Re Larcombe [2022] VSC 741 (McMillan J)

The Court considered an application under section 9 of the *Wills Act 1997* to admit an informal document to probate. The Plaintiff was one of the deceased's 4 siblings. The Court appointed contradictors to the application after the other siblings declined to be added as Defendants to the proceeding. The deceased died in his later 50s after a relatively short illness. He signed a handwritten one-page document disposing of part of his estate. The Plaintiff was named as the executor and received the majority of the estate. The Plaintiff alone was involved in the preparation of the informal document. His affidavit material gave contradictory accounts of the circumstances in which the will was considered, drafted, written and signed. The Court did not accept that the document satisfied the requirements of section 9.

Re Klapsas; Klapsas v Muscat [2022] VSC 755 (Walker JA)

The deceased's son applied to revoke a grant made in 2007 of a will signed in 2002. The facts were set out in some detail and spanned many years. The deceased had changed her will shortly after the death of her husband in 2002 to give her estate to her daughter who was also appointed executrix. Her son was the sole residuary beneficiary in an earlier 1981 will.

The reasons summarise the principles that apply to applications to revoke (or challenge) a will on the basis of a lack of knowledge and approval, citing *Nock v Austin* (1918) CLR 519 (Isaacs J) and related authorities. The shifting burden that characterises the relationship between knowledge and approval and suspicious circumstances is outlined: the presumption of knowledge and approval arises from due execution but suspicious circumstances shift the burden of proving knowledge and approval 'affirmatively by clear and satisfactory proof' to the Plaintiff. The presumption of due execution is not displaced by mere assertion of invalidity but 'a well grounded suspicion' that the instrument might not express the will or mind of the testator (*Veall [*2015] VSCA 60) (*Tobin v Ezekiel* (2012) NSWCA 285). The cogency of the evidence required to allay the suspicion will depend on the circumstances which aroused it.

The Court did not find a 'well grounded suspicion' that the deceased did not know any approve of the contents of the will. It was found that the deceased had given instructions to an independent solicitor who then arranged for the will to be drafted in accordance with those instructions and duly executed. It was found that the will reflected the deceased's intention to protect her home from her son's creditors owing to his financial issues at the time. The Court's findings were supported by an assessment of the witnesses' credit and the tendency of the disappointed beneficiary to misstate matters and give improbable evidence. In the absence of suspicion, there was no onus on the daughter to affirmatively prove knowledge and approval. The application was dismissed.

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Re Graham [2022] VSC 757 (Moore J)

The Court considered whether a Caveator had a *prima facie* case and standing to object to the grant of probate a 2014 will to the three executor-beneficiaries. They were 3 of the deceased's 6 children, and the Caveator was another son. The Caveator did not challenge the validity of the will but sought orders that the executors be passed over. The estate was insolvent. The grounds of objection set out in detail the circumstances in which the deceased transferred her net estate into a family trust. The Caveator said that these transactions warranted careful investigation that the Plaintiffs would not undertake as the specified beneficiaries and controllers of the trust (they were the directors of the corporate trustee). The Court described the grounds and particulars as alleging a 'classic case' of conflict between the executors' duty to call in estate assets and their personal interest in the trust. However, the grounds did not allege that the deceased lacked capacity or was unduly influenced at the time of the impugned transactions (or at all) and the funds transferred to the trust appeared to have been used for her benefit. The Court held that the evidence did not reveal a case for investigation. The caveat was dismissed.

Alexopoulos v Krasovec [2022] VSC 749 (Barrett AsJ)

The Plaintiff approached the Court for directions about the sale of the estate property and the construction of an *in specie* gift of the same real property. The estate's cash reserves were inadequate to meet anticipated liabilities. The Court determined that the executrix was justified in selling the property to meet estate debts under a clause in the will that reflected the general and statutory right of LPRs to use real and personal property to satisfy debts of the deceased and estate (ie ss 13, 36 and 37 of the *Administration and Probate Act 1958*). However it was construed, the Court found that the gift of property could not be satisfied *in specie* in light of the estate's cash position. Under the will, the proceeds of sale would fall into residue to be shared equally between the two beneficiaries.

The construction question concerned a clause in the will giving one the deceased's two sons rights in respect of the estate property. The question was essentially whether there was a right to immediate transfer of the property with a condition deferring possession until the beneficiary paid his brother 50% of the value; or whether the payment had to be made within 6 months after the grant as a condition of any rights in the property vesting in the beneficiary. The Court found it unnecessary to address the construction issue but did indicate that if it had been necessary to decide, the submissions of the executor were preferred - the gift was conditional upon payment and would have failed in the circumstances of non-payment. The Court allowed extrinsic evidence about the deceased's intentions under s 36 of the *Wills Act 1997* since the ambiguity

arose on the face of the will and not from the surrounding circumstances (in which case that evidence would have been excluded under s 36(2).

Kornwasser v Spiegelman [2022] VSC 759 (Richards J)

This proceeding involved a Part IV claim by an adult daughter. The Plaintiff received $3.15m by way of further provision from her father's large estate. The Court arrived at that figure having regard to the Plaintiff's high degree of dependency on the deceased and her own challenging circumstances (including a marriage break down).

Uniting Church Australia Property Trust v Attorney-General (Irving AsJ) [2022] VSC 769

The Plaintiff trustee held the land on which St Hilda's College (a college of the University of Melbourne) was located on trust. The trust was established initially under the *Queens College Land Act* 1962 for the purposes of St Hilda's. Later, in 1963 and 1992, respectively, the subsequent trustees (at the relevant dates) and the St Hilda's College Council executed trust deeds purportedly recording the Council's right to have trust property dealt with at its direction. In 2021, the Council directed the Plaintiff to transfer the land to St Hilda's College Ltd for no consideration under the terms of the 1992 Deed. The Plaintiff refused and proceedings were issued by the Council.

These reasons dealt with the trustee's application for judicial advice under *Beddoe* principles to approve the trustee defending the Council's proceeding. The trustee also sought to be indemnified from trust assets for the costs of defending the proceeding.

It was determined that the trust was a perpetual charitable trust and the Attorney-General was joined. The Court decided that the trustee was justified in defending the Council's proceeding. The Attorney-General submitted that the Court should refer the question of the trustee's indemnity for future costs to the trial judge. The Attorney-General contended that the main proceeding would involve consideration of whether the trustee committed a breach of trust and that, as a result, the trustee may approach the litigation adversarially and in its own interest. The Court found that the Trustee was entitled to be indemnified from trust property for its reasonable costs of defending the proceeding capped at $300,000.

Eastern Health v Bruinink [2022] VSC 772 (Incerti J)

The Plaintiff made an application to the Practice Court regarding the disposal of the deceased's body, which it had held for around 2 years. The Defendant, the deceased's daughter and executor named in his last will, had resisted providing any instructions for the transfer of the body. She harboured concerns that the death had arisen from medical

malpractice, leading to an unsuccessful attempt to have the Coroner investigate the death and an unsuccessful appeal of the Coroner's determination that the death was not reportable. The Court ordered that the body would be transferred to a funeral parlour, held for only two days and then cremated.

Re Moran [2022] VSC 776 (McMillan J)

The proceeding concerned the construction of a will and the application of the statutory exceptions to ademption. The deceased's will was made in 1976 and gave the deceased's son 'the real estate owned by me'. The Plaintiffs were the children of the deceased's son who had predeceased the deceased.

In early 2017 financial administrators were appointed under the (then operative) *Guardianship and Administration Ac*t 1986 to manage the deceased's financial affairs at a time when he suffered from dementia. In late 2017, the deceased's property was sold to satisfy orders made in a Family Court proceeding on behalf of the represented person. The Plaintiffs sought declarations that they were entitled to the proceeds of the sale of the property under the statutory exception to ademption contained in s 53 of the 1986 Act or s 76 of the *Guardianship and Administration Act 2019*. Those sections provide that the represented person or their beneficiaries can trace their interest in property that is sold in the exercise of the administrator's powers to (in this case) the converted proceeds.

The reasons include a refresher (citing *Re Foord* [2019] VSC 444) on various types of gifts: specific gifts (property set aside for a 'distinct' testamentary disposition); demonstrative gifts (to be satisfied from a particular fund or part of the estate); and general gifts, that are to be satisfied out of the general assets of the estate. The statutory provisions and general law principles of ademption apply only to specific gifts.

The Plaintiffs submitted that the gift of 'real estate owned by me' was a specific gift. The Defendant contended that the gift ought to be construed as a general gift of all real property owned by the deceased at the date of death in which case the gift failed.

The Court held that the plain meaning of 'real estate owned by me' was a generic gift of a class of property and not a specific gift of a particular property. That was so even though in construing the will in accordance with the 'armchair principle' the Court took note of the surrounding circumstances and, in particular, that the deceased only ever owned the one property. The gift was not a specific gift subject to ademption and the statutory relief from ademption did not apply to enable the Plaintiffs to trace the gift to the proceeds held by the estate.

Sheppard v Heathcote [2022] VSC 795 (John Dixon J)

The Plaintiff sought an accounting of her father's estate under a 28 of the *Administration and Probate Act 1958*. The Court said that the 'unequivocal and comprehensive' releases

contained in settlement terms signed by the Plaintiff in 2010 contemplated the release of 'any and all other claims' or rights against the estate, including any right to receive an accounting of the deceased's estate. The Court did not accept the Plaintiff's belated contention that she was induced by a misrepresentation to execute the terms in 2010 and noted that, in any event, the terms could not be avoided as she could not repay the settlement payment.

Colosimo v Colosimo [2022] VSC 807 (Incerti J)

The deceased died in 2020 aged 62. He was survived by 6 of 9 siblings who would take on intestacy, along with nieces and nephew by representation who included the Plaintiff. The Plaintiff sought to prove a will made in 1991 that named him as executor and gave him the residuary estate. The original will could not be located. The question before the Court was whether the 1991 will had been revoked. The Court's reasons outline the ways in which a will can be revoked: voluntarily under s 12 of the *Wills Act 1997* or by operation of law upon on the testator's subsequent marriage or divorce (ss 13 & 14). In this case, the Court had to determine whether the presumption of destruction arose from the fact that the original will could not be located and if so, whether it was rebutted. There was no direct evidence that it was destroyed. The evidence disclosed that the law firm that prepared the will had no deed record of it. The deceased held a copy only. The deceased did take steps to give instructions for a new will before he passed but it was not finalised. Interestingly, the evidence was mixed as to whether the deceased even remembered that he had made a will previously. But based on the evidence that the deceased kept 'meticulous' records and still held a copy of the 1991 will, and that he never informed his friend and solicitor that he had revoked it in the course of giving instructions for his later will, the Court ultimately determined on the balance of probabilities that the presumption did not arise and that even if it did, it was overcome.

Re Maddock; Bailey v Maddock (No 2) [2023] VSC 2 (McMillan J)

This costs decision followed her Honour Justice McMillan's earlier decision in *Re Maddock; Bailey v Maddock* [2022] VSC 346. The applicant for probate of a will executed in 2020 that was held to be invalid was ordered to pay her own costs without indemnity from the estate, the deceased's wife's costs on a standard basis for a period and an indemnity basis following the unreasonable refusal of an offer, and the costs of other beneficiaries involved in mediation of the proceedings.

Re Evans; Marks v Evans [2023] VSC 4 (McMillan J)

On its face, this was an application for judicial advice. The deceased was survived by two children and four grandchildren. The will made gifts to charities and purported to deal with family trust assets. Judicial advice was sought by one executor and the trustee of the family trust in relation to the construction of the will and their entry into a proposed deed providing for the distribution of the estate and the vesting of the trust. The executor also sought the removal of his co-executor.

The co-executor was suffering cognitive and other health problems. Given his ill health the Court discharged rather than removed him and vested property in the remaining executor.

With respect to the advice application, the Court noted that it would generally adopt a 'wide and facilitative rather than a narrow or strict approach' to advice questions. In the circumstances of this case, the Court was critical of the application. There was unanimous agreement among the beneficiaries about the proposed deed and the Attorney-General's approval had been granted for unnamed charities. In those circumstances, the beneficiaries submitted that the application was unnecessary and incurred significant costs.

The reasons discuss the difference between applications for approval of compromise (where not all beneficiaries do or can agree) and applications for judicial advice where all interested parties consent but there are additional questions about the administration or management of the estate or trust. Although this was an application for judicial advice in form, the Court determined that in substance it was a request for approval of a compromise that was unnecessary where all affected beneficiaries were *suis juris* and had consented. The Court held that the executor had acted contrary to their duties in making the application rather than simply entering into the compromise.

The affected parties had agreed to seek that the trustee of a family trust would vest and distribute the capital of the discretionary trust in the same proportions as the residuary estate. This gave rise to an interesting point. The Court considered whether the proposed direction to the trustee would unlawfully fetter its discretion (which was absolute under the deed) to distribute trust property. It was held that as long as the proposed action resulted from a 'conscientious judgement' as to the best interests of the beneficiaries, it was within the trustee's power.

Re Hayes (No 3) [2023] VSC 5 (McMillan J)

The Court had previously determined that the applicant failed to demonstrate a *prima facie* case to revoke a grant in respect of the deceased's 2008 will. The Court noted the 'broad and unsupported' allegations of fraud and undue influence. The Court found that special circumstances arose from the Plaintiff's failure to establish a proper basis for the

case that warranted an order that the applicant pay the Plaintiff's (ie the executor's) costs on an indemnity basis. The applicant's solicitors were invited to make submissions in relation to various issues about their conduct under the *Civil Procedure Act 2010*. The Court said that the applicant's solicitor did not have a proper basis for the allegations set out in the grounds covering 'fraud, undue influence, incapacity, promissory estoppel and unconscionable conduct' and had relied heavily on the client's assertions. The solicitors also failed to narrow the issues in dispute. For those reasons, they were ordered to indemnify the client for 1/4 of the Plaintiff's indemnity costs.

Re Wierzbowski [2023] VSC 11 (McMillan J)

The applicant sought to revoke a grant on the basis that the deceased 'was unlikely to have had capacity' and that there were suspicious circumstances giving rise to doubt as to their knowledge and approval of the will. The Court stated that the purported ground that the deceased's was 'unlikely' to have had capacity 'did not appear to be known to the law'. In support of the existence of that ground the Court was referred to comments in *Able Australia Services v Yammas* (2010) VSC 237 by Hargrave J that grounds 'may include' an allegation that the deceased lacked testamentary capacity. However, the Court clarified that those comments reflected the non-exhaustive bases for challenging a grant rather than supporting the existence of a ground that the deceased 'may have lacked' or was 'unlikely to have' capacity. Practitioners can note that grounds alleging lack of capacity ought to be absolute and not framed tentatively.

The applicant was ordered to pay the Plaintiff's costs on an indemnity basis. In considering the costs, the Court had regard to the extent to which the applicant and her solicitors had breached their duties under the *Civil Procedure Act 2010*. The Court catalogued the various delays associated with the application, which was ultimately withdrawn on the first day of the trial. It was also significant that no proper basis or overarching obligations certificates had been filed. The Court found that at the time the grounds were filed there was a case for investigation and the solicitors had not breached their obligations by relying on what was at that time, speculative evidence from the applicant. The Court could not find on the available information that the solicitors breached their obligations but ordered further investigation of those matters. The solicitors did have to pay the costs associated with the Court's inquiries into the breaches of the *Civil Procedure Act* because they failed to file certificates.

Tam v Chen [2023] VSC 12 (Daly AsJ)

The Court granted an application for an extension of time in which to bring a Part IV application and considered the substantive claim by the deceased's only child. The claimant was represented by a litigation guardian. She suffers from an intellectual disability and psychiatric illnesses including paranoia schizophrenia. The estate was very

modest; the sole asset was a serviced apartment valued at approximately $220,000 - 250,000 earning monthly rental income of $1750.

The deceased's will appointed the deceased's two nieces (the Plaintiff's cousins) as the executors and trustees of the estate. The rental income was held on trust for the benefit of the Plaintiff for her life and the remainder of the estate given to the executors. Given her limited means and the small size of the estate, the litigation guardian sought an absolute interest in the estate's capital for the Plaintiff.

The Court noted ([46]) that a disabled child would generally have a strong claim to their parents' estates. However, a recent line of authority (including *Schmidt v Walter* (2019) VSC 385) suggests that a disabled child's provision will be limited or even refused 'by reason of their failure to establish any particular needs over and above what is provided by government agencies', including the NDIS. The Court noted that since *Schmidt*, public debate had arisen about the long term financial viability of the NDIS. Although in this case the Court was satisfied that the NDIS support to the Plaintiff was secure, it indicated that in another case where eligibility thresholds might change, the Court might not make similar assumptions about the long term security of those packages to limit provision (such as in *Schmidt*).

It was significant that the deceased had intended for the executors to provide ongoing support to her daughter during her life and had wished to provide a 'modest reward' to them for doing so. The Court took the view that the additional provision might not make any material difference to the Plaintiff's circumstances so as to justify disturbing the scheme in the will which reflected the deceased's well thought out intentions. The Court made a *Crisp* order ((*Crisp v burns Philp Trustee Company Ltd* (unreported, Holland J, 18 December 1979) providing for a portable interest in the property for the Plaintiff and removing the restriction in the will on the sale which was found to be 'unduly restrictive'. Also note the mention of the Plaintiff's financial need, which was assessed as at the trial date. The Plaintiff's financial circumstances had altered significantly between the date of death in 2017 and the trial.

Re Kordos [2023] VSC 14 (McMillan J)

This was an application for a grant *ad litem* to enable the Plaintiff to bring legal proceedings on behalf of the estate in order to recover assets said to have been acquired from the estate improperly by the deceased's late son and his wife. The Plaintiff was the deceased's other son. The estate contained no assets at the date of the deceased's death.

The Court confirmed that limited grants are made where careful scrutiny is required to investigate *inter vivos* transactions involving the deceased's property. The Court will consider the need to promote the due and proper administration of the estate and the interests of beneficiaries who will be impacted and bound by the actions of the limited administrator. The proposed administrator was not a beneficiary but a potential Part IV

claimant with standing to seek a limited grant (see *Mataska v Brown* [2013] VSC 62). It was noted in the reasons that while the applicant had standing, the Court will approach an application by a potential Part IV claimant 'cautiously' owing to the increased risk that they may pursue their own interests, compared with an independent administrator who might be more cognisant of their fiduciary duties to act within the limits of the grant and not in their self-interest.

The evidence of the Plaintiff demonstrated that the deceased's other son had withdrawn around $600,000 representing the deceased's share of the proceeds of a sale of a jointly owned property into his account when the deceased was in aged care and suffering from Alzheimer's disease. Despite accepting that the other family members with any beneficial interest in the estate would not pursue the claims about estate property, the Court decided that the Plaintiff was not sufficiently independent to be appointed. The Court was also concerned about the Plaintiff's inability to provide a surety guarantee or indemnify the estate for the costs of third parties if the potential litigation was not successful.

As with the similar decision in *Ciantar* [2022] VSC 116 the Court was concerned about the potential partiality of the person seeking to recover assets to the estate, even where the estate consists only of a cause of action that would not be pursued otherwise. Following *Re Emmins* [2019] VSC 605, and *Re Ciantar* this decision confirms that caution is required when using limited grants as a tool for seeking to restore estates where alleged elder abuse or breaches by attorneys have occurred.

Jortikka v Haukka [2023] VSC 20 Daly AsJ

This was an executor removal application. The estate property had been sold and the administration was described as 'almost complete' but there were unascertained tax liabilities arising from the delay in the sale of the property for over three years from the date of death. It was implicit that the trustee phase had not been reached and that an application to the Court was therefore required for the executor's removal. The allegations against the co-executor centred on her attempts to negotiate a purchase of the estate property for herself and associated efforts to obstruct the preparation and sale of the property. The executor was removed. The Court determined that she was unfit to act due to her dereliction of duty and 'irresponsible and cavalier approach' to her role as executor. The Plaintiff also sought an adjustment against the Defendant's share of the estate for any CGT and land tax associated with the delayed sale. The Court agreed to adjust the land tax but not the CGT, finding that the co-executor acquiesced in the delay for the first two years after the deceased's death (being the usual PPR exemption period for CGT purposes).

Walters v Perton [2023] VSC 37 (Forbes J)

These reasons concerned a Part IV claim by a domestic partner and a proceeding in which that Plaintiff sought declaratory relief about various estate assets. Consideration of a third proceeding in which the Plaintiff sought injunctive relief and the executor's removal was deferred by the Court.

A threshold issue was the Plaintiff's standing to seek declarations about whether certain assets formed part of the estate. The Court surveyed the authorities about the sufficiency of a party's interest in the estate and the circumstances in which they might be allowed to essentially step into the shoes of the executor to claw back assets into the estate. The Court said that not all Part IV applicants will have standing to seek such declaratory relief but in the circumstances (including that the Plaintiff was otherwise a beneficiary and was seeking to clarify the size of the estate) the Plaintiff had standing.

The focus of the Court's reasons was otherwise on the allegations that various assets ought to form part of the estate - a property, shares and a commercial property that had been used to secure the guarantee of over $2.5m is business loans. A trust owned the deceased's PPR in Eaglemont. The Plaintiff claimed to have a beneficial interest in the Eaglemont property in her own right or jointly with the estate based on a constructive and / or resulting trust. The Plaintiff also alleged that the cancellation of the deceased's shares in his business in 2015 was not valid (and that they remained in the estate) as the documents filed did not comply with statutory procedures for the reduction of capital. The deceased had used a property in Bell St from which his business traded to secure a guarantee of company debts of around $2.8m at the date of death. The executor had transferred the property to herself and refinanced the debt after the date of death. She claimed to be entitled to the property to satisfy her indemnity out of estate assets for assuming responsibility for the guaranteed debts. The Plaintiff claimed that the property should be declared to have been unencumbered as at the date of death and considered as part of the asset pool for the estate.

The Court found that the Plaintiff did not have a beneficial interest in the Eaglemont property in her own right. The Court also held that although the deceased had contributed $600,000 to the purchase of the Eaglemont property, in deciding to place that asset in a discretionary trust he placed his financial contribution 'beyond the reach of his estate'. The share cancellation for no consideration was held to be valid (the contravention of the *Corporations Act 2001* was only a 'procedural irregularity') and the shares were not clawed back into the estate. In relation to the Bell St property, the Court found that as there had been no demand on the borrower or guarantor prior to death, there was no liability secured under the guarantee as at the date of death. The Court also held that the guarantee did not secure the borrowings after death. The result was that the property was not relevantly 'charged' with the debt under s 40 of the *Administration and Probate Act* 1958 and it formed part of the estate unencumbered as at the date of death.

The Plaintiff's legal fees for both proceedings were $900,000 before trial and were expected to be $1m as the proceedings continue. The Defendant's costs were estimated to be around $650,000. The Court stated that the costs were 'extraordinarily high and disproportionate'. Further consideration of the Part IV was deferred to allow the parties time to consider the reasons about the composition of the estate. The Court noted that legal fees were commensurate with the amount of provision claimed by the Plaintiff.

Vallianos v Coroner's Court of Victoria [2023] VSC 48 (Forbes J)

This proceeding was listed in the Judicial review and Appeal List but is relevant for wills and estates practitioners. It concerned the application of Section 48 of the *Coroner's Act 2008*, relating to applications to the Coroner for the release of a body. The deceased was a relatively young woman who had no partner and who appears to have been estranged from her family. The deceased's parents applied as 'senior next of kin' and a friend applied as the person named in a letter that she said was an informal will. The friend appealed the Coroner's decision that the parents had a 'better claim' under section 48 of the Act based on a finding that the letter was not a will. The Coroner considered that the letter ultimately contained 'personal reflections and expressions of emotions in the nature of correspondence'. There was also a question raised as to whether the hierarchy of 'senior next of kin' in the Act is inconsistent with the *Charter of Human Rights and responsibilities Act 2006*.

The Coroner did not apply section 9 of the *Wills Act* 1997 in considering whether there was a will for the purposes of section 48. The Coroner observed that the finding about the will in this context had 'no bearing' on what document would ultimately be held to be valid by the Supreme Court which has sole jurisdiction over matters of probate. The appellant contended that the Coroner fell into error by focusing on the form of the document and not the deceased's intention that it serve as her will. In other words, the test the Coroner ought to have applied is whether the document constituted a Will under the remedial provisions in section 9. The Court held that that there was no will and no error in law by the Coroner in the test applied, which did not require a determination of the elements in section 9 of the *Wills Act 1997*. The Court also held that any limitations on the choice of the person entitled to dispose of the body under the Act are reasonable and not incompatible with the Charter.

Re Papavasiliou; Theofanous v Aizen [2023] VSC 43 (McMillan J)

The Court considered an application for revocation of a grant based on grounds that alleged a lack of testamentary capacity and knowledge and approval of the deceased's last will signed in 2019. The deceased died in 2020 leaving a 2019 will appointing one of her three daughters the executor and sole beneficiary of the estate. The procedural history was relevant to the Court's decision to dismiss the application. The applicant had

previously, through her first solicitors, filed and subsequently withdrawn a caveat in relation to the grant and then pursued a Part IV application to an unsuccessful mediation. Her first solicitors then ceased acting. The applicant then filed the revocation application and also threatened removal proceedings.

The Court's power to revoke a grant is discretionary and requires the applicant to demonstrate their standing, a prima facie case for the revocation and to explain their delay in challenging the will. In this case, the Court decided that the delay was not justified. The applicant had acquiesced to the grant and had caused prejudice to the Plaintiff by making 'contradictory and unwarranted' claims. The Court also decided that the evidence did not disclose a *prima facie* case for revocation. The Court noted that it may consider broad evidence from medical and lay witnesses in relation to capacity, but that medical evidence is not necessarily 'determinative'. A test administered by a doctor that disclosed 'impaired mental functioning is not decisive'. The evidence disclosed a report in 2017 from one doctor which purported to diagnose Alzheimer's disease. However, the deceased's regular treating doctors were not aware of any diagnosis of dementia and gave some limited evidence retrospectively that the deceased had capacity. Detailed evidence was provided by the solicitor who drew the wills in 2018 and 2019. The Court was persuaded by the solicitor's evidence and found that the applicant had not established a prima facie case. In those circumstances, and given the prejudice to the Plaintiff, the Court dismissed the application.

Re Robustelle No 2 [2023] VSC 72 (Moore J)

In the first set of reasons (*Re Robustelle* [2022] VSC 493) McMillan J dealt with the Caveatrix's standing to object to the grant of letters of administration with the will annexed of the deceased. The Caveatrix was a niece of the deceased who was named only in the deceased's ante penultimate Will. The Court confirmed her standing to challenge the grant in relation to the last (2018) will and noted that the Caveator had also correctly sought to impugn an earlier 2012 will.

The Plaintiff subsequently filed an application for probate of the 2012 Will and the Caveatrix filed grounds in the same terms as those that applied to the 2018 Will. The grounds alleged a lack of testamentary capacity and undue influence of the deceased by the executor and primary beneficiary of both the 2012 and 2018 wills, Stephen Atkins. The Caveatrix relied on extensive affidavit evidence recording an alleged campaign of undue influence and coercion by the late Atkins against the deceased.

Moore J referred to the now familiar principles set out by the Court of Appeal in *Re Gardiner No 2 ((2019 VSC 198*) about establishing a prime facie case, being a 'case for investigation' that rises above 'mere speculation'. His Honour also observed the Court of Appeal's view that the particulars of objection should be read as an overall narrative rather than being scrutinised in isolation - the task is to identify 'whether the particulars

as a whole constituted a narrative warranting further investigation' (82, Gardiner cited at [16]).

The Caveatrix was found to have established a prima facie case that the deceased lacked capacity at the time the will was executed. There is some interesting discussion about the impact of a VCAT guardianship and administration order on the assessment of the prima facie case (see [32]). The Court also found that the fact that the will was prepared by solicitors did not 'extinguish' the case for investigation that arose from medical and other records.

The Court reviewed the principles about testamentary undue influence, which requires that the free will of the testator is overborne and that the testamentary document is the product of that influence and not the testator's wishes. The evidence disclosed a number of accounts from people connected to the deceased of violence, aggression and control of the deceased by the late executor / principal beneficiary (Atkins).

The Plaintiff (who was Atkins's son) submitted that the relationship was complex but that the evidence did not support an inference that the Wills were not made freely.

The Court held that there was a narrative warranting further investigation arising from evidence about the "alleged exercise, over about twelve years, of coercive control by a middle aged man over an elderly and frail woman who was dependent on him in critical respects". The Court decided that the Caveatrix had made out a prima facie case that the 2012 and 2018 wills were made under the primary beneficiary's undue influence.

Re Moran (No 2) [2023] VSC 83 (McMillan J)

This was the costs decision following the earlier judgment outlined above. The Plaintiffs sought their costs from the estate and the Defendant sought indemnity costs. The Court decided that a Calderbank offer made by the Defendant that was conditional on a third party's consent was not an offer but only an offer to negotiate. The Court therefore did not consider that the rejection of that offer was unreasonable so as to justify an indemnity costs order. The litigation was described as adversarial and the Court applied the usual principle that costs follow the event. The Plaintiffs were ordered to pay costs on a standard basis without reimbursement from the estate.

Lambrou v Lambrou & Anor [2023] VSC 90

The factual summary in the reasons discloses a long history of conflict commencing when the deceased was alive and under a financial administration order. Her administrator (State Trustees) alleged that her son and former administrator had misappropriated property. Upon her death, her other son obtained a grant and a settlement was reached

in which just over $500,000 was to be repaid by the son, secured by an equitable charge against the estate property. There was a default by under the terms. The administrator of the estate subsequently had to seek orders for the sale of the property. A warrant was issued but not executed due to the pandemic. The son sought a stay of the warrant and appealed after his application was dismissed. Eventually, a mortgage sale occurred. The Court's reasons related to competing applications to the surplus funds from the sale that were held in the Court. The estate administrator was held to have a priority interest in the funds for the repayment of the settlement sum, interest on that amount (for which judgment was subsequently obtained), and costs of the enforcement proceedings. The Court was also asked to allow costs of preparing the property for sale even though the mortgagee ultimately forced the sale, and did so. The Court noted that in Victoria a duty to cooperate is an implied contractual term and that the son had failed to cooperate at every turn.

Pavlidis v Pavlidis [2023] VSC 92 (Forbes J)

This was a TFM proceeding in which the Court considered an extension application and issues around the alleged disentitling conduct of the Plaintiff. The deceased died in 2017 and was survived by two adult children, a son and daughter. Probate was granted in 2018 to her daughter. The estate's principal asset as at the date of death was her residence in Doncaster, which had been sold by the executrix in the course of the administration. The will left the son only a pecuniary legacy of $100,000 if he was not married with at least one child by the date of death. He was not. The balance of the estate was left to the daughter.

It was alleged in support of the extension application that the executor had not disclosed the will until her solicitors sent a letter to the son in November 2021. The Court granted the extension, finding that the son had not been aware of the contents of the will and because the estate had not been distributed. The Court was not persuaded to deny the extension by the daughter's contention that the claim would cause prejudice to her since she had settled family law proceedings assuming that she would receive most of the estate.

In relation to the substantive provision claim, there were allegations and denials centring on whether financial assistance had been provided by the deceased to the son as a gift or under duress. During the deceased's lifetime she had engaged a solicitor to assist with recovering an amount of around $500,000 that her son deducted from a joint offset bank account. The bank returned a portion of those funds to the deceased and subsequently recovered that amount from the son. He returned another $400,000 to the deceased directly.

Both children were found to be in 'precarious' financial positions. The Court determined that the legacy to the son was inadequate provision. The deceased's reason for the minor provision to her son was her belief that she had provided him with significant financial assistance. However, the funds advanced / taken had been repaid only shortly prior to her death and after the Will was made. The Court noted that the adequacy of provision is assessed at the date of death. The Court found that the deceased had felt pressured to financially support her son but that he had received no substantial 'windfall' because he has repaid the funds. His prior conduct did not disentitle him from further provision or displace his 'demonstrable need'. He was allowed another $240,000 in addition to the $100,000 legacy.

Jackson v James & Anor [2023] VSC 100 (Moore J)

This was a costs decision relating to an application to pass an account. In 2021 the Plaintiff executor issued proceedings under s 28 of the Administration and Probate Act 1958 and r 6.03 of the Supreme Court (Administration and Probate) Rules 2014 to have the Court pass the accounts of the estate. The application followed a lengthy dispute arose with the other beneficiaries involving persistent requests for documents concerning the estate and the deceased's affairs prior to her death. The deceased died in 2016. The account was passed by consent eventually. The executor sought his costs from the estate and the Defendants objected, for reasons including that the orders had been made by consent. The Court confirmed the executor's right of indemnity for expenses properly incurred (referring to s 36(2) Trustee Act 1958 and Wales v Wales (2015) VSCA 345). The onus is on the person seeking to disturb the trustee's right of indemnity. The Court was not satisfied that the costs were improperly incurred.

Cassin v Peak; Tonzing v Caldwell [2023] VSC 108 (Englefield JR)

The proceedings concerned claims for further provision from two estates. Both had been resolved subject to the approval of the Court as each compromise affected the interests of minor beneficiaries. The decision relates to the proper procedure for the approvals. The applications for approval of compromise by the respective Defendants were made by an ex parte summons pursuant to section 63A of the Trustee Act 1958, with alternative approval mechanism proposed via the joinder of the minor beneficiaries and an approval under rule 15 of the Supreme Court (General Civil Procedure) Rules 2015. The Court of its own motion proposed the amendment of the summonses so that the applications were made under order 54. The Defendants contended that the relief sought (ie the approval) was not capable of falling within the ambit of relief in an 'administration proceeding' under rule 54.02(2)(c)(1) and that the compromise involved a variation of a trust that would engage the Trustee Act. The Court held that family provision litigation arises in the administration of estates and declined to make orders under the Trustee Act. The Court held (at [49]) that an LPR has the power to enter into and be bound by a compromise without the Court's approval. The Court noted that *Hodge v De Pasquale* [2014] VSC 413 could be read as authority for the proposition that the LPR is bound by and can give effect

to a compromise even where minor beneficiaries are involved but that in the absence of effective consent from all beneficiaries the approval is necessary as protection from 'later complaint'. The Court made orders under r 54.02(2)(c)(i) approving the compromises. The Court also confirmed that a provision order was not necessary where the further provision was to be made to adult beneficiaries.

Re Papavasiliou; Theofanous v Aizen (No 2) [2023] VSC 118

These reasons dealt with the costs of the applicant's failed revocation application. The Court found that the litigation was adversarial and 'hostile' and that the costs should follow the event. The Court also found that there were special circumstances warranting an indemnity costs order.

Wilden v Meller [2023] VSC 119

This was a family provision claim by a widower who had been left a life interest in his home by a spouse of 25 years. The remainder beneficiaries were adult nephews and charities. The deceased and Plaintiff had no children. The deceased benefited her nephews in circumstances where their father (her brother) had received very little from his mother's estate. The estate property was inherited by the deceased from her late mother. The Plaintiff had contributed to the relationship financially and had been the deceased's carer throughout her illness. It was submitted by the Plaintiff that the Court should follow the 'general rule' outlined in Luciano v Rosenblum (1985) 2 NSWLR 65 regarding provision for a surviving spouse. The Defendant resisted the Plaintiff's claim for an absolute interest in the property and an absolute entitlement to a contingency fund saying that this would exceed what was required to fulfil the deceased's moral duty. The Court declined to make radical changes to the 'architecture' of the Will by awarding the absolute entitlement in the property sought by the Plaintiff. However, the Court held that consideration of the mandatory and discretionary factors weighed in favour of relatively generous provision. The Plaintiff was awarded a portable life interest (via a 'Crisp' order (*Crisp v burns Philp Trustee Company Ltd* (unreported, Holland J, 18 December 1979) and a lump sum fund representing the net residuary estate. Submissions were sought about the appointment of an independent trustee.

Vallianos v Coroner's Court of Victoria & Ors (costs) [2023] VSC 121 (Forbes J)

This was the costs decision following the appeal outlined above. Neither the Coroner's Court nor the Attorney-General sought their costs against the appellant. The Court held that the public interest considerations raised by the appellant were not sufficient to displace the 'ordinary rule' that costs should follow the event between private litigants. The case was found to have turned on its facts rather than addressing matters of public interest and to lack the hallmarks of a test case about the interpretation of the relevant Act. The ppellant was ordered to pay the second respondent's costs on a standard basis.

In the matter of the Will and Estate of Kalliopi Siapantas [2023] VSC 125 (Gorton J)

The deceased died in October 2021 leaving two children, a son and a daughter. She has made wills in 2008, 2015 and two wills in 2019. The 2019 wills were distinct in making provision for the deceased's daughter in law and two grandchildren. This was an application for a grant of probate in solemn form of the last will. The adult beneficiaries had agreed on a distribution of the estate. However, one of the granddaughters was a minor unable to give her consent to the agreement. The Plaintiff put evidence before the Court about the deceased's instructions and her capacity at the time that the last will was made. The Defendants (who had previously filed grounds of objection in relation to all of the wills) consented to the grant. In circumstances where the minor beneficiary's interests were advanced by the admitting to probate of the last Will, the Court made orders for the grant in solemn form and costs orders by consent.

Re Morgan [2023] VSC 133

This was a costs decision relating to a family provision proceeding. The deceased died intestate and her father obtained a grant. A claim for further provision was brought by her brother. The Court reminded the parties' practitioners early in the proceedings of their obligations under the *Civil Procedure Act 2010* and the sanctions for breach. This caution arose from the conduct of the Plaintiff's solicitor. In December 2021, the Defendant's solicitors informed the Court that they had become aware that the Plaintiff had died and that his solicitors knew of his death. The solicitor was joined as non-party for the purposes of the Court's investigation (on the Court's own motion) of possible breaches of the Act's overarching obligations and for the purpose of determining costs. The Court decided that the solicitor had breached their overarching obligations and ordered the solicitor and her firm to pay 80% of the Defendant's costs on an indemnity basis. The Court stated that it was unlikely that the Plaintiff would have been found to be eligible to make a claim. The Court stated that a non-party costs order was 'exceptional' but found that the order was warranted here where the solicitor's conduct included repeated failures to establish the proper basis of the Plaintiff's claim to be a member of the household in correspondence or on affidavit; the inclusion of irrelevant and without prejudice material on affidavit; filing a property caveat 'on instructions'; taking a dilatory and uncooperative approach to the litigation generally; failing to respond to offers made by the Defendant and his attempts to resolve issues via informal means; failure to ensure costs were reasonable and proportionate; an obstructive approach to the joint trial document and inappropriate correspondence with the Court. The solicitor's conduct fell 'far below that which would be expected from a well informed and competent ordinary member of the profession'. The Court dismissed the proceeding after being satisfied that the administrator of the Plaintiff's estate was aware of the claim and elected not to pursue it.

Colosimo v Colosimo (No 2) [2023] VSC 134

These reasons dealt with the costs of the caveat proceeding outlined above. The Court set out a chronology of the correspondence between the parties' representatives and found that the Defendant must have known there was 'cogent evidence' that the presumption of revocation was rebutted. The Court found that the Defendant's solicitors did not engage in settlement discussions or respond to a Calderbank letter. It was determined that the Plaintiff should bear the costs of the copy will application up to the date of lodgement (there is no mention of an indemnity from the estate). The Defendant was ordered to pay the Plaintiff's costs on a standard basis thereafter. The Court declined to make an indemnity costs order.

Haberfield & ors v Larsson [2023] VSC 161 (Cavanough J)

This case involved two proceedings in which grants in relation to the deceased's last will and penultimate will, respectively, were challenged. The deceased died in 2017 in his 70s. His wife of 53 years had predeceased him in 2015. His last and penultimate wills were made in 2012 and 2013 when he suffered from Alzheimer's disease. His antepenultimate will was made in 2006. The Caveator alleged that the deceased lacked capacity to make the last and penultimate wills, did not know and approve the contents of the 2012 will and that the solicitors who took instructions did not ensure that the deceased's wishes - as distinct from his late wife's - were reflected in the Will. The Court considered the authorities on testamentary capacity as they relate to mental illness and cognitive conditions. The Court took a principled approach to assessing capacity in the circumstances, distinguishing between 'negative' and 'affirmative' aspects testamentary capacity. The Court held (at [18]) that the deceased's dementia did not rise to the level of a delusion or mental disorder of the kind that would interfere with capacity (referred to as the 'negative element' citing *Carr v Homersham* (2018) 97 NSWLR 328). The Court then examined whether the deceased possessed the 'affirmative' aspects of capacity: to understand the nature and effects of a will, the property to be disposed of and the moral claims on the deceased's estate. The Court was satisfied that the wills represented long-held and rational testamentary intentions and that the deceased had capacity. Orders were made that the last Will be admitted to probate. The decision endorses an approach to assessing capacity in cognitively impaired testators that requires the 'affirmative' elements of capacity but does not too readily disentitle a person with mental or cognitive ill-health from making effective testamentary dispositions based on unnuanced and out of date concepts about 'unsoundness of mind' that may not reflect modern medical knowledge.

Re Evans; Marks v Evans (No. 2) [2023] VSC 158

This is the costs decision that followed the Court's judgment (outlined above) about an application for judicial advice by an executor and trustee of a family trust. The Court concluded that the application for discharge of an executor was justified but that the application for advice about a proposed deed and construction were unnecessary. The combined costs were over $500,000. The Court said (at [55]) that '[t]here was no proper reason for the proceeding where the beneficiaries were all suis juris and the applicable principles were very clear to all involved. The Plaintiffs' conduct in commencing the proceeding and in incurring significant costs in those circumstances demonstrates a want of prudence and diligence'. Although there was no finding of bad faith or dishonesty on the part of the Plaintiffs, their pursuit of an unnecessary and expensive proceeding largely deprived them of their indemnity. The Court ordered that the Plaintiffs were allowed a small amount of costs for the discharge application - but only the costs that would have been incurred if that application was made unopposed and on the papers. They were otherwise ordered to bear their own costs and those of the Defendants (on a standard basis) without indemnity from the trust or estate.

Re Kairouz [2023] VSC 168 (Moore J)

This was an informal will application determined on the papers. The adult beneficiaries consented to the Registrar exercising her powers under rule 2.09 of the Supreme Court (Administration and Probate) Rules 2014 but as the estate exceeded $1m and involved minor beneficiaries, the application was referred to a judge for determination. The deceased died in her 40s leaving a document described as a will and signed by her but not witnessed. The document was a draft will prepared by a solicitor and based on the deceased's comprehensive instructions. The document was signed in January 2021, and included gifts to the deceased's nephews and nieces, her then fiancé and gave the residue to her sister. As the presumptions arising from due execution did not apply, the Court first had to consider the deceased's capacity. It was found that the deceased's testamentary capacity was not impaired by her condition (ischemic heart disease). The Court was satisfied that the deceased intended the document to be her will. It was noted that the instructions provided by the solicitor about execution of the document did not explicitly refer to the requirements of s 7 so the non-compliant execution reflected a lack of awareness of the proper formalities rather than supporting a conclusion that the deceased intended the document to serve as a draft or trial run. After the will was signed the deceased married. The document did not state that it was made in contemplation of marriage. The Court did not deal with the issue of revocation but it was noted that the husband consented to the application and that the deceased confirmed had the same instructions to her solicitor after her marriage.

Re O'Day [2023] VSC 169 (Moore J)

The deceased died on 21 October 2021 at 48 after a battle with cancer. Her father applied for probate of a Will dated 15 October 2020. The document had been signed under the Covid remote execution procedure but did not comply with it. An application to the Registrar of Probates pursuant to s 9 of the Wills Act 1997 was referred to the Court given that the estate exceeded $1m and involved a minor beneficiary. The document did not enjoy the presumptions that arise from due execution. As a result, the Court considered whether the deceased had testamentary capacity and knew and approved the contents of the will. Although it was found that there was some doubt about the deceased's capacity at the time that the document was signed, the Court was satisfied that testamentary capacity was established by reason of the rule *in Parker v Felgate* [1883] UKLaw RPPro 41; (1883) LR 8 PD 171. The rule allows capacity to be established in respect of a testamentary document if the testator had capacity when they gave instructions, the will reflects those instructions, and the testator understands and believes at the date of execution that they were signing a document prepared by a solicitor on their instructions. The Court was satisfied that the deceased had capacity at the time of providing detailed instructions to her solicitor and that the other conditions in *Parker* were satisfied. The Court noted that the minimal departure from the formalities along with sound evidence of intention, and knowledge and approval, supported the conclusion that the document ought to be admitted to probate under section 9.

Re Wood (No 2) [2023] VSC 163

This was an application by summons for approval of compromise under Order 15 of the *Supreme Court (General Civil Procedure) Rules 2015*. The decision deals with the procedure for approval of a compromise of a caveat proceeding. The approval was sought by the Caveator (a minor represented by a litigation guardian) for a compromise that involved the prospective executor agreeing to alter the distribution of the estate from the terms of the will before the grant was made. The estate was very modest (just over $200,000). The Caveator had unsuccessfully applied for the compromise previously and then appealed to the Court of Appeal. The Court of Appeal upheld the trial decision and agreed that the application involved more than an approval affecting the minor but also questions about the validity of the will and therefore the named executor's power in that capacity. The Court of Appeal's reasons suggested that the next step would involve the executor securing the consent of all affected parties. Drawing on the appeal judgement, the Caveator again attempted approval but filed additional evidence regarding her attempts to notify others affected by the compromise.

The compromise had been reached before the Caveator established her prima facie case and was joined as a Defendant. This was no doubt an attempt to manage the costs associated with the proceeding in the context of a very small estate. The Court referred to relevant authorities endorsed also by the Court of Appeal that confirm that probate proceedings can be compromised but that, in the absence of a grant, where the validity of

the Will is in question and the pattern of distribution is altered, the executor cannot rely on a 19(1)(f) of the *Trustee Act 1958* before a grant to compromise a proceeding about the validity of the will. Instead, the executor is required to have the consent of suis juris beneficiaries or a Court order binding them. The ability of the Court to bind the relevant people (who were not parties) depends on them being joined as parties. The Court also emphasised its exclusive power to determine the validity of testamentary documents. The Court concluded that there was no short cut through the usual procedure. It was determined that the summons ought to be dismissed and that the Caveator was required to establish a prima facie case before the approval could be considered.