deceased. The facts of that case are relatively straightforward (even if the law itself is not): in that case, a friend of the deceased was refused leave by the primary judge

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[12] *Lee v Hearn, Op. Cit.*
[13] Richard Cook, 'Testator's Family Maintenance' (2002) 11 *LIJ* 42 at 44.
[14] *Ibid*.
[15] *Lee v Hearn, Op. Cit.*
[16] *Leahey v Trescowthick* [1999] VSC 409.
[17] *Sherlock v Guest* [1999] VSC 431 (unreported, 12 November 1999, per Beach J).
[18] Testamentary capacity means that a person understands what a will is, what assets comprise their estate and what claims might be brought against the estate.
[19] *Boulton v Sanders & Ors* [2004] VSCA 112.

under s26 of the *Wills Act* 1997 to apply for an order under s21 of the Act. The testatrix lacked testamentary capacity at the time of death and although she had made a will making her residuary estate out to a friend, that friend had since died without gifting over the residue.

Reasons for dismissal of the appeal are found in the judgment of Dodds-Streeton AJA.[20] Her Honour points out that the legislation insists on 'an accurate reflection of the likely intentions of the testator'. She notes the significant lack of evidence explaining the testratrix's intent.[21] Her Honour also noted that the testatrix had made several wills in the past and accordingly she was:

> … not persuaded that there was any compelling pattern which establishes, on the balance of probabilities, that the proposed will accurately reflects Ms Sanders' likely intentions.[22]

It seems then that an application for a statutory will pursuant to s26 of the *Wills Act* 1997 should be backed by sufficient evidence of intention. Remembering that the deceased lacks testamentary capacity, the question then arises as to just how much evidence is sufficient evidence? The next few cases on the issue may clarify the matter.

Conclusion

Of course, the social causes that appear to sit behind these legislative changes are manifold – perhaps a combination of factors, including the divorce rate, the rapidly changing composition of the modern family unit, and the simple fact that probably people are increasing their wealth and living longer (hence, applicants have more to lose if they fail to make a claim and, of course, more to gain if they make one).

So why wills? Why probate? Why equity? Those questions might be explored in the social realism of the contest over the assets of deceased persons in the modern statutory environment.

On that note, may I welcome you all to this 2004 Grundig Annual LIV Wills & Estates Conference. It is a great pleasure for me to open this conference today and to see the attendance of so many here as reflected by, so it seems, the growing number of practitioners in this field.

[20] *Ibid.*, from para. [3].
[21] *Ibid.,* at [121]-[122].
[22] *Ibid.* at [97], [133].