A GUIDE TO MAKING A VALID WILL IN VICTORIA

ACKNOWLEDGEMENT OF COUNTRY

We, in the spirit of Reconciliation, acknowledge the Wurundjeri People of the Kulin Nation as the traditional custodians of the land now known as the City of Maroondah, where Indigenous Australians have performed age-old ceremonies.

We acknowledge and respect their unique ability to care for Country and their deep spiritual connection to it. We pay our respects to their Elders, past, present and emerging.

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TESTAMENTARY CAPACITY

- An essential prerequisite to making a valid Will in Victoria is the requirement of *testamentary capacity.*
- Reference is made to the Law Institute of Victoria Capacity Guidelines and Toolkit Concise Edition – 'Taking Instructions when a Client's Capacity is in Doubt' (updated November 2020), page 5 : "4. Testamentary Capacity
- The elements of 'testamentary capacity were clearly set out in the High Court case of *Banks v. Goodfellow (1870) LR5QB 549.* The person making the will has to understand :
  - what it means to be making a will;
  - broadly, what assets he or she possesses and is leaving to others; and
  - who are the people who might reasonably expect to be included in the will.
  - The person must also be free of any delusion that affects their will-making ability."

EXECUTION

- Section 7 of the Wills Act 1997 (Victoria) states :
- “How should a Will be executed ?
- (1). A will is not valid unless –
  - (a). it is in writing, and signed by the testator or by some other person, in the presence of, and at the direction of the testator; and
  - (b). the signature is made with the testator’s intention of executing a will, whether or not the signature appears at the foot of the will; and
  - (c). the signature is made or acknowledged by the testator in the presence of, two or more witnesses present at the same time; and
  - (d). at least two of the witnesses attest and sign the will in the presence of the testator but not necessarily in the presence of each other.”
- Note – the amendments in Section 7(2) to Section 7(7) of the Wills Act 1997 (Victoria) in 2021 relating to the use of the remote execution procedure.

WITNESS NOT KNOWING

- Note the requirement of Section 8 of the Wills Act 1997 (Victoria) – namely that -
- “A will which is executed in accordance with this Act is validly executed even if a witness to the will did not know that it was a will.”

REMOTE EXECUTION PROCESS

- Sections 8A, 8B, 8C and 8D of the Wills Act 1997 (Victoria), introduced in April 2021, set out comprehensive requirements where a person resolves to make and execute a will in accordance with the remote execution procedure set out in Section 8A, instigated by the COVID-19 epidemic.
- Section 8B explains which document is the will, should this procedure be followed.
- Section 8C succinctly explains the recording of the remote execution procedure, whilst Section 8D confirms that, should this procedure be implemented, all existing obligations (pursuant to legislation or common law) continue.
- The requirements set out in these sections must, of course, be strictly followed if the remote execution procedure be implemented.
- Reference to those Sections is obligatory if this procedure is to be followed.
- As was widely anticipated, on the 17th October 2022, the Supreme Court of Victoria delivered a ruling on the remote execution procedure amendments *in the Matter of the Estate of Carl John Curtis – SPRB2021 14624.*
- It is worth noting some of the remarks made by the Honourable Justice Kate McMillan in the above case:
- "It is only by seeing the testator operating the computer or device to apply the signature and the signature appearing on the electronic document that the witnesses can be truly satisfied that it is the testator who has applied the electronic signature", adding that "as this proceeding demonstrates, careful attention needs to be paid to the requirements of the remote execution procedure when seeking to execute a will by audio-visual link."
- She continued :
- "Notwithstanding the outcome of this proceeding, practitioners should not assume that wills that do not comply with the remote execution procedure will necessarily be admitted as informal wills" (see Paragraph 83 of her ruling, listing the requirements for a will to be valid and executed in accordance with the remote execution procedure).
- (Richard Boaden was one of two counsel for the Plaintiff.)

THE 'DISPENSING' PROVISION

- When it comes to important provisions relating to enabling the [Supreme Court] to dispense with requirements for execution or revocation, particular regard must be had to Section 9 of the Wills Act 1997 (Victoria), which states that:
- "(1). The Supreme Court may admit to probate as the will of a deceased person -
- (a). a document which has not been executed in the manner in which a will is required to be executed by this Act; or
- (b). a document, an alteration to which has not been executed in the manner in which an alteration is required to be executed by this Act-
- *If the Court is satisfied that that person intended the document to be his or her will .*
- (2). The Supreme Court may refuse to admit a will to probate which the testator has purported to revoke by some writing, where the writing has not been executed in the manner in which a will is required to be executed by this Act, if the Court is satisfied that the testator intended to revoke the will by that writing."
- One such case which related to this provision, inter alia, was *Estate of Brock (2007), VSC 415.*
- In that case, the Supreme Court of Victoria was asked to consider which, of three wills (if any) was the last will of Peter Geoffrey Brock – well-known, successful motor racing driver.
- After reviewing all the evidence before it, the Court concluded that a will made in 2003 – although not properly executed, was accepted as being his last will and testament – even though it was silent as to how his assets were to be distributed.
- The 2003 Will failed, as stated, to give direction on how his assets were to be distributed and he effectively died without a proper will.
- This case provides us with a number of lessons, including :
  - seeking proper legal advice when drafting or updating one's will to ensure it meets the legal requirements to be a valid will; and
  - when one's life circumstances change, one's will should always be updated to reflect this vital fact.
- Subsections (3) to (6) of Section 9 – relate to evidence that a Court may consider, documents and powers.

WILL WITNESSES & REVOCATION

- Section 10 (1) of the Wills Act (Victoria) 1997 provides that “a person who is unable to see and attest that a testator has signed a document may not act as a witness to a will.”
- Keep in mind that Section 11 of the same Act provides that “a person who witnesses a will or his or her spouse or domestic partner, at the time the will is witnessed, is not disqualified from taking a benefit under the will.”
- Section 12 of the Act explains that a will may be revoked :
  - “(a). by a later will; or
  - (b). by some writing, declaring an intention to revoke it, executed in the manner in which a will is required to be executed by this Act; or
  - (c). by the testator, or some person in his or her presence and by his or her direction, burning, tearing or otherwise destroying the will with the intention of revoking it; or
  - (d). by the testator, or by some person in his or her presence and at his or her direction, 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.”
- Section 12(3) enables revocation via ‘remote execution’.

EFFECT OF MARRIAGE ON A WILL

- Section 13 (1) explains that ‘a will is revoked by the *marriage* of the testator’, subject to (2) :
  - “(a). a disposition to the person to whom the testator is married at the time of his or her death; or
  - (b). an appointment as executor, trustee, advisory trustee or guardian of the person to whom the testator is married at the time of his or her death ; or
  - (c). a power to exercise, by will, a power of appointment, when, if the testator did not exercise the power, the property so appointed would not pass to the executor or administrator or the State Trustees under Section 19 of the Administration and Probate Act 1958”
- “is not revoked by the marriage of the testator.”
- Section 13 (3) explains that “despite subsection (1) –
  - “(a). a will made *in contemplation of marriage* (whether or not that contemplation is expressed in the will) is not revoked by the solemnisation of the marriage contemplated; and
  - (b). a will which is expressed to be made in contemplation of marriage generally is not revoked by the marriage of the testator.”

EFFECT OF DIVORCE ON A WILL

- Section 14 deals with the effect of divorce on a will.
- Sub section (1) provides :
- "(1). The divorce of a testator revokes –
  - (a). any disposition to the divorced spouse of the testator, made in a will in existence at the time of the divorce; and
  - (b). the grant of a power of appointment by the will exercisable by or in favour of the spouse, other than a power of appointment exercisable by the spouse only in favour of persons who are the children of both the testator and the spouse; and
  - (c). any appointment made by the will of the spouse as an executor, trustee, advisory trustee or guardian other than the appointment of the spouse as a trustee of property left by the will upon trust for beneficiaries that include the children of the spouse."
- Importantly, subsection (2) states that Section 14 does not apply to any disposition, appointment or grant, " if it appears that the testator did not want the disposition, appointment or grant to be revoked on the ending of the marriage."
- Section 14 (4) defines 'divorce'.

MODES OF WILL ALTERATION

- Section 15 of the Act explains how a will can be altered.
  - "(1). An alteration to a will after it has been executed is not effective unless the alteration is executed in the manner in which the will is required to be executed under this Act.
  - (2). Subsection (1) does not apply to an alteration to a will if the words or effect of the will are no longer apparent because of the alteration.
  - (3). If a will is altered, it is sufficient compliance with the requirements for execution, if the signature of the testator and of the witnesses to the alteration are made –
  - (a). in the margin, or on some other part of the will beside, near or otherwise relating to the alteration; or
  - (b). as authentication of a memorandum referring to the alteration and written on the will."
- Subsections (4) and (5) confirm that alterations apply to the remote execution procedure.

WILL REVIVAL

- Section 16 sets out the manner in which a revoked will can be revived, noting that it also applies to the utilisation of the remote execution procedure (subsection (5)).
  - " (1). A will or part of a will which has been revoked is revived by re-execution or by execution of a codicil which shows an intention to revive the will or part.
  - (2). A revival of a will which was partly revoked and later revoked as to the balance only revives that part of the will most recently revoked.
  - (3). Subsection (2) does not apply if a contrary intention appears in the document which revives the will.
  - (4). A will which has been revoked and later revived, in whole or partly, is to be taken to have been executed on the date on which the will is revived."

WILLS BY MINORS – COURT AUTHORISED

- It is true to say that a will can be made by anyone over the age of 18 in Victoria, as long as they have the *testamentary capacity* to understand what they are doing. Conversely, a person under 18 can only make a will if they are married, get a court order to authorise making a will.

- Section 20 of the Wills Act 1997 (Victoria) describes 'wills by minors' that are 'authorised by the Court' :
  - "(1). ..the Court may make an order under this section *authorising a minor to make a will in specific terms or revoke a will."* (The application may be made by the minor or a person on the minor's behalf).
  - (3). In making an order under this section, the Court must approve the terms of the will", and "may impose any conditions on the authorisation that the Court thinks fit (4)."
  - (5). "Before making an order … the Court must be satisfied that –
  - (a) . the minor understands the nature and effect of the proposed will or revocation and the extent of the property disposed of by it; and
  - (b). the proposed will or revocation accurately reflects the intentions of the minor; and
  - (c). it is reasonable .. that the order should be made."

DIVISION 2 – COURT AUTHORISED/STATUTORY WILLS FOR PERSONS WITHOUT TESTAMENTARY CAPACITY

- Division 2, or Sections 21, 21A, 21B, 21C, 21D, 22, 24, 25 and 30 of the Wills Act set out a powerful process enabling "Court authorised wills for persons who *do NOT have testamentary capacity."*
- These statutory (or Court Made) wills enable an application to be made by any person. However, leave of the Court is required to make the application.
- In the event that the Court authorises the making of the will the original will is signed by the Registrar, and sealed with the Court seal. The original is retained by the Registrar for safekeeping.
- The above-described Sections explain matters such as the information required for the application, matters it should consider, persons entitled to appear, the possible need for separate registration, hearing of applications pursuant to this Division and other matters.
- Examples include :
- *Bailey v. Richardson [2015].*
- *De Gois v. Korp [2005] VSC 326.*
- (Link – **http://www.austlii.edu.au/cases/vic/VSC/2005/326.html**

RECTIFICATION & CONSTRUCTION OF WILLS

- Division 3 of the Wills Act 1997 (Victoria) – or Sections 31 and 32 explain the circumstances in which a will can be rectified and requires that the Court order be attached to the will.
- Part 4 of the Wills Act 1997 (Victoria) relates to the very important area of the 'Construction of Wills', with Division 1 referring to *general* rules about the construction of wills – Sections 33 to 39 inclusive – and Division 2 providing rules about the 'Construction of *particular provisions in wills'* – Sections 40 to 49 and 49A inclusive.

RECTIFICATION & CONSTRUCTION OF WILLS (Continued)

- Section 43 (1) of the Wills Act 1997 (Victoria) states that "a disposition to a person's issue, *without limitation as to remoteness,* must be distributed to that person's issue in the same manner as if that person had died intestate and as if that person had died leaving only issue surviving."
- "(2). Subsection (1) does not apply if a contrary intention appears in the will."

- It is also very important to have full regard for the provisions/requirements of Section 45 of the Wills Act 1997 (Victoria) :

SECTION 45 WILLS ACT 1997

- Section 45 states :
  - (1). If a person makes a disposition to any of his or her issue, where –
    - (a). the disposition is not a disposition to which Section 43 applies; and
    - (b). one or more of the issue do not survive the testator for thirty days; and
    - (c). the interest in the property is not determinable at or before the death of the issue –
- *The issue of the deceased issue who survive the testator for 30 days take the deceased issue's share of the disposition in place of the deceased issue in the same manner as if the testator had died intestate and as if the testator had died leaving only issue surviving.*
  - (2). Subsection (1) applies to dispositions to issue either as individuals or as members of a class.
  - (3). Subsection (1) does not apply if a contrary intention appears in the will, but a general requirement or condition that a beneficiary survive the testator or attain a specific age does not indicate a contrary intention…"

WHO MAY SEE A WILL?

- Whilst nothing to do with the validity of a will, Section 50 of the Wills Act 1997 answers a question often asked – namely 'Who may see a will ?' The answer:
- "A person who has possession and control of a will, a revoked will or a purported will of a deceased person must allow the following persons to inspect and make copies of the will (at their own expense) –
  - (a). any person named or referred to in the will, whether as beneficiary or not;
  - (b). any person named or referred to in any earlier will as a beneficiary;
  - (c). any spouse of the testator at the date of the testator's death;
  - (d). any *domestic partner* of the testator;
  - (e). any parent, guardian or children of the deceased person;
  - (f). any person who would be entitled to a share of the estate if the deceased person had died intestate;
  - (g). any parent or guardian of a minor referred to in the will or who would be entitled to a share of the estate of the testator if the testator had died intestate;"
  - (h). any creditor or other .. who has a legal/equitable claim.

JOINT TENANCY V. TENANTS IN COMMON

- Of vital importance, if you own real estate with someone else, you need to know and understand whether you own it as *joint tenants or as tenants in common (in equal or varying shares).*
- This will be stated on your Certificate of Title.
- Generally speaking, most couples purchase real estate as joint tenants.
  However, there can be more than two joint tenants who own a property.
- If you are a joint tenant, on your death your share of the real estate will *automatically* pass to the remaining joint tenant[s] on your death.
- On the other hand, if you are a tenant in common, you can pass on your share in the property in your will to your chosen beneficiary/beneficiaries.
- *Understanding the VITAL differences between joint tenants and tenants in common is particularly important in the case of 'blended families'* – of which there are many.
- Dealing with 'blended families' requires considerable caution.

MIRROR WILLS V. MUTUAL WILLS

- It is very fair to say that, very often, a husband and wife prepare their wills together often rendering them almost identical and jointly attend their solicitor's office to sign them.
- Whether or not you and your wife (partner) signed *mirror wills OR mutual wills* is an important question.
- Indeed the distinction can be vital. Be aware of the consequences.
- It can be said that *mirror wills* are wills that are mostly identical to each other. Very often, the spouses appoint each other as executor and sole beneficiary and, alternatively , appoint an alternate executor and beneficiary or beneficiaries.
- Vitally, mirror wills can be changed or revoked at any time, without the permission or consent of the other spouse, provided that the will-maker still retains the necessary capacity to do so.
- Conversely, mutual wills made by spouses also typically 'mirror' each other. However, the terms of the wills prevent either party from changing or revoking their will without providing NOTICE to the other spouse.
- Notice allows the other spouse to change their own will.
- Should one spouse die, or the other not have capacity to change their own will, the 'survivor' can't change theirs.
- The High Court in Birmingham v. Renfrew (1937) 57 CLR 666 summarised a mutual will as follows :
  - Two parties can make mutual wills, thereby creating a binding contract.
  - Whilst both parties are alive, the contract can only be altered or revoked with notice to the other.

MIRROR WILLS V. MUTUAL WILLS (Continued)

- In the event that the contract is broken without sufficient notice, either when both parties are alive or by the survivor following the death of the first, it is fraud.
- Upon the death of the first party, the contract becomes binding and irrevocable.
- The 'survivor' is free to deal with the 'inherited' assets, however he or she continues to be bound by the obligations to the deceased to hold those assets on trust for the benefit of the beneficiaries named in the will.
- Those people/entities named in the will become beneficiaries of a constructive trust pursuant to the terms of the will , with the survivor acting as trustee for their benefit and the trust capital is what remains after the survivor has enjoyed it; and
- Any transactions to defeat the deceased party's intentions, on the part of the survivor, will be in breach of that trust.
- It is fair to say that the risk of entering into a mutual will contract is that your own personal circumstances may change – slightly or significantly - and yet you may have limited ability to alter your will.
- Ensure you discuss your long-term intentions are fully discussed with your partner, and that you fully understand the long-term consequences of your intentions.

UNDUE INFLUENCE & WILLS

- Another area of possible concern, relates to the issue of *undue influence.*
- This involves the exploitation of a relationship of influence. Generally speaking, it involves a person convincing a testator to favour that individual to the detriment of other(s). Very often, it occurs when the testator is vulnerable and dependent on others – e.g. elderly or frail.
- Keep in mind that undue influence can often be very difficult to prove, and the burden of proof lies with the person making the claim.
- Examples of presumed relationships of influence could include such relationships as a doctor and patient, solicitor and client and a religious leader and disciple.
- In the event that possible undue influence is suspected, the person complaining must prove to the Court that :

UNDUE INFLUENCE & WILLS (Continued)

- * that the will transferred property in a manner that was unexpected in the circumstances;
- * the testator was dependent on the 'influencer', or trusted him or her;
- *illness or frailty left the testator vulnerable to undue influence; and
- * the person took advantage of the testator and, as a consequence, benefitted from the distribution of assets under the will.

- The presumption of undue influence may be rebutted.
- Useful examples of cases of undue influence include :
- *Wingrove v. Wingrove (1885) LR 11 PD 81 et seq.*
- *Nicholson v. Knaggs (2009) VSC 64.*
- *Birt v. The Public Trustee of Queensland (2013) QSC 13*

INVALIDITY – FRAUD, FORGERY ETC;

- There are various ways in Victoria where the validity of a will can be challenged all of which are of considerable importance.
- These include reasons such as :
  - undue influence (referred to above).
  - the will being incorrectly executed (also referred to above).
  - allegations of fraud.
  - forgery.
  - lack of mental/testamentary capacity on the part of the testator (or willmaker).
  - the testator (or willmaker) having a lack of knowledge and approval of what is contained in the will.
- In clearly defined legislation (Part IV of the *Administration and Probate Act 1958 Victoria)* claims may also be made for further provision from a deceased estate if *defined* relatives or loved ones consider that insufficient provision has been made for them.
- Since the inception of what has often been loosely described as a 'testator's family maintenance' application, the 'eligible applicants' have narrowed – and are dealt with hereafter.

CHOOSING AN EXECUTOR WISELY

- Many observers – both lay and professional – would say that one of the most important considerations when making a will is - very carefully – choosing an executor or trustee company to manage your estate after you die – as well as providing your executor with suitable powers to enable them to effectively and expeditiously deal with your estate – e.g. a reasonably broad power of sale and a power to invest and a power to provide for the maintenance and support of infant beneficiaries.
- Your executor could be a family member, a friend, a lawyer or other professional such as an accountant or a trustee company.
- Importantly, when choosing an executor, the willmaker should consider the proposed executor's circumstances *and skill set* to decide if he, she or they are suitable.

CHOOSING AN EXECUTOR WISELY (Continued)

- Factors you might consider when choosing an executor may include :
  - ensuring that the person has the time and skills to undertake the job – and is willing to take it on.
  - ensuring that the person is someone you trust to carry out your wishes.
  - ensuring that the person is able to understand basic accounting and deal appropriately with a wide range of people – including lawyers, agents, banks, corporations, families and beneficiaries.
  - ensure that the person (or institution) you select is not older than you, is unwell, or about to move overseas. Generally speaking, these are not good choices.
- In the event that you appoint a professional as an executor, he or she will need to be paid from your estate. *Accordingly, you should refer to payment for their services in your will.*
- (noting, inter alia, the requirements of Section 65 of the *Administration and Probate Act 1958 [Vic]*).

CHOOSING AN EXECUTOR WISELY (Continued)

- It is trite to say that, very often, it is preferable to appoint more than one executor ensuring, of course, that they can work well together – noting they may 'bring more skills to the table.'
- Furthermore, should one executor die or predecease the testator, you have viable alternative (s).
- Given the responsibility of being an executor, it would be prudent to discuss your plans with your intended executor.
- This will ensure they are comfortable carrying out your wishes.
- Keep in mind that an executor is entitled to benefit from your will.
- *However, the executor(s) must remain completely impartial and not allow conflicts of interest to decide the outcome.*

CHOOSING AN EXECUTOR WISELY (Continued)

- If you consider that your executor may have difficulty remaining impartial, it may be preferable to select an executor who does not benefit from your will in any way.
- Executor's duties or responsibilities may well include :
  - locating the will (i.e. its location).
  - arranging the funeral, burial, cremation etc;
  - obtaining the death certificate.
  - ensuring that the funeral arrangements are carried out.
  - Identifying all of the assets comprising your estate, as well as their value and redemption/transfer requirements.

CHOOSING AN EXECUTOR WISELY (Continued)

- Executor's duties or responsibilities may well include (continued) :
  - determining liabilities (if any).
  - organising payment of funeral expenses, outstanding bills, income taxes and all other debts.
  - (if necessary) making an application for grant of probate.
  - defending your estate against any legal claims.
  - resolving any disputes that may arise between beneficiaries.
- An 'obvious' tip is, prior to your passing, to let your executor know, not only where your most recent will is located, but also other relevant paperwork – such issuer-sponsored holding statements, bank records, house deeds, insurance or Centrelink papers.

CHOOSING AN EXECUTOR WISELY (Continued)

- Additionally, you could provide your executor with a list of all of your assets, financial organisations and any debts you may have.
- Steps such as these will enable the administration of your estate and may well minimise the expense of that administration.
- For the record, Section 65 of the *Administration and Probate Act 1958 (Vic)* provides :
- "(1). It shall be lawful for the Court to allow out of the assets of any deceased person to his executor, administrator or trustee for the time being such commission or percentage not exceeding five per centum for his pains and trouble as is just and reasonable."
- [here – 'executor' includes the executor becoming by representation the executor of the original estate.]

IMPORTANT CONSIDERATION – THE RESIDUE

- It is something of a 'truism' – i.e. always include a *residue* in your will.
- No matter how 'on the ball' you may think you are, most willmakers are unlikely to list every single item/asset they own and, in turn, outline how those items are to be allocated.
- It may be said that a willmaker's residuary estate refers to everything that is left over in an estate after payment of all debts, expenses and specific gifts.

- Payments required to be made prior to the residuary estate being calculated may include :
  - payment of funeral and related expenses;
  - costs and disbursements relating to the administration of the estate;
  - full payment of the deceased's debts; and distribution of specific gifts allocated pursuant to a will.

IMPORTANT CONSIDERATION – THE RESIDUE (Continued)

- A willmaker can decide how the residuary estate is distributed.
- It is true to say that the residuary estate operates by acting as a ‘catch-all’ for assets that the willmaker may not have specifically mentioned in his or her will to go to a beneficiary.
- In the event that a willmaker doesn’t have a residuary clause the willmaker risks partial intestacy.

IMPORTANT CONSIDERATION – THE RESIDUE (Continued)

- There are a number of important reasons why you should include a residuary clause in your will :
  - That, importantly, it ensures that your will provides instructions relating to the whole of your estate;
  - That the creation of allocations of your entire estate in advance aids the avoidance of conflict between beneficiaries;
  - It minimises the testator's necessity of compiling an overly lengthy inventory of smaller estate items;
  - A residuary provision includes items which the testator may have forgotten to include in specific provisions;
- As very often happens, the testator often acquires additional assets after the will has been executed – which may automatically comprise part of the residuary estate;
- In the event that a beneficiary dies before a testator, the asset(s) which would otherwise have passed to that beneficiary might be allocated to the residuary clause, rather than devolve on intestacy principles;
- A residuary estate clause is easily incorporated into a will;
- A residuary clause may be drafted in various flexible ways.

GUARDIANS FOR INFANT CHILDREN

- *Appointing guardians for your infant children* can be particularly important. For example, who would take care of your infant children should you and your partner both be unexpectedly incapable of doing so or die.
- Indeed, one of the main reasons for a parent of a young child or children to make a will is to ensure who you intend to take care of your infant children should both parents be incapable of doing so.
- By nominating a guardian(s), ensures that your wishes as to who should take legal responsibility for the care and parenting decisions of your infant children in the absence of your partner are taken care of.
- Needless to say, in the event that only one parent passes away, the surviving parent will usually be the legal guardian of your infant child/children.
- Importantly, you can nominate anyone to be the preferred guardian(s) of your infant children, provided they are over 18 years of age and they consent to the appointment.
- Very importantly, when preparing your will and considering this matter, include a clear direction that your executors should make available to the guardian(s) such funds as are necessary to meet the reasonable accommodation, education and other appropriate living expenses from your estate.
- The appointment of a guardian (s) is clearly an important matter and requires considerable thought.

GUARDIANS FOR INFANT CHILDREN (Continued)

- As a guide, when considering your nomination, it may be appropriate to consider such matters as :
  - similarities in lifestyle, values and religious beliefs;
  - who your children have a bond with;
  - whether the proposed guardian has or may be planning to have children, as well as the ages of your children;
  - the physical, financial and emotional capacity of the proposed guardian to take on the responsibility of looking after your children; and
  - the possible transition for your child/children in relation to living environment and location.

SECTION 36 WILL CONSTRUCTION

Section 36 of the Wills Act 1997 (Vic) is both important and helpful.

Sub-section (1) provides :

"In any proceedings to construe a will, if the language used in the will renders the will or any part of the will –

- (a). meaningless; or
- (b). uncertain or ambiguous on the face of the will; or
- (c). uncertain or ambiguous in the light of surrounding circumstances

evidence may be admitted to assist in the interpretation of that language."

Sub-section (2) states that –

"Evidence which may be admitted under sub-section (1) (c) does not include evidence of the testator's intention."

DISPOSITIONS – VARIOUS

Disposition to issue of deceased :

In the event that a person makes a disposition to any of his or her children or grandchildren and one or more of the children or grandchildren do not survive the willmaker for 30 days, the children of that deceased child or grandchildren who survive the willmaker for a period of 30 days will automatically take the share that their deceased parent would have taken.

This provision in the Wills Act 1997 (Vic) :

- applies to dispositions to issue either as individuals or as members of a class.
- does not apply if the willmaker has expressed an intention to the contrary in their will; and
- applies only to wills made on or after July 20, 1998.

Residuary dispositions :

A disposition of the whole estate, or of the residuary estate and which refers only to the real estate or to the personal property of the willmaker is to be construed to include both the real and personal estate of the willmaker.

This provision :

- does not apply if the willmaker has expressed an intention to the contrary in their will.
- applies only to wills made on or after July 20, 1998.

LAPSE AND REDEMPTION

The general rule is that, subject to any contrary intention expressed in a will, a beneficiary named in a will must be alive at the date of the testator's death in order to take the gift or benefit – i.e. in the event that the beneficiary predeceases the testator, the gift or benefit lapses.

Ademption :

This doctrine refers to the complete or partial distinction of a gift under a will. *When a disposition is not able to be taken by a beneficiary because the subject matter has been already disposed of or has been destroyed or converted into an entirely new form of property/asset, it is said that the gift has been adeemed* – e.g. 'I give my photographic collection to my nephew Noah Flashflood'. In the event the collection is subsequently destroyed in a fire, the disposition is adeemed.

Furthermore, ademption of a gift occurs only in relation to a *specific* gift.

Alternatively, if a gift is *general* in nature, it may be provided for out of the general estate of the deceased.

ABATEMENT

This doctrine provides that when the estate left by the willmaker turns out to be too small to provide for all the legacies which the willmaker directed in his/her will, the general legacies must be reduced in amount proportionately – e.g. 'I give to each of my friends Stanley and Oliver the sum of $20,000.' This is a general legacy which must be paid out of the general estate of the deceased. If, after the specific legacies have been paid, there is an amount of only $30,000 left in the general estate, Stanley and Oliver will have to accept the proportionately reduced amounts of $15,000 each by way of abatement.

As a general observation, specific legacies usually only abate when the general estate is too small to pay off all of the willmaker's debts.

As with lapse and ademption, this is an important doctrine.

RIGHT TO RESIDE AS COMPARED TO A LIFE INTEREST

Another important concept relates to the right to reside as compared to the creation of a life interest.

It is not a rare occurrence to see a situation where one partner in a 'marital relationship' owns real estate in his or her own name, has children from a previous relationship, and has a new partner and resolves to ensure that the new partner has the ability to live in that house, as well as ensuring that the property ultimately devolves on someone else (usually children from a previous relationship).

This aim can be achieved by permitting the partner to reside in a property –via two main types – the right to reside or a life interest.

A right to reside gives your named beneficiary the right to reside in your property in the manner set out in your will – e.g. 12 months from the date of your death, or upon the happening of a specified event – e.g. remarriage. This right is usually subject to conditions such as maintaining the property and paying property expenses.

The reasons for the inclusion of a testamentary right to reside might include :

- The fact that the home is solely in the willmaker's name and he or she wants the property to pass to his or her children on the partner's death, but wants to allow his or her partner to reside in the property until his or her death.
- The fact that the willmaker has a child or other individual that he or she would like to reside in the property – i.e. the benefit of residence, but not the benefit of renting the property out or receiving its incomes.
- The willmaker may have a new partner as well as children from a previous relationship and the willmaker requires the house to go to the children from that relationship and the willmaker wants to allow the new partner to reside in the house thereby avoiding eviction.

RIGHT TO RESIDE V. A LIFE INTEREST (Continued)

As stated, the ‘alternative’ is a life interest.

This alternative provides the beneficiary with power and rights to real property. Furthermore, the interest in the property remains with the beneficiary for his or her life, then devolves as provided for in the will.

In clear contrast to a ‘right to reside’, the beneficiary is defined as a life tenant and is entitled to the income generated from the property for his or her lifetime. However, he or she has no entitlement to the capital or ownership of the property.

In further contrast, a life tenant can live in the property or lease it and live of the proceeds. Furthermore, the life tenant has the right to sell the property and purchase a new one, live in it, or invest the proceeds of the sale of the income. He or she cannot be forced to move out of the home or sell it against his or wishes.

Examples abound.

Clearly, considerable care is required to be taken when considering which alternative you wish to adopt – i.e. the right to reside or a life estate.

The obtaining of appropriate professional advice is paramount.

CHARITABLE PROVISIONS – SOME THOUGHTS

Many prospective willmakers are motivated by a desire to help a person, not-for-profit organisation or *charity* of their choosing by making provision for them in their will.

Indeed, it may be said that a gift in a will, also known as a bequest, is a charitable donation left to a person, not- for-profit organisation or charity by a willmaker, as stated in their will.

If you are seriously contemplating making a bequest to a charity in your will, keep in mind that most charities have a bequest officer or legacy manager who is there to help implement your wishes to the fullest possible extent.

Keep in mind that, as a general rule, the law favours charities and, accordingly seeks to save or uphold charitable trusts. Thus, in such cases there is an ability to apply to the Court for an order from that Court to apply the trust property 'Cy-Pres' (as 'near as possible') to the original charitable intent of the trust – i.e. when the express purpose of the trust becomes impossible to fulfil.

Sample guidance :

https://nationalseniors.com.au/news/finance/how-to-leave-a charitable-gift-in-your-will.

‘TESTATOR’S FAMILY MAINTENANCE APPLICATIONS – SOME CONSIDERATIONS

In Victoria, a person left ‘without adequate provision from a deceased estate (testate or intestate) may be eligible to contest the will.

Such a claim, if and when available, is generally described as a “Testator’s Family Maintenance Claim” and, on the 1st January 2015, changes were made in relation to ‘eligible applicants’.

In Victoria a person may contest a will if he or she is an eligible applicant, he or she believes that he/she or they have been left without adequate provision and the will left by the deceased is valid.

According to Dr. Nicola Bowes of Armstrong Legal, “a TFM Claim is made in Victoria if :

- The deceased was domiciled in Victoria as at the date of death;
- The deceased owned real and personal estate in Victoria at the date of their death;
- The person bringing a TFM claim is an ‘eligible applicant’ as defined by Section 90 of the *Administration and Probate Act 1948.*
- The claim is made within six months from the date on which probate has been granted to the executor(s) of an estate or outside of 6 months with special leave to do so from the Supreme Court.”

‘TESTATOR’S FAMILY MAINTENANCE APPLICATIONS – SOME CONSIDERATIONS (Continued)

She adds that ‘eligible applicants’ are defined by Section 90 of the *Administration and Probate Act 1958* as : “spouse or domestic partner at the time of death. The spouse must be married to the deceased as at the date of death.

A domestic partner may be in a ‘registered’, or ‘unregistered’, relationship with the deceased as an unregistered domestic partner is whether that person was living with the deceased as a couple on a ‘genuine domestic basis’ pursuant to the *Relationships Act 2008.* If there is no child from the relationship with the deceased who is under 18 years of age at the date of death, then the domestic partner must have been living for a continuous period of 2 years with the deceased before death.

A former spouse or domestic partner as at the date of death who was able to take proceedings against the deceased pursuant to the *Family Law Act* and who did not take such proceedings and was prevented by the death of the deceased from taking them ,or, who did take such proceedings and could not finalise them because of the death of the deceased.

A carer. A carer can only bring a claim if they are in a ‘registered caring relationship’ as defined under the *Family Law Act 1975* and that the relationship was with the deceased. A relationship of this nature must not be for a ‘fee or reward’ and between two people who are not a couple or married to each other. The *key issue* is that the relationship must be registered.

‘TESTATOR’S FAMILY MAINTENANCE APPLICATIONS – SOME CONSIDERATIONS (Continued)

Children are defined as :

- A child under 18 years of age; or
- A child who was a full time student aged between 18 or 25; or
- A child who has a disability (as defined in Section 90);
- Or a step-child, or adopted child of the deceased, subject to the categories listed above” (see *Baill v. Mackenzie (Estate of Ruopp) [2017 VSCA 108*).
- An adult child who has difficulty supporting their financial needs. The adult child claimant must demonstrate the degree to which he or she is not capable by reasonable means of adequately providing for their own proper maintenance and support;
- An ‘assumed child’ .. where the child was treated by the deceased as a natural child.”

Dr.Nicola Bowes of Armstrong Legal adds that “the Court may have regard to the following :

- Any family or other relationship between the eligible person and the deceased, including the nature of the relationship, and if relevant, the length of the relationship;
- Any obligations or responsibilities of the deceased to the eligible person, any other eligible person and the beneficiaries of the estate;
- The size and nature of the estate of the deceased and any charges and liabilities to which the estate is subject;
- The financial resources, including earning capacity, and the financial needs at the time of the hearing and for the foreseeable future of the eligible person, any other eligible person and any beneficiary of the estate. This may also include the expectation of possible future inheritance from another family member;

‘TESTATOR’S FAMILY MAINTENANCE APPLICATIONS – SOME CONSIDERATIONS (Continued)

Dr.Nicola Bowes of Armstrong Legal adds that “the Court may have regard to the following (continued) :

- Any physical, mental or intellectual disability of any eligible person or any beneficiary of the estate;
- The age of the eligible person.
- Any contribution (not for adequate consideration) of the eligible person to building up the deceased’s estate; or the welfare of the deceased or the deceased’s family;
- Any benefits previously given by the deceased to any eligible person or to any beneficiary;
- Whether the eligible person was being maintained by the deceased before that deceased’s death, either wholly or partly and if the Court considers it relevant, the extent to which, and the basis on which the deceased had done so;
- The liability of any other person to maintain the eligible person;
- The character and conduct of the eligible person to any other person;
- The effects a family provision order would have on the amounts received from the deceased’s estate by other beneficiaries;
- *Any other matter the Court considers relevant.* “

'TESTATOR'S FAMILY MAINTENANCE APPLICATIONS – SOME CONSIDERATIONS (Continued)

- These comprehensive factors are set out in Section 91A of the *Administration and Probate Act 1958.*
- Sections 90(c) and (f) of the *Administration and Probate Act 1958 (Vic)* sets out the law which governs step-children and their rights to contest a will to obtain a share or larger share of an estate.
- Dr. Bowes adds that "a grandchild is an eligible person under the Act and he or she is entitled to contest a will."
- However, she notes that "to be successful, the grandchild must establish the criteria that relates to *dependency, moral duty to provide, and the absence of or the lack of proper maintenance."*
- Furthermore, she says that "if the Court is satisfied that the applicant has established the above criteria, it will then decide what provision ought to be made out of the deceased's estate for the grandchild. In that regard, each application will depend on its own set of circumstances".
- Part IV of the *Administration and Probate Act 1958 (Vic)* and is the 'go to' legislation in the event that an eligible person wishes to make a claim.
- Over the years there have been substantial changes in many important aspects of this area of the law – commencing in or about 1962.
- At various stages there have been a wide range of potential claimants, whereas current claimants are relatively confined.

SOME CONCLUSIONS AND ASSISTANCE

It is, of course, trite to say that this Guide has made reference to some important aspects of will making.

At the same time, many issues have not been comprehensively addressed – such as :

- the rule against perpetuities;
- safekeeping and storage of wills;
- right to peruse the will;
- interested witnesses;

Intestacy : the 'Statutory Scheme of Distribution' and the *Administration and Probate Act 1958 (Vic);*

Types of grants;

- Revocation;
- Will constructions;
- The role of valuations;
- Superannuation and binding and non-binding nominations;
- The important role(s) of a range of inter vivos trusts.

SOME CONCLUSIONS AND ASSISTANCE (Continued)

Whilst not part of this Presentation, should you be involved in a Probate or Letters of Administration application – various types – or are undertaking it on your own behalf – I strongly urge you to check out the Supreme Court, Red Crest website. You will find it invaluable.

Most importantly, in the event that you have any queries about willmaking or the probate and administration process, always seek appropriate professional advice – ensuring that you do so promptly.