Estates and Administration Legal

TEP / TFM CASE UPDATE – SUPREME COURT OF VICTORIA (TRIAL DIVISION)

August 2024

Re Legal Super Pty Ltd **[2023] VSC 545**

This was an application for advice under r 54.02 of the *Supreme Court (General Civil Procedure) Rules 2015* by the trustee of a superannuation fund as to whether the trustee was justified in amending the trust deed to add a discretionary power to charge fees for services provided to the fund by the trustee. The application was made in the context of changes to the *Superannuation (Industry) Supervision Act* 1993 (Cth) that restricted the indemnity available to the trustee and its directors from trust assets for certain statutory liabilities. The Court observed that with a capital of only $16.00 in its own right, the imposition of personal liability on the trustee company could result in its insolvency. The proposed amendment was held to be within power and proper.

Edwards v Attorney-General for the State of Victoria **[2023] VSC 569** ***(Daly AsJ)***

The trustees of a charitable trust applied for judicial advice under r 54.02 of the *Supreme Court (General Civil Procedure) Rules 2015* concerning the interpretation of a trust deed. The deed stated that the relevant trust's purposes included the support of religious congregations that promoted 'primitive Christianity' and which were operated in accordance with strict prescriptions outlined in the deed. The trustees also sought approval under s 63 and s 63A of the *Trustee Act* 1958, respectively, for the application of trust funds and for amendments to the deed. The trustees had sought the opinion of Senior Counsel and a religious scholar about the interpretation of the deed. The Court found that the jurisdiction under r 54 was enlivened by the uncertainty in the trust deed and accepted that it was impractical for the trustees to identify churches or organisations that complied with the requirements in the deed. In the circumstances, it was expedient to permit amendment of the deed. The existing terms of the deed were found to provide greater scope for applying trust funds to broader charitable purposes than the application had contemplated. The trustees were permitted to amend their originating motion to seek advice as to whether certain broader charitable purposes or organisations fall within the scope of the deed.

Walters v Perton (interest ruling) **[2023] VSC 615** ***(Forbes J)***

In earlier decisions (*Walters v Perton* [2023] VSC 37 & *Walters v Perton (No 2)* [2023] VSC 335) the Court had determined that over $1.5m was to be paid to the deceased's former partner by way of further provision. The Defendant executor was ordered to pay the amount of provision personally. The Plaintiff sought interest under s 58 of the *Supreme Court Act* 1986, alleging that the provision sum was a 'debt or sum' recovered in a proceeding. The

Court decided that s 58 section did not apply to allow interest to the Plaintiff on the provision sum which was not a relevant 'debt or sum'. The order for further provision operates as a codicil to the Will. The sum claimed is not owing or ascertained before the litigation and the exercise of the Court's discretion to award further provision. The Court was not persuaded to adopt a different view because the executor had been ordered to pay funds personally. This did not change the nature of the sum but only the party ordered to pay.

Re Gray [2023] VSC 668 (McDonald J)

The deceased signed a will in 2019. That document did not comply with the formal requirements for making a will under s 7 of the *Wills Act 1997* because it was not made or acknowledged in the presence of two witnesses. The deceased had made an earlier 'formal' will in 1995. The beneficiaries of both the 1995 and the 2019 wills consented to the application. The Court assessed the terms of the document, the surrounding circumstances and direct evidence of intention. It was noted that the usual presumptions that arise from due execution do not arise. The Court stated that in assessing capacity, it can be appropriate to consider the complexity of the will and estate, and the exclusion or not of certain beneficiaries (citing *Re Martin* (2019) 59 VR 584). The Court was satisfied of the deceased's capacity to make the 2019 will and that the deceased intended the document to be her last will. Orders were made that the informal will ought to be admitted to probate. The Court also found that under s 9(2) of the Act it ought to refuse to admit the 1995 will to probate because the deceased had 'by writing' (ie the informal will) revoked that earlier will.

Cavanagh v Mace [2023] VSC 670 (Moore J)

The Plaintiff was the domestic partner of the deceased who had applied for a grant of probate. The Defendant, the deceased's son from a previous relationship, was also named as an executor in the will. He sought orders passing over both himself and the Plaintiff as executors of the Estate. It was clearly the Plaintiff's conduct that prompted the application. The main asset of the estate was a share in a farm property that the Plaintiff and deceased had purchased from the deceased's elderly mother in exchange for a 'granny flat' agreement allowing the mother a life interest in a residence on the property. The Plaintiff had allowed her son to live at the property and eventually locked the deceased's mother out of the flat and allowed her son to occupy it. The evidence established that his use of the property caused extensive methamphetamine contamination. The Court found that the Plaintiff did not understand her duties to the estate and was unfit to hold office.

Re Lidgett [2023] VSC 673 (Moore J)

This was an application for judicial advice by the trustee of the Lidgett Property Trust. The Court declined to provide the advice sought. The trustee was one of the four children of Mrs Jillian Lidgett. The trustee became the registered proprietor of a farming property in early 2023, just as claims made in a related proceeding by another of the Lidgett children (Simon) in relation to that property were to be mediated. In the related proceeding, Simon alleged that Mrs Lidgett had made promises that he would receive the property upon her death sufficient to give rise to a constructive trust, and also that a contract had been entered into binding her to leave the property to him by her will. Simon

alleged that the transfer of the property was in breach of the alleged constructive trust and contract and that it constituted a fraud within the meaning of ss 42 and 43 of the *Transfer of Land Act* 1958 (Vic). Claims were made by Simon against the trustee of the trust in both her representative and personal capacities that, in receiving an assignment of the properties, she assisted the breach of trust and participated in a fraud.

The trustee sought advice that she was justified in defending the claims on behalf of the trust and paying the costs of doing so from trust funds. The Court reviewed the principles applying to judicial advice under r 54.02 of the *Supreme Court (General Civil Procedure) Rules 2015*, noting that it was a summary procedure designed for the dual purpose of providing 'private advice' for the protection of the trustee and to protect the interests of the trust. The Court declined to provide the advice sought owing to the familial and private nature of the dispute. The Court found (at [51]) that the trustee and Jillian would actively defend the claims in their personal capacity and that it was unnecessary for the trust to also defend the claims. His Honour stated that: (at [58]) 'the controversy which finds expression in Simon's proceeding is self-evidently a family dispute'. The Court directed that the trustee would be justified in taking no active part in the proceeding and that the trust should not bear the costs of defending Simon's claims.

Cvitovic v Dillon* [2023] VSC 701 *(Moore J)

This was a successful application to remove an administrator *pendente lite*. The necessity for the limited administration arose from an ongoing dispute about the validity of the deceased's marriage (some 5 months before he died) and the resulting entitlement on intestacy. A key issue in the administration was whether the administrator ought to call in the principal asset of the estate - a loan account in a related trust. It had been submitted on behalf of the deceased's wife that that would have 'catastrophic' effects on the trust which would need to be liquidated and likely wound up to fund the loan repayment. The Court observed that the trust and estate were distinct entities and that the administrator's duties were owed to the beneficiaries of the estate alone. The Court provided some useful guidance on the role of an administrator *pendente lite*. Although the role and powers will vary depending on the circumstances of the estate, the administrator will invariably have a duty to get in the assets and preserve them for the benefit of those found to be entitled (citing *Henderson v Executor Trustee Australia* (2005) SASC 477). The administrator consented to his discharge. The Court removed the limited administrator, appointed a new administrator and empowered the administrator to call in the loan account but did not provide approval in advance for him to do so.

Perpetual Trustee Company Limited v The Bays Healthcare Group Incorporated & Anor [2023] VSC 727 (AsJ Ierodiaconou)

This was an application for judicial advice concerning charitable gifts to two institutions named in the will of the deceased. Both institutions existed in the form described in the will at the time of the deceased's death in the 1980s. At that time, an interim payment of the residuary estate was made to those institutions. This application related to the balance of the residuary estate that had been subject to a life interest.

The reasons include a neat summary of key principles about when charitable gifts will lapse. In the leading authority (Re Tyrie (No 1) (1972) VicRp, 16) Newton J enumerated the following key

principles: although a gift to a charitable institution is a gift to advance the charity's purposes, a gift to a particular institution that has ceased to exist will lapse because the testator has demonstrated an intention to benefit the charitable purpose through the 'instrumentality of the named institution and in no other manner'. However, the gift can still be applied in some circumstances: where there is an organisation that can be properly regarded as the successor of the named institution and which carries out its purposes and where the 'dominant charitable intention' of the testator was sufficiently broad to encompass the successor; where the testator's intention was for the gift to be added to the assets of the organisation; or where the gift can be applied *cy pres* because the 'indispensable or essential elements' of the testator's dominant charitable intention can otherwise be given effect.

The Court refers to *Re Coulson* (2014) 13 ASTLR 399 (per McMillan J) which deals with the anterior question of whether an organisation has ceased to exist. Her Honour held that an organisation might change legal form but continue in existence if its charitable work has continued notwithstanding changes to the 'mechanics of its operation'. The Court was satisfied that in this case neither organisation had ceased to exist 'and it was merely the mechanics by which they operate that the changed' (at [82]). The Court agreed with the Defendants that the application for advice was unnecessary. The two Defendants were the only organisations possibly entitled to the residuary estate and, despite an initial minor contest between them, they had agreed to receive the balance of the estate in equal shares. There was found to be 'no practical significance' (at [28]) to the Plaintiff's technical inquiry in the application as to whether the Defendants were the 'continuation' of the organisations named in the will (ie they remained in existence) or the successors. These reasons once again reveal a relatively cautious approach by the Court in granting relief to fiduciaries who seek its protection without very sound reason (recalling the decision in *Re Evans; Marks v Evans* [2023] VSC 4 (McMillan J).

Re Occhipinti [2023] VSC 730 (Moore J)

What is required for a caveator to establish a *prima facie* case of testamentary undue influence? The deceased was an elderly lady who was survived by four sisters and a niece (the caveator). The deceased made a will in 2006 appointing the caveator as sole executrix and beneficiary. The Plaintiff had sought to prove a will made in 2014 that instead gave the estate to the deceased's sisters. The caveator's grounds alleged that the deceased suffered a massive stoke in 2009 and was, at the time the 2014 will was made, unable to communicate other than to express her agreement with simple concepts by nodding her head. She was also subject to an administration order having been found to lack capacity to make reasonable decisions regarding her estate. The Plaintiff submitted that the grounds and particulars did not establish a *prima facie* case supporting an allegation of actual influence by the sisters - only the opportunity to exert it. The Court restated the principles outlined in *Re Robustelle (No 2)* [2023] VSC 72 (in turn referring to *Gardiner v Hughes (No 2)* [2019] VSC 198) about the grounds and particulars required to sustain a *prima facie* case. In summary, it must be the case that the allegations, assumed to be true and considered together as an overall narrative, establish a case for investigation. In this case, the Court considered the role of inference in establishing this 'case for investigation'. The Court found that it was sufficient if relevant inferences establishing that case could be drawn from the grounds and particulars. It was not necessary for the caveator to prove that the particulars justify the specific inference asserted by the caveator; which is a matter for trial.

Lidgett v Lidgett [2023] VSC 743 (Daly AsJ)

These reasons concerned two interlocutory applications in proceedings involving the Lidgett family. The allegations by Simon Lidgett in relation to the family farm owned by his mother (Jillian) are described above (see *Re Lidgett* [2023] VSC 673). The claims by Simon to beneficial entitlement of the family farm extended also to the farming assets, plant and equipment owned by a farming partnership between Simon and Jillian. Simon applied for an injunction to prohibit sale of the assets and sought to be permitted to continue to manage the assets - particularly livestock - that he had built up in the farming partnership. Jillian instead sought orders appointing a receiver and manager to the assets with powers to call in and sell the assets.

The Court held that the appointment of a receiver was not necessary in the circumstances to prevent the 'dissipation or waste' of assets and that the appointment would be disproportionate to the relatively modest assets (valued at approximately $200,000).

An injunction was granted to Simon, and he was permitted to undertake the ongoing management of the farming assets on strict conditions. The Court considered the three main threshold issues for injunctive relief to be granted to Simon: as to the merits (ie whether there was a serious question to be tried) the Court took a 'neutral' view but noted that an applicant is not required to show that they are more likely than not to succeed on the merits but only that their prospects are sufficient to justify maintaining the status quo; it was held that damages would not be an appropriate remedy if the livestock were sold by a receiver in a 'fire sale' scenario; that balance of convenience was found to favour the injunction, but on strict conditions. Jillian submitted that the injunction sought was not permitted under s 43 of the *Partnerships Act* 1958 (Vic) which prevents any partner being required to continue in the partnership or binding another partner after dissolution of the partnership. The Court did not agree that Jillian would be forced to work in a partnership that had been dissolved but only that she would be restrained from selling assets that Simon would manage as the temporary caretaker. The Court sought to 'ameliorate' the risk to Jillian of Simon's ongoing management of the assets by imposing various conditions including dual access to bank accounts, appointment of new accountants and regular reporting.

Cavanagh v Mace (No 2) *[2023] VSC 745* (Moore J)

This was the costs decision that followed a successful application for orders passing over the executors named in the deceased's will and the appointment of an independent administrator. The deceased's son succeeded in that application largely due to the Court's findings that the Plaintiff (the deceased's domestic partner) had failed to appreciate or act in accordance with her executorial duties. The Plaintiff sought her costs. The Court found that there was 'no arguable basis' [(7)] for that outcome. She was ordered to pay the son's costs on an indemnity basis without recourse to the estate, and to bear her own costs.

Pizzi v Pizzi [2023] VSC 760 (Moore J)

The Court declined to approve a proposed compromise of a removal application that would affect the interests of the deceased's minor son (the Plaintiff) in what was described as an 'unusual' matter. The Plaintiff was the sole beneficiary of the estate. The deceased's father was one of the Defendant executors who alleged that he was owed a substantial portion of the estate. The Court could not be satisfied that the compromise was in the Plaintiff's interests and referred the proceedings for determination on the question of removal of the Defendants. The Defendants were provided with the opportunity to show cause why they should not be removed as LPRs. The Court also recorded serious concerns about the quantum of the Defendants' costs.

Walters v Perton **(Costs No 2) (Forbes J) [2023] VSC 785**

This was a further costs decision in this long-running and bitter series of proceedings. The Court had previously ruled on substantive issues in the TFM and TEP proceedings and fixed costs for professional fees. The parties were ordered to try to resolve final issues about disbursements. The reasons set out a detailed consideration of issues around interlocutory costs orders, allowances for disbursements and whether the fixed fees set by the Court in July 2023 encompassed subsequent costs incurred in the later phases of the proceeding. The Court allowed some additional costs for the dispute about disbursements and other discrete matters that were reserved or not foreseeable at the date that a gross sum was fixed for professional fees.

Australian Unity Trustees Limited v Tsatsaronis **[2023] VSC 796 (Gobbo AsJ)**

This novel application followed a referral by the Registrar of Probates to the Court on the question of whether a probate caveat had lapsed. The *Supreme Court (Administration and Probate) Rules 2014* provides that a caveat will lapse 30 days after notice is given of an application unless the caveator files grounds of objection or 'the Court otherwise orders'. The Court noted that there has been no prior judicial consideration of the circumstances in which the Court would make such an order. The caveator was self-represented. The Court was careful to afford the caveator procedural fairness . The Court was not persuaded by his unsubstantiated and wide-ranging allegations to make any order allowing the caveat to persist. The utility of any contested proceeding was also in doubt where the caveator would take an equal share of the estate under the will or on an intestacy. The Court ordered that the caveat had expired under r 8.03 and referred the application to the Registrar. The Plaintiff was allowed its costs on an indemnity basis. The reasons include a helpful outline of authorities on the Court's role in proceedings involving self-represented litigants.

Re The Pickering Family Trusts **[2024] VSC 5 (Lyons JA)**

Section 63A of the *Trustee Act 1958* (Vic) empowers the Court to (among other things) vary or revoke trusts on behalf of classes of persons not capable of providing consent or who have an unascertained interest in the trust. The Court restated the principles that apply to consideration of an arrangement under s 63A with reference to the Court of Appeal decision in *Perpetual Trustees of Victoria v Barns* (2012) VSCA 77. In short, the Court must not approve such an arrangement unless satisfied that the arrangement would be for the benefit of that person or class of persons (the 'first proviso'). If satisfied of the benefit, a further 'proviso' requires that the arrangement is 'proper and fair'.

The case concerned the trusts established in two identical deeds by George and Ted Pickering for the benefit of them, their respective spouses and their respective current and future children and grandchildren. The trust deeds included no power of amendment. Both George and Ted had died. The Proceedings were issued initially to seek to expand the class of beneficiaries in each trust to include the beneficiaries of the other trust. This was aimed to give effect to the estate plans of George and Ted which would dispose of their joint business assets to certain family members (from both sides) who were executives in the business (the 'Group Managers').

The Court addressed in detail the considerations that apply in determining whether an arrangement is for the benefit of the relevant objects of the trust: how the arrangement will operate in fact; the nature of the benefit which can be financial or connected to 'social, familial, moral or educational' outcomes; and the test that applies to assess benefit to minors. If the practical operation of the arrangement results in a benefit that is theoretical or 'illusory', the first proviso will not be satisfied. The Court was cautious about the emphasis to be placed on non-financial familial benefit such as the avoidance of familial conflict, in assessing benefit.

The Court initially declined to approve the variation as it was not satisfied that the proposed arrangements in the context of the estate plan would be for the benefit of the relevant persons under s 63A, particularly future beneficiaries of the children who were not of the families of the Group Managers. In circumstances where it appeared that the succession plan was to involve an imminent distribution of assets out of the trusts, any benefit to those potential future beneficiaries of being an object of the other trust was 'illusory'.

In this decision, the Court considered a revised arrangement in which the beneficiaries of each trust would be expanded to include the family members who are the objects of the other trust but which also provided for undertakings by the trustees to maintain assets in the trust for a period of 18 years unless Court approval is obtained to distribute the corpus or resettle the trust. This reinforced the trustees' intention to give consideration to all beneficiaries in exercising its discretion notwithstanding the estate plan that benefited the Group Managers. The arrangement would allow minor and unborn beneficiaries to have access to a broader class of assets from which income and capital distributions could be made. The Court decided that the revised arrangement was for the benefit of minor and future (unborn or yet to be adopted) children and was fair and proper.

Re Estate of Vaughan; Dunn v Dunn-Vaughan [2024] VSC 7 (O'Meara J)

This proceeding followed a long history of acrimonious disputation involving two brothers. The deceased was the stepfather of the Plaintiff and the Defendant, who was the administrator of the estate. This proceeding concerned allegations by the Plaintiff that the Defendant has breached his duties in two principal ways. First, by failing to value and call in assets of the estate and instead causing the destruction of intellectual property and by failing to comply with the terms of the will, previous Court orders and an alleged contract relating to the exercise of options, as well as the valuation and sale of an estate property at Balnarring. The Plaintiff also sought the Defendant's removal as administrator.

The factual background to the dispute was convoluted, as is evident from the length of the judgement (around 650 paragraphs)). The detailed consideration required of various allegations and counter allegations reflected the antipathetical relationship between the brothers. The Court found that in around September 2019 the Defendant knew or ought to have known that certain

documents and IP could have had value and that he 'recklessly' destroyed material (at [399]). The Plaintiff assigned a valued of $2.528m to the IP. The Defendant maintained that any valuation of the IP was speculative. The Court assessed the value of the lost intellectual property at $300,000.

The Defendant's conduct in relation to the estate property at Balnarring was found to be 'somewhat mischievous' ([637]) but it was noted that he had complied with the substance of the contractual arrangements regarding the property. The Defendant was found to above adopted a 'critical and punitive' attitude to his brother (at [141]) and to lack 'balance and judgement' in his conduct of the estate administration. The Court determined that it was appropriate to remove the Defendant administrator. He was ordered to pay $300,000 to the estate for the wasted value of the IP assets.

***Re Tsialamandris* [2024] VSC 9 (Meek J)**

This was a revocation application heard and determined in Sydney. The applicant was one of the daughters of the deceased, the Plaintiffs (the executors) were the other daughter and a solicitor. The Court described the application as one for 'summary judgement'. However the case was argued as a contest about whether the applicant had established a *prima facie* case to revoke the grant on the grounds that that deceased lacked knowledge and approval and that the will was infected by undue influence. The Court applied the usual test - that is, do the particulars, assumed to be true, establish a case for investigation? The Court found that the particulars revealed a case for investigation and ought to proceed to trial. It was of some significance that the will was lengthy and complex and the affidavit of due execution did not match the details in the attestation clause and expressed conclusions about the deceased's understanding of the will rather than the manner in which it was read and explained to her.

***Re Miglic* [2024] VSC 20 (Gorton J)**

The question before the Court in this proceeding was whether a mutual wills agreement had been made in 1993 between a husband (Kurt) and second wife (Marilyn). In other words, to adopt the formulation of the Court: was there an agreement between Kurt and Marilyn that wills would be made in terms agreed that were not to be changed without the informed consent of the other party?

Kurt and Marilyn had both died; Kurt predeceased Marilyn. They had made wills in 1993. In previous wills, Kurt had protected the bulk of the capital in his estate for his daughters by allowing Marilyn a life interest rather than an absolute entitlement to certain assets. This pattern changed in 1993, with Kurt leaving Marilyn a greater absolute interest in his assets. There was no documentary evidence of their agreement but hearsay evidence was admissible. The solicitor who drew the will did not know about any mutual wills agreement. The evidence in support of the agreement included discussions between Kurt and his daughters and ex-wife about the existence and effect of such an agreement, as well as discussions between Marilyn and one of his daughters of which a contemporaneous file note was made.

Marilyn made wills in 2001, 2005 (prior to Kurt's death) and 2011, 2014 and 2018. Her wills progressively increased gifts to her nieces and nephews and decreased the share of her estate (which has been enlarged by Kurt's assets) to be given to Kurt's daughters.

The Court found on the balance of probabilities that Kurt and Marilyn had entered into an agreement in 1993 that they would not change theirs wills without the informed consent of the other. Kurt had

developed dementia from sometime around 2001. The Court found that he did not provide informed consent to Marilyn's subsequent wills. If he had provided such consent to the 2001 will, that was revoked by the later wills made by Marilyn.

The Court discussed the reliability of the witnesses and their recollections at some length. It was said that it was sufficient if the recollections reliably recalled the 'substance or import' of the discussions that supported the existence of the agreement rather than the actual words used. The fact that some witnesses had altered their conception of the legal mechanism for making their case (there had been a previous challenge to the grant made in Marion's estate) was not fatal.

Despite their being a valid will inconsistent with the agreement, Marilyn's estate was fixed with a trust in favour of the beneficiaries in terms of the 1993 will. The Court found that it did not tell against the existence of any such agreement that it was commonly understood that certain assets held by Marilyn (inherited from her mother) in which she had a life interest were to go to her nieces and nephews.

Re Wallace [2024] VSC 22 (Moore J)

This was an application to admit an informal will to probate under s 9 of the *Wills Act 1997*. The deceased drafted a joint homemade document with her husband in 2019 shortly before the couple travelled overseas. The document was signed on each page by both the deceased and her husband but not witnessed. The deceased and her husband had contacted the executors at the time of making the will to let them know of the existence and location of the will, which had been stored with other important documents. The evidence disclosed that the couple collaborated in drafting the document and that their failure to have the document witnessed was 'inadvertent' or 'accidental'. The Court was satisfied that the informal document should be admitted to probate and given effect as the deceased's will insofar as it related to her assets.

Re Estate of Sillitoe [2024] VSC 37 (O'Meara J)

This was an unusual application for rectification of a codicil made by the deceased with the assistance of friends who were not legally qualified. The testator's earlier will provided for a foundation to be established for the benefit of athletes. The deceased made two codicils, the second of which provided instead for a gift to an existing charity but expressed this gift as an appointment of that charitable organisation as trustee of the foundation established in the earlier will. The Court considered evidence from friends who facilitated the drafting of the codicil but did not stand to benefit from it. The Court was satisfied that the codicil did not carry out the deceased's testamentary intentions because it failed to give effect to his instructions and ought to be rectified to provide instead for an absolute gift to the charitable organisation.

Lidgett v Lidgett (No 2) [2024] VSC 43 (Daly AsJ)

This costs decision followed two competing interlocutory applications for the appointment of a receiver to certain partnership assets and an injunction preventing the sale of those assets (see above *Lidgett v Lidgett* [2023] VSC 743 (Daly AsJ)). The Court decided that the receivership application was sufficiently distinct from the issues in the substantive proceeding that costs should

follow the event rather than falling within the costs of the proceeding. The unsuccessful party (Jillian) was ordered to pay those costs but the Court declined to order that those costs should be taxed and paid immediately (such an order is made where the conduct of the losing party is unreasonable). It was determined that the injunction application costs would be costs in the proceeding.

Re Laird [2024] VSC 66 (Gorton J)

This was an application by the administrator of Mrs Laird's estate for advice about the construction of her will. The will provided for alternate dispositions of the deceased's property depending on its ownership at the date of her death. If the deceased owned the property, "Harkaway Farm", at the date of her death, then two of her seven children would receive the property. If the property was no longer owned by the deceased, then all of Mrs Laird's seven children inherited the entire estate equally. The property was described by name in the will but also with reference to the title details at the date the will was made. Following the execution of the will, the original title was subdivided and another area added by adverse possession so the legal description of the land was no longer the same as the title details in the Will. The Court found that the deceased did not intend that any alterations to the title details or boundaries of the land would cause the specific gift of the property to two of her sons to fail.

Re Bourikas [2024] VSC 96 (Watson J)

This was an application to admit a copy will to probate. The deceased left a 2016 will appointing each of his three children executors and dividing the estate equally between them. The Plaintiffs were two of the executors. The Court found that a will was made and executed by the deceased in the same terms as the copy that was available. The evidence about whether the deceased held the original will at the date of his death was not conclusive. In order for a copy will to be admitted to probate, the evidence must rebut the presumption of destruction that arises if the original will is traced into the possession of the deceased. The Court found that whether or not the presumption of destruction arose, it was rebutted by the evidence that was inconsistent with the deceased having taken steps to destroy the will with the intention of revoking it. For example, despite making preliminary inquires about changing his will in 2020, the solicitor who acted for him until later in his life did not receive instructions to draft a new will; the Court held that it was unlikely that he would have revoked the 2016 will without making a new one. Orders were made that the copy will ought to be admitted to probate subject to the Registrar's requirements. Interestingly, the Court noted that even if the original will existed but was unavailable, rather than lost, an order admitting a copy could be made.

Re Brumer; Sturnfein v Bloom & Anor [2024] VSC 121 (Englefield JR)

This was an application for summary dismissal of a claim for further provision. The Plaintiff was a former step-child of the deceased. The Plaintiff claimed to be eligible under s 90(g) of the *Administration and Probate Act* 1958 which provides that a person is eligible if for a 'substantial period' during the life of the deceased, that person believed that the deceased was their parent and treated them as a 'natural child'. The Court considered the following three elements in determining

the application – the duration of the relationship with reference to the phrase 'substantial period'; the Plaintiff's belief about the role of the deceased as his parent; and the deceased's treatment of the Plaintiff. The Plaintiff lived with the deceased between the ages of 12 and 19. They lost touch from 1997 when the relationship between the deceased and the Plaintiff's mother ended but resumed some interaction online from 2013 until the deceased died. The Defendants alleged that the Plaintiff was ineligible under the Act as he did not believe himself to be a natural child of the deceased for a 'substantial period' during the deceased's life. There is some interesting commentary in the judgement on the statutory interpretation of the definition of 'parent' in the Act. The Court noted that the definition of parent in the Act describes a person who is a caregiver of the child with whom the child is 'ordinarily resident' rather than just a natural parent. The Court found that the Plaintiff was not required by the Act to establish a belief that the deceased was his natural parent. The Court was satisfied that the proceeding ought to continue as the Plaintiff's prospect of establishing his eligibility was more than fanciful. If the Court were not so satisfied, it was noted that orders would nevertheless have been made for the proceeding to continue under s 64 of the *Civil Procedure Act* 2010 in view of the novel question of statutory construction and the associated factual issues about the nature and duration of the parent-child relationship.

Re Biondo (No 2) **[2024] VSC 132 (Moore J)**

This decision was about the costs of a proceeding described as being 'particularly unsuited to adjudication by the Courts' ([2]). The parents of the deceased sought orders that the deceased's wife (the Defendant executor) should arrange for the exhumation of his remains and the purchase of a crypt into which the remains would be reinterred. The only hearing concerned the Plaintiffs' standing. The substantive issues were resolved in a settlement. The Court held that the Plaintiffs were responsible for payment of the Defendant's costs up to the date at which their claim was properly made in an amended originating motion. However, the Defendant was ordered to pay the Plaintiffs' costs on an indemnity basis from that date because she had refused an offer that would have been a substantially better outcome than she achieved in the settlement.

Estate of Vaughan; Dunn v Dunn-Vaughan **(No 2) [2024] VSC 128 (O'Meara J)**

This was the decision about costs and interest that followed the substantive reasons outlined above. The Court was asked to review detailed submissions on those issues which necessitated a lengthy discussion of the procedural history and the outcomes achieved by the Plaintiff on the numerous issues agitated. The Defendant was ordered to pay to the estate damages in the nature of interest in the amount of almost $120,000. The Court allowed each party 25% of their costs from the estate referable to a particular issue (the trust issue) that was properly characterised as estate litigation as distinct from the majority of the issues in the proceeding which were *inter partes* (see *Re Koroneos* [2024] VSC 734 per McMillan J). The Plaintiff was entitled to his costs on a standard basis as he had substantially succeeded on the main issues of the Defendant's destruction of estate property and his removal. The Defendant was ordered to pay 75% of the Plaintiff's costs on a standard basis without indemnity from the estate.

Fahey v Bird (No 3) [2024] VSC 148 (Moore J)

This is the third decision in a series of cases in which an executor was jailed for contempt following a persistent failure to comply with orders that he file an administration account for the estate and an associated testamentary trust. The executor applied under r 75.12 of the *Supreme Court (General Civil Procedure) Rules* 2015 to shorten his sentence. The Court considered the authorities on early discharge from imprisonment for contempt and determined that because the executor had filed an account, albeit not verified on affidavit, he had largely 'purged' his contempt. In those circumstances, it was in the 'interests of justice' that he be released on the condition that he verify the account on affidavit.

Hughes v Brandt [2024] VSC 153 (Ierodiaconou AsJ)

The trustee of a discretionary family trust sought declarations that the proposed distribution of trust corpus and income was appropriate, and orders passing the trust's accounts. Issues about the trust and an associated estate had been the subject of Court proceedings following the deceased's death in 2015. Terms of settlement were signed in 2016 to resolve issues in relation to the trust and estate. The terms included an agreement as to the distribution of trust property between the Defendant and his sister, who were both beneficiaries of the estate and trust. The trustee resolved in 2017 to distribute the trust property in accordance with the terms. The Defendant subsequently objected, and denied having validly signed the terms.

The Court found that the trustee had exercised his discretion appropriately, and that he did not unduly fetter his discretion by taking into account the terms of settlement. The Court made the declaration sought but would not pass the accounts, finding that the trustee had not established a reason for the Court to do so. It was implicit that the trustee sought the passing of accounts in order to head off any further allegations of maladministration by the Defendant but the Court does not appear to have been satisfied (based on the tests in authorities cited) that those circumstances warranted the passing of accounts.

A practice point: the Court noted that the application was appropriately made under r 52.01 *Supreme Court (General Civil Procedure) Rules* 2015 rather than order 54 which provides only a summary procedure for judicial advice and not declarations.

Re Gengoult-Smith Family Trust [2024] VSC 189 (Moore J)

This was an application to seek the Court's approval under s 63A of the *Trustee Act* 1958 (Vic) on behalf of minor and potential unborn beneficiaries of an arrangement to vary the terms of a discretionary family trust. The trust deed (as amended) provided that the trust was to vest in April 2024. The capital of the trust would vest in certain adult beneficiaries (capital beneficiaries) all of whom consented to the application. The variation power in the trust deed did not allow for the vesting date and perpetuities clauses to be varied. The variations sought would defer the vesting date and allow for the life of the trust to be extended from 50 to 80 years.

The Court refers to the recent decision of *Re Pickering* (see above) in which Lyons J cited a two-phase analysis of the benefit and fairness / propriety of the arrangement to vary a trust and outlined the considerations that apply in determining whether the arrangement is for the benefit of the

relevant class of persons: how the arrangement will operate in fact; the nature of the benefit which can be financial or connected to 'social, familial, moral or educational' outcomes.

In the circumstances of this case, the minor and unborn potential beneficiaries would receive no benefit if the trust vested on its current terms. If the trust continued, the trustee would retain the discretion to allocate income and capital from which these objects or potential objects of the trust might benefit. There was a gift over in favour of the minor beneficiaries on vesting if the adult capital beneficiaries passed away before the vesting date, but the Court found that possibility too remote to weigh against approval of the proposed variations (it was only a few weeks until the trust was due to vest).

The Court approved the proposed variation on the basis that it was for the benefit of the minor and potential unborn beneficiaries and that it was fair and proper. The arrangement would prevent a significant CGT liability arising on the otherwise imminent vesting of the trust. His Honour noted the 'repeated affirmations' in the cases that the Court need not hesitate to approve an arrangement for that reason.

Pozzebon v Pozzebon **[2024] VSC 205 (Harris J)**

This was an application by two beneficiaries of an estate under Order 54 as to the construction of a gift and the application of s 83A of the *Powers of Attorney Act 2014* to provide relief from ademption. The deceased's 2012 will gave her bank accounts and "investments" to her son (the Defendant). Her residuary estate was gifted to her four children as tenants in common in equal shares. The deceased's Fairfield property fell into residue. The residuary clause contained precatory directions about the way in which certain shares in the Fairfield property could be purchased by beneficiaries. The Fairfield property had been sold by her attorney during her lifetime. The Plaintiffs sought declarations that the directions in the will about the property ought to be construed as a specific gift of the property. This would mean that, due to s 83A(1) of the Act, all the children were entitled to share in the proceeds of that adeemed gift. The Court held that the relevant clauses in the will and the will as a whole evidenced the testator's intention to deal with the property as a distinct part of the estate so that the gift of property ought to be construed as a specific gift. Section 83A applied to enable the residuary beneficiaries to trace the gift to the proceeds of sale. The Plaintiffs had raised an alternative argument that the RAD was not an 'investment' within the scope of the gift to the Defendant executor. Unfortunately, the Court did not have to decide this interesting point both because the Plaintiffs succeeded on their primary case and because the Defendant had agreed to treat the RAD as part of residue.

Re Nanut; Nanut v Nanut **[2024] VSC 212 (Richards J)**

This was a contested application by a non-proving executor for probate of her late father's estate pursuant to leave reserved. The estate had been administered by the Plaintiff's mother (the deceased's wife) for some 17 years before the application. The Plaintiff's application was challenged by her mother. The grounds alleged that the Plaintiff was unsuitable on the basis of her residence overseas, and her allegedly obstructive attitude to the administration. The executrix took issue with the delay in her daughter's application. The Court held that the delay required explanation but was satisfied that the Plaintiff, as well as the executrix and other non-proving executors, had been under a common misapprehension

that they had all obtained a grant and that this was the reason for the delay in the applicant seeking to apply under leave reserved. On the facts, the Court declined to make any order passing over the Plaintiff and instead ordered that she be granted probate pursuant to leave reserved.

Roper v Roper [2024] VSC 249 (Gray J)

This was a claim by an adult child for further provision from his mother's estate. He was one of 7 children. The deceased had allowed the Plaintiff to live with her rent free for 17 years and he provided her with increasing support as she advanced in years. The net estate was valued at approximately $1.5m The Plaintiff sought a life interest in the deceased's principal place of residence and approximately $370,000. The Court was not satisfied that the Plaintiff had a disability. He was therefore required to demonstrate that he was not capable by reasonable means of providing for himself.

The Court stated that the amount claimed by the Plaintiff would represent an 'extreme distortion' of the deceased's intentions to treat her children equally. However, in view of his long-term dependency on his mother, it was found that the deceased had a moral duty to provide an amount sufficient for him to avoid homelessness and that his proper maintenance and support required only a small lump sum to supplement his welfare payments. The parties were invited to submit evidence about the amount of provision required to meet the standard the Court identified in broad terms (ie. access to basic accommodation and a modest sum to supplement pension income).

Ghosh v Ghosh & Ors [2024] VSC 259 (O'Meara J)

The proceeding was issued by one of the deceased's two sons and a co-executor (along with his brother, the Defendant) named in a copy will. The Plaintiff had initially sought urgent relief to deal with the deceased's remains and to restrain the Defendant from dealing with estate and company assets. These issues were heard together with his application for probate of a copy will and for orders passing over the Defendant. The Defendant belatedly made a competing application to admit an informal will to probate. The procedural history was lengthy. The reasons enumerate the Defendant's various appeals of previous Court decisions relating to the estate (including to the High Court) and his interlocutory applications in which he made generalised and unsubstantiated allegations about the Plaintiff's conduct and serially challenged even basic directions orders of the Court. The reasons included a necessarily detailed account of the first Defendant's 'argumentative', 'troubling' even 'bizarre' conduct representing himself. The Court also set out the spurious and irreconcilable claims the Defendant had made to ownership of estate assets. Orders were made that the copy will should be admitted to probate. The Court determined that the Defendant ought to be passed over. It was noted that, even though the deceased had appointed him as an executor, she could not have contemplated the 'extremity of behaviour' ([240]) demonstrated many years later. The technical issues of the case aside, the reasons present a vivid and insightful portrait of the challenges presented by self-represented litigants and display the patient forbearance required of the Court, parties and practitioners in applying the law amid the emotional turmoil and extreme behaviour of one such litigant.

***State Trustees Limited (as administrators of the estate of Ioannis Zegas) v DPP* [2024] VSC 284 (Gorton H)**

This proceeding was heard in the Confiscation and Proceeds of Crime List of the Common Law Division but answers a novel query for estate practitioners: when might a lender's estate have an interest in restrained property under the *Confiscation Act 1997* (Vic) sufficient to exclude that interest from forfeiture? The deceased made an unsecured loan of $300,000 to the owner of the property that was later the subject of an 'unexplained wealth restraining order'. Under the Act, such property is forfeited to the Minister 6 months after the order. However, the confiscation regime enables a person with a legal or equitable interest, or a 'right, power or privilege' over or 'in connection with' the property to have their interest excluded from the forfeiture. The estate's administrator argued that the unsecured loan gave rise a relevant 'right, power or privilege'. The Court did not agree. It was held that although the loan was made to facilitate the purchase of the property, that did not provide the estate a direct interest in it.

***Bennett v Pless Nominees Pty Ltd* [2024] VSC 312 (Quigley J)**

This was an unsuccessful attempt to restrain a solicitor and barrister from acting for the Plaintiff. The solicitor was likely to be witness and it was alleged that he had maintained an inconsistent position on issues relevant to this proceeding when acting for the Plaintiff previously. The principal authority on restraining practitioners based on the administration of justice ground (*Grimwade v Meagher* (1995) VicRpt 38) established the following test for the 'rare' exercise by the Court of the power to restrain a lawyer from acting: whether a fair minded reasonably informed member of the public would conclude that the proper administration of justice required that the lawyer be prevented from acting. In administering the test, the Court gives 'due weight' to the public interest in a litigant not being deprived of their choice of lawyer without 'just cause'. Her Honour determined that the circumstances 'approache[d] the mark' but did not justify the restraint. The Court noted that the issue of inconsistent allegations propounded by the solicitor was a matter for trial and that, if those allegations were substantiated, costs orders could be made under the *Civil Procedure Act* 2010.

***Chahine v Wenzler* [2024] VSC 317 (Watson J)**

This contested probate proceeding turned on whether the deceased possessed one element of the *Banks v Goodfellow t*est when her will was made in May 2018 - the ability to discriminate between the competing claims on her estate. The deceased had no partner and children but was assisted in her later years by her nephews (one in particular) and a neighbour. The deceased had been consistent in expressing her wish to change her will to alter dispositions made to family members but the reasons suggest that that desire arose from fixed and suspicious beliefs about her nephew. Although the presence of dementia or medical opinion is not always determinative of testamentary capacity, the resolution of this case did require the Court to balance four different medical assessments. The Court preferred the opinion of a neuropsychologist who had seen the deceased in 2019, around 10 months after the will was made to two separate neuropsychological assessments within a few months before and after the will was made which stated that the deceased did not have capacity. The Court regarded those earlier assessments as providing a 'baseline' from which the 2019 assessment could conclude that there was no further decline from the time the will was made. The implication seems to be that any relevant cognitive impairment at

the time the will was made would have resulted in further decline by 2019; this assumption about the linear nature of cognitive decline was not the subject of evidence. The Court appears also to have been persuaded of the deceased's capacity from the contemporaneous notes of a solicitor (albeit one who had not met the deceased before) and the notes of a GP (who was not available for cross examination).

Francis v Martin [2024] VSC 340 (Daly AsJ)

This proceeding was issued under Part IV of the *Administration and Probate Act* 1958 by an adult daughter aged 66 against her father's estate. The Court ordered the summary dismissal of the claim on the application of the Defendants - a rare outcome for a Part IV proceeding.

The Plaintiff contended that the deceased failed to make adequate provision for her proper maintenance and support by establishing a testamentary trust from which her share of his estate was to be administered. The need for the trust arose from the Plaintiff's bankruptcy at the time the Will was made, which had been subsequently annulled. The evidence of the Defendants established that the Plaintiff had received substantial assets from her mother's estate in 2015 and that she had refused or avoided receiving entitlements from that estate and a family trust. The Defendants said that the Plaintiff had failed to establish need and had not provided 'frank and fulsome' information about her financial position.

The Court noted that caution is required in exercising the power to summarily dismiss a Part IV claim given the discretionary nature of the jurisdiction which generally requires adjudication on the merits at trial. Her Honour framed the summary dismissal question as follows: [57] 'Is there a real prospect that the Court's jurisdiction to order further provision will be enlivened?'

The Plaintiff had not presented any evidence about her financial position despite many opportunities to do so (the proceeding had been issued in 2021). The Court held that on the already extensive evidence there was no real prospect of the Plaintiff establishing that the deceased failed to make adequate provision for her proper maintainable and support in creating the Will trust. In those circumstances, the Court's jurisdiction was not enlivened and summary judgement was granted.

Cwalina (Filing of Writ and Statement of Claim) [2024] VSC 349 (Gorton J) & Thorpe v Prothontary & Anor [2024] VSC 360 (O'Meara J)

Although these are not a TEP / TFM decisions they are a useful resource for practitioners operating in those lists which frequently involve self-represented litigants. In both cases the Court confirms the decision of the Prothonotary to refuse to accept an originating process for filing because the proceedings would constitute an abuse of process.

Stanojevic v Damnjanovic & Anor [2024] VSC 350 (Tsalamanrdis J)

The Court was asked to determine whether there was either an express or resulting trust over a property that was registered in the deceased's name at the date of his death. The deceased was predeceased by his only son. He was survived by his daughter in law and three children from his son's relationship with his wife (the 'Plaintiff grandchildren') and a daughter from another relationship, who was the sole beneficiary of the grandfather's estate. The son's wife

had drafted a document purporting to be a declaration of trust over the property in favour of her children (the Plaintiff Grandchildren) and arranged for the deceased to sign it. The Court found that that document had been explained to the deceased by his daughter in law and a friend but that the deceased had not understood it. The document contained a significant error: it stated that the property had been paid for by the deceased's son and daughter in law whereas the deceased and his wife had actually contributed 40% of the purchase price. The deceased was elderly, did not read or write English and had limited experience in dealing with financial matters and property transfers. He had no independent legal or financial advice. In those circumstances, the Court found that the deceased was under a special disadvantage that was evident to the counterparty (the daughter in law) so that it would be unconscionable to enforce the trust document. However, a portion of the property was held on resulting trust for the daughter in law and son's estate in proportion to their contributions to the property.

Re Gdanski [2024] VSC 356 (Barrett AsJ)

The applicants sought injunctive relief to restrain a firm from acting for the Plaintiff executor. The deceased died in 2020 and a grant was made to the Plaintiff (one of the deceased's two brothers) in 2021 of a 2012 Will. The Plaintiff's solicitor had initially acted for the Plaintiff and his brother (Arthur) on a limited retainer than involved searching for the deceased's testamentary documents at his home. The interests of the two brothers diverged but the firm continued to act for the Plaintiff with Arthur's knowledge. The solicitor who was involved in the initial engagement was excluded from the file. The estate administration continued between 2021 and 2024. One Part IV claim had settled. Arthur issued a Part IV claim but subsequently sought to revoke the grant.

The Court affirmed the need to exercise the discretion to restrain a solicitor with caution. In view of the steps that had been taken to exclude the solicitor who had initial carriage of the limited engagement from the file and the serious and prejudicial delay of the application, the Court declined to restrain the firm from acting.

Re Sampson [2024] VSC 351 (Moore J)

This case considers the interpretation and application of s 14 of the Wills Act 1997 (Vic) which revokes any appointment - in a will made before a divorce - of a person's spouse as executor, trustee or guardian (with limited exceptions) and dispositions to that person after the testator's divorce from that spouse. These default provisions are subject to the testator's contrary intention in the following terms (in s 14(2)): "[the above provisions do not apply] if it appears that the testator did not want disposition, appointment or grant to be revoked upon the ending of the marriage". The testator and his former wife had been through an amicable separation and divorce. There was no express statement of contrary intention in the will about the effect of the divorce on the will. The testator made his will appointing the wife as executor while they were separated. He also affirmed his intention that she be the executor of the estate in discussions and letters to several family members before his death. The Court applied the principles of statutory construction to determine whether the legislature intended that the contrary intention of the testator could be established on extrinsic evidence alone. His Honour determined that the phrase 'if it appears that' permits a broad inquiry into the circumstances surrounding the making of the will and the testator's intention consistent with the remedial purposes of the Act. That language did not confine the Court to evidence of the

text of the will or to evidence of intention at the time the will was made. It was decided that the Act permitted the contrary intention of the testator about the effect of divorce to be established from extrinsic evidence of the testator's intention drawn from various points in time, not only when the will was made but also prior to death.