Estates and Administration Legal

**TEP / TFM CASE UPDATE – SUPREME COURT OF VICTORIA (COURT OF APPEAL)**

**November 2023**

- *Ghosh v Ghosh* [2023] VSCA 77
- *Laird v Vallance* [2023] VSCA 138
- *Coffey v O'Halloran* [2023] VSCA 146
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**TEP / TFM CASE UPDATE – SUPREME COURT OF VICTORIA (TRIAL DIVISION)**

- ***Artcam Enterprises Pty Ltd v Campbell McLaren & Ors* [2023] VSC 196 (Delaney J)**

  In this proceeding, the Plaintiff company sought its discharge as trustee of the BF McLaren Family Trust, its replacement by an individual trustee and consequential orders for the vesting of property in the new trustee. Orders were also sought under s 63 of the *Trustee Act 1958* for powers to be conferred on the proposed new trustee to charge $2000 per hour to be retained from the trust fund. Delaney J emphasised (at [4]) that the decision to make certain orders was driven by the facts of the case and the fact that key beneficiaries (not all general beneficiaries) either consented to or did not oppose the orders.

  The BF McLaren Family Trust was established by deed in 1978. The trust held substantial assets following the sale of the family's business. It was intended that the trust would vest and make significant distributions of trust capital to those who would be identified as its proper beneficiaries. A number of instruments actually or purportedly varied the terms of the trust, the guardians and appointors. Given the doubt about the validity of those instruments and appointments, the trustee sought the certainty of a discharge ordered by the Court and the appointment of an independent trustee who could then consider the effect of two variation deeds that purported to alter the beneficiaries, and alleged breaches of trust that were agitated in related proceedings.

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The Court agreed that the jurisdiction under s 41 of the *Trustee Act 1958* to voluntarily discharge the trustee was not enlivened because of the uncertainty created by the variations about the identity of the appointor. The Court was prepared to exercise its inherent jurisdiction to discharge the trustee, finding that it was expedient to do so. The Court's power is discretionary and will be 'guided by the welfare of the beneficiaries and the competent administration of the trust in their favour' (at [40] citing Miller v Cameron (1936) 54 CLR 572). The Court held that, among other reasons, the replacement of the trustee was appropriate to end an ongoing contravention of a 259D of the *Corporations Act 2001* which had prevented the trustee from exercising voting shares in a holding company with $61m in assets. It would also enable steps to be taken to review the Plaintiff's conduct in making distributions to beneficiaries and in respect of alleged breaches of trust. The Court declined to make an order for the approval of the new trustee's fees on an hourly rate basis finding that the deed allowed for fees to be charged for legal and non-legal work associated with the appointment.

### ***Cartledge v Bryan* [2023] VSC 195 (Moore J)**

This was a decision about whether a *prima facie* case was established in a caveat proceeding. The deceased died intestate. The Plaintiff in the application for a grant was one of his three children. The Caveator alleged that she was a domestic partner and that her daughter was the deceased's child. If she was the partner, she stood to take the whole estate as its value was less than the statutory legacy under section 70L(1)(a) of the *Administration and Probate Act 1958*.

Moore J referred to his recent decision of *Re Robustelle* (No 2) [2023] VSC 72 which recorded the principles relevant to determining the existence of a prima facie case - that is, whether the allegations, if true and assessed as an overall 'narrative', reveal a case for investigation. The Court found that the allegations suggested a case for further investigation as to whether the caveator was the deceased's domestic partner within the meaning of section 3 of the *Administration and Probate Act 1958*. The reasons again delineate the information required to establish a *prima facie* case and the more extensive evidence required to establish a case at trial.

### ***Re Estate of P Mirabella (dec'd)* [2023] VSC 185 (O'Meara J)**

Mr Mirabella passed away in early 2021 leaving an estate comprising significant assets including shareholdings in the company that owned the family business. He was survived by a wife and four children. The Plaintiff executor (a daughter) sought rectification and construction of certain clauses in the deceased's 2007 Will. The 2007 will omitted the words 'in equal shares' in relation to the gift of the deceased's shareholdings to his four children. Although the Defendant - another sibling - eventually accepted that the deceased intended those words to be included, he argued for a construction of the gift 'in equal shares' as a gift of each share to all siblings as tenants in common. The Plaintiff, on the other hand, said that the gift was intended to take effect as a disposition of separate and equal parcels of shares. The manner in which the shares were to be held would significantly affect the voting power held by each of the siblings under the company constitution.

The Court was persuaded by the Plaintiff's arguments. The Plaintiff had contrasted the clause relating to the shares with another clause that specifically stated that a gift was made to the children 'as tenants in common' where that was intended. The Court was referred by the Defendant to authorities for the proposition that a Court leans towards a construction that creates a tenancy in common (and not a joint tenancy) but found that the authorities referred to did not deal with relevantly similar drafting. The Court was also not persuaded by the Defendant's argument that a reference to 'equal shares' had an accepted technical meaning encompassing the concept of co-ownership. The gift was construed to give effect to a disposition of separate and equal parcels of shares to the children. The Court's reasoning outlined above was not dependent on there being any application of section 36 of the *Wills Act* 1997 (ie. consideration of extrinsic evidence). However, the Court stated that it would also have been satisfied that the extrinsic evidence supported the same conclusions if s 36 had been enlivened by the uncertainty in the will. The Court found that if the relevant clause was construed as creating a tenancy in common in respect of all gifted shares, it ought to be rectified.

### *Re Field* [2023] VSC 210 (Moore J)

The deceased died in 2018 leaving a modest estate of approximately $250,000. Under the Will, the residuary estate was divided between two charities. One of those charities was a disability support organisation in Bendigo operated by a company that entered liquidation in 2016. The Plaintiff executors sought judicial advice about the construction of the gift in the circumstances. The Court considered the following issues - did the organisation cease to exist causing the gift to lapse? Was the gift to the organisation for its charitable purposes (that might be applied *cy pres*) or a gift *simpliciter* available for distribution to creditors? The Court held that the company existed because it remained in liquidation. The liquidator still held funds that were to be distributed to unsecured creditors. The Court decided that the gift which was made expressly for the organisation's 'general purposes' was not a gift for charitable purposes but was made to the defendant organisation in its own right.

### *Re Luna* [2023] VSC 223 (Moore J)

This proceeding concerned a passing over application. The deceased (the Defendant's father) died in 2021, leaving two sons. The deceased's wife (the Defendant's mother) had died in 2015. The Plaintiff was a grandchild who was one of the beneficiaries named in the couple's mirror wills. The Court (at [10]) summarised the principles associated with passing over an executor. The Court will not readily pass over an executor but will do so having regard to the due and proper administration of the estate and the interests of the beneficiaries. Although not all conflict between an executor's private interests and their executorial duties will justify orders passing over the chosen executor, in this case the Court found that the defendant was "hopelessly conflicted". He had alleged that he was owed over $250,000 by the estate and he had already transferred estate funds to himself allegedly to reimburse expenses paid on his parents' behalf. The Court also expressed "serious reservations" about the Defendant's ability to understand and discharge his duties for a number of other reasons: he had failed to provide information to the Court when ordered and only revealed his alleged debt just before trial; his role as substitute executor of his mother's

estate was activated from 2018 but he had neglected all responsibility to administer that estate in accordance with the will; he had been insistent that he would 'buy out' the beneficiaries' interest in estate property contrary to the self-dealing rule. The Court appointed an independent administrator but declined to order that the independent administrator's costs ought to be borne by the Defendant personally.

### *PTD Nominees v Deacon* [2023] VSC 245 (Moore J)

The Applicant was the trustee of the PTD Trust. The specified beneficiary of the trust was a profoundly disabled man who had received a $2.5m award of damages that was initially held by Funds in Court but then paid to his parents. The Court found that the man's parents had erroneously represented to the Senior Master that the funds paid out to them were to be held in a trust for his sole benefit. The trust that was actually established (the PTD trust) included a broad class of general beneficiaries. The surviving parent contended that the assets in the trust were held for the family and that her son's award of damages had been 'exhausted'. The Court found that the assets of the trust derived predominantly from the funds awarded to the disabled son. The trustee successfully applied for approval under a 63A of the *Trustee Act* 1958 to vary the terms of the trust to delete the general class of beneficiaries. The Court removed the trustee and appointed both an independent trustee and appointor of the trust.

### *Re Davis (a pseudonym)* [2023] VSC 293 (Moore J)

This was an informal will application made by the deceased's son in respect of a document that was drafted and signed by the deceased prior to his suicide in 2021. The deceased was alone and filmed himself signing the document. The Court noted that a death by suicide does not give rise to a presumption of incapacity or even mental illness (referring to authorities including *Stuart v Kirkland-Veenstra* 237 CLR 215). The Court found that the deceased had been deliberate and purposive in organising his affairs in the days prior to his death. The document was said to reflect a detailed and considered approach to the disposition of his estate and to imparting information about the estate (such as banking passwords etc). The Court was satisfied that the deceased had capacity and intended the document to be his will. Although the document did not name an executor, the Court accepted that a grant ought to be made to the Plaintiff who was one of the residuary beneficiaries.

### *Callisi Pty Ltd v Sterling & Freeman Advisory Pty Ltd* [2023] VSC 300 (M Osborne J)

This is a Commercial Court case which clearly explains and deals with the equitable doctrine of marshalling. The question before the Court related to 'marshalling by apportionment' which is equity's response to addressing the different priority rights of security holders over mortgaged property. It is usual for a first ranking mortgagee (Lender 1) to have the power to elect to satisfy its security over whichever secured assets it chooses (say, Assets A and B). If there are lower ranked security holders (Lenders 2 and 3) with security over only certain of those assets (Assets A and B might be secured to Lenders 2 and 3, respectively) the doctrine of marshalling can operate anomalously to prejudice one of the lower tier lenders. For example, if Lender A satisfies its debt from Asset A which is also secured to Lender 2,

marshalling would ordinarily allow Lender 2 to be subrogated to Lender 1's rights in other assets (ie Asset B) . In this case, Lender 2 would be allowed to access security in Asset B. This would mean that Lender 3 will be short changed to the extent that its security in Asset B is exhausted by Lender 2's exercise of its right to marshall the first tier lender's superior security interest. The Court held that in such a scenario equity would be allowed to step in to apportion the remaining equity in the secured properties between the lower tier lenders rateably according to value (this involves quite a complex calculation that is explained by the Court). As the Court put it, marshalling by apportionment means that the lower tier lenders are not subject to the 'whim' of the first ranking lender as to how it will satisfy its debt.

### *In the matter of the will and estate of Maria Carmela Mazza* [2023] VSC 32 (Gorton J)

Maria Mazza died in 2006 leaving a will that gave one of her daughters a life interest in her Albert Park property and the remainder interest to her grandchildren. The estate was administered by the executrix and trustee until she also passed away in 2019. No grant was made in relation to the executrix's estate but the Albert Park property remained in her name as legal personal representative of Mrs Mazza's estate. The executrix's will named her husband as executor but he passed away in 2018 without obtaining a grant of probate. There were various attempts to pass the Albert Park property to the remainder beneficiaries under Mrs Mazza's will following the death of the life tenant. The Court noted that the chain of representation under s 17 of the *Administration and Probate Act* 1958 had been broken by the executrix's husband's failure to obtain a grant in relation to her estate before he died. Similarly, s 22 of the *Trustee Act 1958* only operated where a grant was obtained in the last remaining trustee's estate. The executrix's daughter attempted to obtain a grant *de bonis non* in Mrs Mazza's estate but the Registrar refused that application because the estate administration was finalised (ie the estate had reached the trustee phase). The Registrar of Titles also refused to vest the property. The Court made orders vesting the Albert Park property directly in the grandchildren who held the beneficial remainder interest in it.

### *Wang v Jiang (No 3)* [2023] VSC 341 (Gorton J)

The Court was asked to restrain the Defendants from bringing or maintaining proceedings in the People's Republic of China where there were proceedings on foot in Victoria relating to the entitlement to administer the estate and the validity of a marriage. It was common ground that the deceased was domiciled in and left property in Victoria. The Court dismissed the application on the basis that the issues ventilated in the foreign jurisdiction related to immovable property and their determination would therefore be governed by foreign law. In those circumstances, the Court held that it was not vexatious or oppressive to the local Victorian proceedings in which the law of the domicile applied, for the foreign proceedings to be allowed to continue.

### *Walters v Perton (No 2)* [2023] VSC 335 (Forbes J)

In in its first decision (*Walters v Perton* [2023] VSC 37) the Court had determined the size of the estate and that the deceased's former partner was entitled to further provision. These

reasons dealt with the amount of provision and how it ought to be satisfied. The Court found that a property in Bell St was owned by the estate unencumbered at the date of death but was transferred to the Defendant executrix within 6 months of the grant being made. The Defendant argued that, since the property was no longer in the estate, the provision could not be satisfied and the application for further provision should fail. The Court rejected the Defendant's submissions. The Court awarded further provision of just over $1.5m and ordered that the Defendant was personally liable to pay it.

### *Re Thomas* [2023] VSC 344 (Moore J)

This was an unusual and ultimately successful application to prove revocation of a will under section 12(2)(g) of the *Wills Act* 1997, which provides that a will can be validly revoked by the testator 'writing on the will or dealing with the will in such a manner that the Court is satisfied, from the state of the will, that the testator intended to revoke it'. The facts were novel. The deceased passed away in his 70s leaving no immediate family. He had made a will in 2011 with the assistance of a solicitor. His close friend located the original will in his home after his death with the name of the executors and beneficiaries redacted by a marker. The question for the Court was whether the obliterations showed that the deceased intended to revoke the will. The Court discussed the various means of validly revoking a will under section 12(2) of the *Wills Act* 1997 and, applying the principles of statutory construction, determined that the section should be given a broad application consistent with its 'ameliorative' purpose. His Honour contrasted the relevant subsection from other means of revocation (under12(2)(e) and (f)) and stated that the Court could be satisfied of the deceased's intention to revoke the will under section 12(2)(g) with something 'less than an express intention to revoke or complete destruction of the Will'. However, the Court must be satisfied of the deceased's intention from the state of the will itself and not extrinsic evidence (citing *Re Williams* [2018] VSC 543). The Court considered evidence of the deceased's historical living arrangements and the chain of custody of the will and found that it was the deceased who made the markings. The Court was satisfied of the deceased's intention to revoke the will because the obliterations removed its 'essential' parts. The Court held that testamentary capacity could not be presumed from the actions taken by the testator (which did not comply with formal requirements for revocation). Although he was described as having 'eccentric' habits, there was no evidence of cognitive impairment.

### *Re Biondo* [2023] VSC 357 (Moore J)

This case arose out of remarkable circumstances but, at least for now, involved only a discrete issue about standing. The Plaintiffs (the deceased's parents) sought orders for the exhumation and reinterment of his remains. The Court was asked by the Defendant widow-executrix to refuse the Plaintiffs' application to amend their originating motion on the basis that they lacked any standing under Order 54 of the *Supreme Court (General Civil Procedure) Rules 2015* to raise issues in the deceased's estate. That argument was rejected by the Court as an overly narrow reading of the rule and relevant authorities. The Court granted the Plaintiffs leave to amend.

### *Walters v Perton (Costs) [2023] VSC 380*

These reasons recorded the Court's initial findings and orders about costs in this complex multi-proceeding matter. The parties' final estimates of costs were just over $1m for the Plaintiff and approximately $815,000 for the Defendant. The Court apportioned the costs equally between the two main proceedings (TFM and TEP proceedings). The Court reduced the costs of the TEP proceeding by 20%. The Defendant was ordered to pay the Plaintiff's costs of the TEP proceeding on a standard basis, subject to an adjustment for the Plaintiff's unsuccessful claims. In relation to the TFM proceeding, the Court found that the Defendant had failed to comply with her obligations under the *Civil Procedure Act* 2010 and her paramount duty to the Court. The Defendant was ordered to pay the Plaintiff's costs on an indemnity basis. The Court reserved its decision about whether the Defendant was entitled to be indemnified from the estate.

### *McFarlane v McFarlane* [2023] VSC 379 (Barrett AsJ)

This proceeding concerned an application by an adult child for further provision from his father's estate. The estate was modest, comprising only a half interest in the property that the deceased shared with his second wife. Having regard to the Plaintiff's age, assets (including around $1m in superannuation) and his earning capacity, the Court was not satisfied that the deceased failed to make adequate provision for his son's proper maintenance and support. Ultimately, the Court decided that its jurisdiction to award further provision under s 91(2)(d) of the *Administration and Probate Act 1958* was not enlivened and the application was dismissed.

### *Re Connock (No 3) [2023] VSC 420*

The executor of the estate (the deceased's son) made a proprietary estoppel claim on behalf of the estate in relation to property that devolved by survivorship and under the will to the deceased's third wife (the Defendant). It was alleged that the deceased and the Defendant had created and encouraged a mutual expectation in one another that the assets they each brought to the marriage would ultimately be inherited by their natural children after the death of the survivor. The deceased's assets were more significant than the Defendant's. The Court examined the facts and took careful note of the witnesses' demeanour in assessing the credibility of their evidence about the alleged expectation. The Court found (at [137]) that the expectation existed at the time the couple made their respective wills in 2006. However, by 2012 the evidence was consistent with the dissolution of that expectation. At that time, the deceased and Defendant made new wills that removed a clause that sought to quarantine the 'Connock' assets for the Plaintiff executor and his siblings. The deceased also transferred his property into joint names. The proceeding was dismissed.

### *Yuen & Anor v Louey [2023] VSC 423 (Irving AsJ)*

The Plaintiffs were two of the executors of an estate who sought Court approval under r 54.02 of the *Supreme Court (General Civil Procedure) Rules 2015* to defend a claim by the deceased's widow to equitable ownership of estate property. The Court held that there were reasonable grounds for the estate to defend the proceeding, particularly as there were

multiple infant beneficiaries relying on the executors to seek to protect the residuary estate in contention in the related proceeding. The Court made orders that the executors would be indemnified out of estate assets for the costs of defending the proceeding, capped at $150k but with liberty to apply to increase that amount.

### *Cartledge v Bryan (No 2)* [2023] VSC 436 (Moore J)

This was the costs decision that followed the prima facie case judgement above (*Cartledge v Bryan* [2023] VSC 195). The Caveator sought her costs from the Plaintiff executrix. The Plaintiff submitted that the *prima facie* case issue ought to be viewed as a preliminary matter in the dispute, and the associated costs determined at the resolution of the proceeding. The Court found that the Plaintiff had 'fundamentally misconceived' the legal principles that applied to determining the existence of a *prima facie* case - a prima facie case does not depend on findings about the evidence but whether the allegations, if they are assumed to be true, call for further investigation. The Plaintiff was ordered to pay the Caveator's costs on an indemnity basis without reimbursement from the estate. The departure from the standard costs order was found to be justified because of the Plaintiff's disregard for clearly established principles.

### *St Hilda's College Ltd & Ors v Uniting Church in Australia Property Trust (Victoria) & Anor* [2023] VSC 462 (McDonald J)

The First Defendant trustee held the land on which St Hilda's College (a college of the University of Melbourne) was located. The trust was established initially under the *Queens College Land Act* 1962 for the purposes of St Hilda's and was a charitable trust. Later, in 1963 and 1992, respectively, the trustees at the relevant dates and the St Hilda's Council executed trust deeds purportedly conferring on the Council a right to have the land (trust property) dealt with at its direction. In 2022, the Council directed the trustee to transfer the land to St Hilda's College Ltd for no consideration under the 1992 deed. The trustee refused and proceedings were issued by the Council. The Court was asked by the Plaintiffs to determine whether the relevant clause in the 1992 deed compelled the trustee to transfer the property at the Council's direction. The Court instead characterised the main question before it as whether the trustee would be acting beyond its statutory powers in complying with the direction.

The Court held that there was no statutory power for the trustee to transfer title to the property while it remained subject to the trust. The direction was held to be invalid and of no effect. The Plaintiffs' alternative claim was for an order under s 7L of the *Charities Act 1978* requiring transfer of the legal title to the property. The section allows a trustee or administrator of a trust to seek orders enabling the application of trust property for additional purposes incidental to the trust's existing charitable purpose. The Court dismissed that application, finding that the first Plaintiff was not an administrator or trustee under s 7L, and that the application sought additional powers for the trustee (ie the power to transfer property) rather than the application of trust property to serve any further or incidental charitable purpose.

### *Re Hall* [2023] VSC 482

This was a statutory will application made by the son of the *propositus*, Mrs Hall. The Court was asked to authorise a testamentary document that either excluded or limited the participation of Mr Hall - the husband of the propositus and the Plaintiff's father - in the estate. The Plaintiff claimed that Mrs Hall's testamentary intentions would be likely to or would be reasonably expected to have changed in view of Mr Hall's alleged lack of capacity and recent dissipation of marital assets. The Court noted that the application was made in urgent circumstances and without comprehensive evidence. Documents relating to Mr Hall's alleged incapacity had been filed in a related VCAT proceeding that was contested by Mr Hall and were not available to the Court. The Court was not satisfied on the available evidence that the revised testamentary intentions embodied in the draft proposed wills could be imputed to the propositus or that it would be reasonable for the Court to authorise the will. The application was dismissed.

### *Re Estate of P Mirabella (dec'd) (No 2)* [2023] VSC 185 (O'Meara J)

This was the costs decision that followed the primary judgement above relating to an application for rectification and construction of the deceased's 2007 will. The Plaintiff and Defendant filed submissions, as did the drafting solicitor's firm (as a non-party). It was common ground that the firm ought to pay for at least some of the Plaintiff's costs of the rectification application. The submissions required the Court to consider the following questions: should the balance of the Plaintiff's costs be paid by the law firm? Should the Defendant pay some of the Plaintiff's costs and bear his own costs without indemnity from the estate? The Court observed that, where the solicitor's errors caused the litigation, an order might be made that the law firm pay all the costs of the rectification application. However, in this case the rectification question was only one component of the litigation. The Defendant's submissions about the construction of the will gave rise to broader issues. The Court did not agree with the position of the Plaintiff and law firm that the Defendant had acted unreasonably and in his own interest. The Court refused to order the Defendant to contribute to the Plaintiff's costs. The non-party law firm was ordered to pay both the Plaintiffs' and the Defendant's costs of the application on a standard basis. The balance of the parties' costs were ordered to be paid from the estate.

### *Re Memos* [2023] VSC 475 (Moore J)

This was an application for revocation of a grant of letters of administration. The deceased tragically died intestate in 2022 at the age of 23. Her parents had obtained a grant in November 2022. The applicant claimed to be the deceased's partner and therefore sought the revocation of the grant so that she could apply for letters of administration on intestacy. The issue of the applicant's standing and the substantive revocation issue arose from the same factual inquiry about the nature of the relationship. The Court dealt with both questions in these reasons. The applicant filed 7 affidavits to establish that she and the deceased were in an unregistered domestic partnership (under s 3(1) of the *Administration and Probate Act 1958*, with reference to s 35(2) of the *Relationships Act 2008*). The Plaintiffs alleged that the applicant and deceased were only university friends and roommates. There was scant evidence of any contact between the deceased and her parents for the two years before she

passed away. The Court was satisfied that the applicant was the deceased's domestic partner and that it was appropriate for the Court to exercise its discretion to revoke the grant made to the deceased's parents.

### *Cappelleri v Cappelleri* [2023] VSC 485 (Moore J)

This proceeding concerned the ownership and control of a company and the assets it held. The company had two shares - one had been registered to the deceased (Frank) and the other to his wife from whom he was separated (Leonie). The Plaintiffs were represented by their son as administrator for Frank's estate and litigation guardian for Leonie. The Defendants were the deceased's brothers, one of whom had been registered with ASIC as the owner of the shares in the company. With the parties' consent the Court determined the dispute by addressing 9 questions. The main issues were the beneficial ownership of the shares in the first instance; whether registrations lodged with ASIC regarding a change of director and shareholder were supported by valid appointments / transfers; and whether the property owned by the company was held on trust for the deceased (Frank) and Leonie.

The reasons span a range of interesting legal issues, arising from the Defendants' more adventurous pleadings and submissions. The Defendants alleged that the Plaintiffs' claims were statute barred under s 5(2) (relating to actions 'founded in tort') and s 21 (actions to recover trust property or allege a breach of trust (other than a fraudulent breach)) of the *Limitations of Actions Act 1958* .The Court held that the Plaintiffs' claims as to the rights in shares and for rectification of the ASIC register were not statute barred as they were claims purely for declarations as to rights without claims for consequential relief. The Court noted that s 35 of the *Supreme Court Act 1986* provides that a proceeding is not open to objection on the ground that declaratory relief is sought and the Court can make declarations without consequential relief (also citing *Director of Consumer Affairs Victoria v Mecon Insurance Pty Ltd* [2016] VSC 42 as to when declaratory relief may be appropriate). In a similar vein, the Court noted that a claim for declaratory relief is not subject to equitable defences such as estoppel or laches (citing *Ambridge Investments Pty Ltd v Baker & Ors* [2010] VSC 59), and that a claim for a legal or statutory remedy (ie the rectification of the ASIC register) is also not vulnerable to a defence of laches.

The Court determined that the shares were not validly transferred in law or equity to the deceased's brother and that he was not validly appointed as a director. As the deceased had contributed all of the purchase money for the properties owned by the company, the Court held that the properties were held on resulting trust for Frank. The reasons also include a refresher on perfecting a gift in equity, citing *Milroy v Lord* 1862 EngR 951; *Corin v Patton* (1990) 169 CLR 540 as authorities for the well established principle that the donor must do all that is ''necessary to be done" to transfer the property and render the voluntary gift binding on him / her.

### *Re Connock (No 4)* [2023] VSC 488 (Moore J)

This was the costs decision that followed the principal judgement about a constructive trust claim (outlined above). The Court was asked to exercise its discretion to impose indemnity costs on the unsuccessful Plaintiff based on his rejection of two offers made before and

during the trial, respectively. The Court reviews the matters that will be taken into account in assessing whether the rejection of an offer is unreasonable (citing *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2)* 2005 VSCA 298; (2005) 13 VR 435). In the circumstances, the Court held that the rejection of the offers was not unreasonable as the offers required the disposition of related proceedings in which other parties were involved. Despite the relatively generous nature of the offers, the Plaintiff's decision to reject them was viewed as not unreasonable in the context of the 'all or nothing' or binary nature of his constructive trust claim.

### *Cline & Anor v Rodden & Anor* [2023] VSC 492 (Garde J)

Marlene Cline passed away in 2016 leaving her husband ('Chet') and two children from a previous marriage, Andrew and Sally. Marlene and Chet lived in Gippsland on a farm purchased by Marlene with an inheritance. She and Chet lived on the farm for 30 years and Chet established his business there. Some time before her death, the deceased transferred the farm property to her two children but subject to a life tenancy in her favour.

The Court considered a claim by Chet (and, following his death, his estate) for an interest in the farm founded on an alleged common intention constructive trust and, alternatively, proprietary estoppel. The Court outlined the principles that apply to establishing a common intention constructive trust: there must be an actual (not imputed) common intention that the claimant would have or had a beneficial interest in the land; the claimant acted to their detriment in reliance on that common intention; and it would be equitable fraud for the legal owner to act contrary to the intention. The Court received evidence from a related Part IV proceeding brought by Chet against Marlene's estate. In his affidavit, Chet's statements about the farm did not reflect the evidence he gave in this proceeding of Marlene's representations about the alleged common intention. The Court also noted that the couple maintained separate assets pools throughout their marriage. No common intention was found to exist about Chet's beneficial ownership of the farm. The Court dismissed the proprietary estoppel claim, finding that any contribution to the farm property had not been induced by Andrew and Sally as the legal owners. Claims that the property had been transferred fraudulently and dishonestly in breach of trust and associated claims against Andrew and Sally in unjust enrichment and under *Barnes v Addy* principles were also dismissed. The Defendants counterclaimed under s 132A(2) of the *Property Law Act* 1958 which codifies remedies in waste against tenants and life tenants. The Court found that those claims were not established because Chet's alterations to the farm were done with a licence from Andrew and Sally.

### *Campana v Censori* [2023] VSC 502 (McDonald J)

This proceeding involved various trust claims in relation to a Brunswick property involving a brother (Mr Campana, the Plaintiff) and his sister (Ms Censori, the Defendant). The brother had purchased a property in Brunswick in 2005 and developed it as an owner builder. He formed the belief that he could not obtain building permits for the properties if they remained in his name. He transferred the properties to his sister but alleged that a trust deed was signed pursuant to which she was to hold his beneficial interest in the properties on trust. The trust deed had been lost but the Court was satisfied that it had been signed. However, the

Court found that the express trust claim by the Plaintiff failed because the alleged trust did not meet one of the requisite certainties - certainty of subject matter. The sister had signed a contract at the time the trust deed was executed but she had done so as nominee which did not entitle her to seek specific performance of the contract. The Court found that at the time the trust deed was signed, her interest in the property was not a vested or contingent proprietary interest capable of being sufficiently certain subject matter of a trust.

The Court did not accept the Defendant's argument that the Plaintiff was estopped (under deed estoppel) from leading evidence that he had contributed to the purchase price of the property in circumstances where the transfer of land (operating as a deed) stated that the sister had contributed to the purchase price. The Court explained that deed estoppel operated as a rule of evidence that prevented a party from leading evidence that contradicts a deed to which they were bound. In this case, the Plaintiff was not seeking to overturn the transfer itself but to challenge its legal import. The Court held that the sister's evidence about her own alleged financial contributions to the property were 'implausible'. The Court received and accepted the Plaintiff's evidence of his financial contributions to the property, which included payment of the purchase price. A resulting trust argument failed as the parties' attempt to establish an express trust was found to exclude a trust based on inferred intention (citing the High Court's recent consideration of resulting trusts in *Bosanac v Commissioner of Taxation* (2022) HCA 34). Ultimately, the Court held that the parties had a common intention that the Defendant would hold the property on trust, that the Plaintiff had relied on this in paying the purchase price and that the Defendant had engaged in equitable fraud by failing to honour that common intention.

### ***Jedrzejewska v Sheedy*** **[2023] VSC 511 (Moore J)**

This was a passing over application made by the deceased's domestic partner. The deceased died in 2018 leaving a will that appointed his brother (the Defendant) as executor. The executor did not apply for a grant until 2021. By the hearing in August 2023 there were still outstanding requisitions. The executor's solicitor was called to give evidence. It was apparent that the delays in filing the application and responding to requisitions arose to a significant extent from his failure to act promptly on instructions or at all. However, the Court held that the solicitor's 'serious dereliction' of his duties did not excuse the executor's delay. The appointment of an LPR invests personal responsibility in the executor. If they choose to delegate any aspect of their role, it is their responsibility to engage agents who are suitably competent and to continue to supervise their actions. The executor was found to have failed to discharge his duties and to be unable to act due to ill health. The parties sought costs against the solicitor but he was to be given the opportunity to be heard on that issue.

### ***Fahey v Bird (No 2)*** **[2023] VSC 540 (Moore J)**

The Defendant executor had pleaded guilty to two charges of contempt for failing to comply with orders and an undertaking to produce an account of the administration of the estate and associated testamentary trust. The Court's reasons considered the penalty to be imposed. The Defendant had failed to communicate or appear before the Court at the initial return of the summons for contempt. The Court ordered that a warrant be issued to the sheriff to arrest the defendant and bring him before the Court for a hearing in May 2023. A declaration was

made that the beneficiary of the trust was entitled to unclaimed estate funds; those were transferred to her in the course of the contempt proceedings. The Defendant was allowed two more opportunities to file an administration account and still failed to do so by August. The Court held that his breaches were wilful and criminal in nature. Although noting that a custodial sentence is a last resort for a contempt charge, the Court imposed a four month jail term but suspended the sentence for a period of 28 days to allow one final opportunity for the account to be filed.

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