Managing problems that arise as a result of mediation in family provision applications

R.D. SHEPHERD[1]

Member of the Victorian Bar

Overview

1. In mediation of family provision claims made under the Part IV of the *Administration and Probate Act 1958* one encounters events from time to time that fall outside the usual spectrum of negotiation difficulties. The purpose of this paper is to review these events in order to be prepared to manage them.

2. One may be a mediator a party or acting for a party or a support person participating in or attending a joint session when difficulties arise. One usually is not greatly surprised by the 'elephant in the room', polarised or agreed positions, tractable and intractable positions, first offers, final offers, resolution or termination of mediation, but it is often the process of getting a resolution in a relatively short period of time that can predispose a mediation to a bad outcome.

3. Assumptions are often made that a Court will approve terms of settlement and make orders which accord with the parties' fondest wishes. Time constraints when documenting mediation agreements at the end of the mediation day, predispose the process of drafting to oversight or error or slavish reliance on precedent terms of settlement. Things done in the heat of mediation document drafting may result in unanticipated or unwanted problems that may or may not

[1] R.D. SHEPHERD LL.M (Commercial Law), Barrister At Law
Member of Victorian Bar since 1982
Isaacs Chambers Room 932 Level 9, 555 Lonsdale Street, Melbourne, Victoria.
Tel: (03) 9225 7652 Fax: (03) 9225 8450 Email: http://www.robshepherd@vicbar.com.au
C/ Howells List Barristers, 205 William Street, Melbourne 3000
Accredited Advanced Mediator (Victoria). Nationally Accredited Mediator
Author: *de Groots Wills, Probate Administration Practice (Victoria)*
Chair: Property and Probate (Commercial Bar Association)

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be curable by: application to a Court or by agreement, or after assessment by a revenue authority and lodgment of objection, or application for review.

4. In *Morse v Morse & Anor*[2] in which there was a dispute as to arising out of mediation of a family provision claim Osborn J (as his Honour then was) said, "One of the plaintiff's submission to me is that the law should provide for a cooling off period after mediations result in settlement. There is no statutory scheme to this effect at present." As a result, what is done before, at and after the mediation must be as a result of preparation and application to the task at hand, which in simple terms is to achieve resolution of a dispute.

5. Throughout the process of mediation there are constants. One of them is the imperative at some time to reduce the agreement or resolution of the parties to writing and another is the application of the law to the agreement or resolution of the parties. In some cases one may enter into non-binding heads of agreement which may provide time for careful drafting of the terms of the agreement or the seeking of judicial advice but often the negotiation impetus can be lost if this course is adopted. In claims that are not at the simple end of family provision applications; a balance must be struck between getting terms of settlement signed at the end of the mediation, and the risk of a failed negotiation, if further time to carefully document or to seek other advice including judicial advice is spent.

6. In cases which are at the complex end of family provision claims, consideration must at an early stage be given to whether other advisers should be involved before, during or after the mediation. Revenue issues fall within the purview of expert advisers who often are not involved in the mediation process until after agreement has been reached. Revenue issues may not be in some cases identified until after the mediation or they arise during it.

7. The orders to be sought by the parties once agreement is reached must be properly considered and framed. They should be recited in the terms of

[2] [2009] VSC 323 (6 August 2009), [71].

settlement or at least it be recited that orders be sought, "In or to the effect of the orders" in the terms of settlement.

8. The need to keep a good record of what is said and done at the mediation both in the open and private sessions as well as in the kitchen for that matter is a prudent risk management strategy. In cases where disputes arise as to what is said and done, one must expect that evidence will be adduced about what occurred at the mediation.

Should judicial advice be sought during or after mediation and before executing terms of settlement?

9. Before signing terms of settlement one may seek advice of the Court in relation to whether a party to a proposed transaction has power to enter it, to seek the conferral of power to enter it and in any event an order approving the transaction. Rule 54.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) enables a trustee to seek an order of the Court either to approve a transaction or to direct that an act be done in the execution of the trust. If the trustee enters into a transaction approved by the Court or performs an act in accordance with the Court's direction, he or she is protected from any claim by a beneficiary or creditor arising from that transaction or act.[3]

    - ***In the matter of the Salvation Army (Victoria) Property Trust*** [2017] VSC 553 (18 September 2017). Powers under *Salvation Army (Victoria) Property Trust Act 1930* and the Trust Deed. Judicial Advice. Rule 54.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic). Proposed transactions approved.

In cases where an agreement will affect the interest of a beneficiary, what should be done when a beneficiary attends mediation and opposes an agreement reached at mediation or does not attend mediation and has not consented to the agreement reached?

10. Various scenarios present for consideration:

[3] *Ballard & Ors v Attorney-General for the State of Victoria* (2010) VR 413 per Kyrou J at [41].

(a) Where there is no application to the Court for approval of a compromise which affects a beneficiary's interest.

- ***Hodge v. De Pasquale*** [2014] VSC 413 (29 August 2014). (Costs). ***Hodge v. De Pasquale (No. 2)*** [2014] VSC 444 (16 September 2014).

This proceeding concerned the power of the executor of an estate to settle a claim made under Part IV of the *Administration and Probate Act 1958*. It was held inter alia by the Court that the executor and trustee acted beyond her power as executor and trustee in paying the sum of $250,000 to a party pursuant to terms of settlement; that person was not liable to repay that sum to the estate; and the executor and trustee was personally liable to reimburse the estate for that sum and was not entitled to be indemnified from the trust for that sum.

(b) Where an approval of the compromise is sought but after the approval proceeding is filed, the beneficiary consents.

- ***Tritt v. Hoskins & Anor*** [2016] VSC 589 (29 September 2016). Application for approval of compromise of a proceeding. Where at hearing no basis for application.

(c) Where an approval of an administrator's decision to compromise litigation involving the deceased's estate is sought and there is opposition by a beneficiary of the estate.

- ***Brown-Sarre v. Waddingham*** [2012] VSC 116 (30 March 2012). Held: Approval of administrator's decision to compromise litigation involving the deceased's estate. Opposition by deceased's widow, the sole beneficiary of the estate. *Supreme Court (General Civil Procedure) Rules 2005*, r.54.02 (2)(c)(i).

(d) Where there is a compromise of a probate proceeding; a further proceeding by another claimant alleging an interest in the estate and a compromise in that proceeding, which affects the interest of a minor.

- ***Re Gooriah*** [2016] VSC 659 (4 November 2016). Compromise of probate proceeding. Further proceeding by another claimant alleging interest in estate after compromise of probate proceeding. Compromise of subsequent proceeding subject to approval. Whether compromise should be approved. Whether contravention of overarching obligations of claimant: *Civil Procedure Act 2010*, ss.18, 41, 42. *Supreme Court (General Civil Procedure) Rules 2015*, r 15.08.

Mixed outcome in a compromise between executors, when costs are not agreed to be paid out of the estate. Costs issue to be determined by the Court whether or not agreement has been reached by the parties.

10. When a proceeding has been compromised between executors in dispute and there has been no hearing on the merits and no findings on disputed facts, the Court is often asked to decide the issue as to whether costs should be paid out of the estate.

From time to time the Court will, notwithstanding the parties have reached agreement on costs, require the parties lawyers to provide to the Court details of the costs agreed and the terms of settlement and then determine the amount to be allowed, if any.

- ***Hall v Hall & Ors (No 2)*** [2019] VSC 60 (15 February 2019)

The exercise of the power to award costs where a claim is settled

"23. Where, as in the present case, there has been no hearing on the merits, 'a court is necessarily deprived of the factor that usually determines whether or how it will make a costs order.' The 'factor' that usually controls the exercise of a court's discretion is a party's success or failure in the action or in respect of a particular issue".

Deed of settlement reserved parties' right to seek costs order. Deed of settlement extended well beyond resolution of causes of action pleaded against first defendant. No proper basis for ordering first defendant to indemnify trustee for the plaintiff's costs.

- ***Cody v. Cody*** (No 3) [2016] VSC 499 (23 August 2016). From the plaintiffs' perspective, they achieved the defendant's signature on the settlement documents and, from the defendant's perspective, he achieved the withdrawal of the application to remove him as an executor of the estate. Both sides instructed solicitors and counsel to reach this result. Both sides were acting as executors of the estate of the deceased and have incurred costs in that capacity. In these circumstances, the Court held it was appropriate that the costs of both the plaintiff and the defendant parties should be paid out of the estate of the deceased.

Where a compromise application is made, the Court may decide all questions arising including costs and may seek further information before approval.

11. The Court may decide all questions including, costs questions on an application for approval of a compromise. This is also the case even if the parties have sought an order that there may be "no order as to costs" or have otherwise agreed on orders for costs, which they present to the Court. From time to time parties seek an order that there be "no order as to costs" but in their terms of settlement they reach agreement on costs. The Court may require production of the terms of settlement and request further information in relation to costs and other matters. The Court may make costs orders under the *Civil Procedure Act 2010* (Vic) and the *Supreme Court (General Civil Procedure Rules) 2015* and other relevant laws. The Court may also seek further information which must be provided to enable the Court to assess the compromise.

- ***Seng Hpa v Walker & Ors*** [2017] VSC 320 (8 June 2017). Family provision proceeding compromised. Whether conduct of parties unreasonable. Where plaintiff substantially successful. Whether defendant beneficiary should pay costs of plaintiff and the executor of the estate: *Re Minister for Immigration and Ethnic Affairs: Ex parte Lai Qin* [1997] HCA 6; (1997) 186 CLR 622.

- ***Re Simcocks*** [2019] VSC 62 (14 February 2019). The Court concluded that given identified difficulties, the compromise could not be approved on the basis of the evidence currently before the Court. The Court then

identified the further information to be provided to enable the Court to assess the compromise.

The disputed costs of added beneficiaries in a family provision claim who are joined as defendants upon their application to the Court may be decided upon a compromise approval application

12. When a beneficiary applies to be joined as a party and is joined, and the proceeding is compromised, the question of whether their costs should come out of the estate is often in dispute. In some cases, when they are invited to attend a mediation beneficiaries assume they should get their costs out of the estate. Where the executors rightly conclude at mediation that there is a claim that is cheaper to settle than to contest, added beneficiary parties, collectively, should not assume that the defence of the litigation can be pursued safe in the belief that their costs will always be paid out of the estate. In *Smith v. Whittaker & Ors*[4] Derham AsJ on the hearing of the approval of the compromise application approved the compromise but ordered that the added beneficiaries bear their own costs. His Honour expressed the view that, "In some circumstances, activism in litigation is rewarded. But in the case of a proceeding under Part IV, activism is a double edged sword."[5]

- ***Re Rattle (No 3); Equity Trustees Ltd v Halstead*** [2019] VSC 69 (18 February 2019).

  "16. Whether it was reasonable for Mr Halstead to seek to be joined as a defendant at such a late stage in the proceeding is a judgment call on his part. The fact that the Court did not make any adverse comment in relation to his joinder is not to the point. Costs are in the discretion of the Court and practitioners are well aware that it is unlikely that more than one set of legal costs of separately represented parties with the same or similar interests will be allowed".

[4] [2016] VSC 287 (26 May 2016)
[5] Ibid [44].

Defendant joined after appointment of independent contradictors. Where defendant unsuccessful. Where defendant sought fixed costs on an indemnity basis from the estate. Defendant's application not allowed.

What should be done when both parties have been mistaken about a relevant matter that was contained in terms of settlement?

13. The parties may apply to the Court and seek appropriate relief which may be rectification or setting aside the terms of settlement or deed.

- ***Rees v. Rees*** [2016] VSC 452 (5 August 2016); ***Rees v. Rees (No 2)*** [2016] VSC 579 (27 September 2016) (Costs).

  The parties entered into deed of settlement in respect of a foreshadowed claim for further provision from deceased estate pursuant to Part IV of the *Administration and Probate Act 1958*. Will referred to some parcels of land in colloquial terms and other parcels of land by registered title. Where solicitor relied on inventory of assets prepared by probate clerk and wording of the will and did not undertake title searches. Where both parties to the deed mistaken as to the identification of the parcels of land. Whether mistake at common law or in equity. Whether rescission, rectification or setting aside the appropriate remedy. Where both parties submitted that deed should be set aside if a common mistake is found.

A party may seek orders and declarations, as to the proper construction of a Settlement Agreement or Heads of Agreement. In the proceeding evidence of what occurred at a private or judicial mediation may be given.

14. Evidence may be given about what occurred at a private or judicial mediation.

- ***Hughes v. Wong*** [2015] VSC 510 (25 September 2015). Construction of settlement agreement. Objections to evidence of surrounding circumstances. Evidence of matters at mediation. Application of parol evidence rule; *Codelfa Constructions Pty Ltd v. State Rail Authority* [1982] HCA 24; (1982) 149 CLR 337; *Western Export Services Inc v.*

Jireh International Pty Ltd (2011) 282 ALR 604; *Evidence Act 2008*, s.131(2).

- ***Re Di Benedetto; Di Benedetto v. Kobor*** [2015] VSC 472 (7 September 2015). Determination of issues arising from settlement deed under *Supreme Court (General Civil Procedure) Rules 2005*, O 54.

- ***Smith v. Woods*** [2014] VSC 646 (18 December 2014). Ferguson JA (as the Chief Justice then was). Counter-offer made by party to settle proceedings. All communications regarding settlement between solicitors for parties. Acceptance after death of offeror before either solicitor knew of death. Held: Offer not revoked by death. Acceptance communicated to solicitor on the record. Concluded agreement falling within first category of *Masters v. Cameron* [1954] HCA 72; (1954) 91 CLR 353. There is a concluded agreement pursuant to which the defendants must pay $430,000 to the estate.

- ***Hanna v. Hanna*** [2010] VSCA 268 (18 October 2010). Mandie, Hansen and Tate JJA. Appeal from *Hanna v. Hanna* [2009] VSC 188. Intestacy. Dispute concerning appointment of administrator. Construction of heads of agreement in relation to appointment of administrator also considered. Whether parties bound to advance appointment of 'preferred administrator' also considered. Held: The orders made by the judge were correct save that the Court would favour the variation of the injunction by the insertion of the words 'until further order' in order to allow for the contingency that, for some reason, circumstances might change in relation to the question of 'necessity'.

It is not the role of the Court to 'rubber stamp' a grant of probate, or any such changes to a testator's dispositions that an administrator, executor, beneficiary or any other party may desire. A grant of probate is a public act giving power to a person or persons to distribute the assets of the deceased according to his or her last valid will or pursuant to the intestacy provisions

15. When there has not yet been a grant of representation there is a transitional period between the death of the deceased and the making of a grant of

representation that bears upon the enforceability of purported agreements which are tied to or dependent upon an executor or administrator having power to compromise a family provision proceeding. One cannot file a family provision proceeding in the Court until there has been a grant of representation and accordingly this is a matter that must be considered when drafting terms of settlement generally and always when there are contested probate proceedings. The six month limitation period in s 99(1)(a) of *the Administration and Probate Act 1958* (Vic) commences to run from the date of the grant. That fact is a matter that is often the subject of terms of settlement in various forms (entered both before and after there has been a grant of representation), which may provide that, "These terms of settlement shall be void and of no effect if within the period of six months after there is a grant of representation a claim is made by a person under *Part IV* of the *Administration and Probate Act 1958 (Vic),"* or words to that effect.

16. In *Dowling v St Vincent de Paul Society Victoria Inc*[6] Nettle J in the Supreme Court of Victoria (as His Honour then was) stated, "In the apparent absence of authority to the contrary, and in light of what I have said about the history of the section and the duties of an executor, I have reached the view that s. 19(1)(f) does not authorise an executor to compromise a dispute as to the validity of a will without the consent of affected parties or an order of the Court that binds them."

- ***Robinson v. Jones*** [2015] VSC 222 (1 June 2015). ***Robinson v. Jones (No 2)*** [2015] VSC 334 (17 July 2015) (Costs). ***Robinson v. Jones (No 3)*** [2015] VSC 508 (20 November 2015).

  Whether deceased intended informal document to be his will. Held: The Court was not satisfied that the deceased intended the informal document to be his last will and accordingly, the application for a grant of probate of the informal document was refused: *Wills Act 1997*, s.9. Held: In the Court's view s.19(1)(f) of the *Trustee Act 1958* does not empower an executor, or in this case administrators acting under a

[6] [2003] VSC 454 (20 November 2003), [37]

limited grant, to compromise a probate proceeding in which the validity of the will is to be determined by the Court; that is, where the validity of the will is contested. Accordingly, the deed of settlement is beyond the power of the plaintiffs and should not have been entered into in the circumstances. In relation to the costs of the parties of the proceeding, the parties were specifically requested to address the concerns expressed by the Court in the judgment and to address the reasonableness and proportionality of the costs of the proceeding. It is not the role of the Court to 'rubber stamp' a grant of probate, or any such changes to a testator's dispositions that an administrator, executor, beneficiary or any other party may desire. A grant of probate is a public act giving power to a person or persons to distribute the assets of the deceased according to his or her last valid will or pursuant to the intestacy provisions.

By seeking the approval or ratification of the deed of settlement, the plaintiffs are requesting the Court approve a distribution of the deceased's estate that is beyond the power of the plaintiff to enter into and which purports to distribute the estate in a manner that does not reflect the provisions of the last valid will of the deceased. The deed of settlement should not be approved or ratified by the Court upon a grant of probate being made of the June 2012 will.

Re Wood [2018] VSC 597 (9 October 2018). Caveator and plaintiff executed terms of settlement before determination of prima facie case for grounds of objection and the caveator sought approval of the compromise. The Court dismissed the application. McMillan J stated at [33], "By seeking the approval of the terms of settlement, the caveator is requesting the Court to approve a distribution of the deceased's estate that is beyond the power of the plaintiff to enter into and which purports to distribute the estate in a manner that does not reflect the provisions of whatever might be the last valid will of the deceased."

Re Pacella [2019] VSC 170 (19 March 2019).

Proceeding compromised subject to determination of construction of the will. Where determination of construction question may affect adequacy of the further provision for plaintiff. Further submissions required on the adequacy of the further provision. *Administration and Probate Act 1958*, s 91.

> "49. Although the parties have entered into terms of settlement, the parties must obtain the approval of the Court to the settlement. In approving terms of settlement resolving family provision claims, the Court aims to facilitate the settlement without simply acting as a rubber stamp. Brief consideration is given to the evidence and the submissions of counsel and, if the resolution appears reasonable, the Court makes the orders sought. Greater consideration is necessary where persons under a disability, such as minors or unascertained classes of persons, are involved.
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> 52. The division of the estate as agreed in the terms of settlement reflects an obligation on the part of the deceased to provide for the plaintiff. The plaintiff was the domestic partner of the deceased since 1970 and is now aged 83 years. She has limited means and ability to earn income. The terms were premised on the principal asset of the estate being valued at $1,075,000, whereas it was valued at $800,000 in the inventory of assets. The property was subsequently sold at auction for $820,000. The terms were entered into when the meaning of cl 3(a) had not been determined. With the $200,000 now falling into the residue of the estate, the value of the estate is higher than when the terms were agreed. In considering the terms, the Court must be satisfied, amongst other matters, that the further provision is sufficient for the plaintiff's proper maintenance and support.
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> 53. Accordingly, if the parties are unable to agree on this, further submissions may be made on this discrete issue. The parties are to inform the Court by 9 April 2019 whether the remaining issue is agreed or not".

May an executor agree that the will which he propounds shall be admitted to probate but that he will administer the estate in accordance with the provisions of a revoked will, whilst accepting that the Court retains the power itself to decide what the valid testamentary dispositions are?

17. In *Dowling v St Vincent de Paul Society Victoria Inc*[7] Nettle J further explained that, "While a probate proceeding may be compromised and the parties to the proceeding and their privies may be bound by the compromise, they will be bound as parties or privies and not because of any power under s. 19(1)(f) of the *Trustee Act 1958* (Vic) to impose a settlement upon them". This principle and how it is applied to particular factual circumstances taking into consideration the authorities of *Robinson v. Jones* and *Re Wood* requires careful analysis at mediation. When parties or privies are bound not because of any power under s. 19(1)(f) of the *Trustee Act 1958* (Vic), they will need to decide whether they can seek orders from the Court before there is a grant of representation and if not, how that is to be factored into their terms of settlement.

18. An obvious matter but one that is sometimes overlooked or not properly addressed in agreements reached at mediation is that the grant of representation that the Court will make is not a matter over which they have control in any real sense other than by properly adducing evidence according to law, withdrawing a caveat and opposition to the grant the subject of the application or applications before the Court. As a result assumptions made that there will be a grant of probate of a particular will or that there will be intestacy should not be made. The parties must focus upon ascertaining the persons who will be affected in various scenarios when drafting terms of settlement and in some cases at the complex end of the scale of solemn proof cases one will just have to wait for a grant of representation to be made before being able to ascertain the persons affected or to obtain conferral of necessary powers required in order to enter into terms of settlement.

19. Where all of the persons who will be affected by the compromise of a contested probate proceeding are ascertained and agree to the compromise, the use of the generic description "grant or representation" may be considered when drafting terms of settlement, rather than a description of a particular will or intestacy. This is because it is not linked to a particular will or intestacy and

[7] Ibid, [31].

adapts to the ultimate finding of the Court itself when it decides what the valid testamentary dispositions are.

Is a Court bound by an agreed concession made in a family provision application? While the Court is not a rubber stamp for an agreement between the parties, the Court may consider an agreed concession and decide if it is properly made.

20. In mediation one finds from time to time that an issue in the proceeding is resolved and the proceeding otherwise continues based on an agreed concession. The Court is not a rubber stamp for this agreement of the parties and terms of settlement need to state what happens if the Court will not accept the concession.

- ***Re Davies*** [2014] VSC 248 (15 August 2014). Application by minor grandchildren by their litigation guardians under Part IV of the *Administration and Probate Act 1958* where children's father and son of the deceased predeceased the deceased. The defendant accepted that the deceased had a responsibility to make provision for the plaintiffs and that the distribution under the will did not make adequate provision for them. By way of *obiter* the Court observed that while the Court was not a rubber stamp for an agreement between the parties in a Part IV application, it considered that in the circumstances of this case, that concession was properly made. It was therefore only the third question (what is the amount of provision (if any) that the Court should order) that remained outstanding in the proceeding. Held: Further provision is to be made for each of the plaintiffs in the sum of $400,000 to be held on trust for their benefit until each of them attain the age of 28 years.

21. Where a plaintiff in a family provision proceeding dies and the enforceability of the settlement is called into question, the Court, in considering whether the amount of the provision to be made for the then plaintiff by the consent orders was appropriate, cannot ignore the fact that the plaintiff has died.

- ***Groser v Equity Trustees Limited*** [2008] VSC 163 (15 May 2008).

The issue for determination arose out of a conditional settlement of an application by the then plaintiff, for further provision out of the estate of her late husband, pursuant to Part IV of the *Administration and Probate Act 1958*. Leave to make the application for further provision was earlier granted by Gillard J. The enforceability of the settlement was called into question because the plaintiff died before the two conditions subsequent were satisfied. Those conditions were that the Attorney-General approved the settlement and that the Court made the proposed consent orders. The Court approached the question of whether the settlement of the deceased plaintiff's Part IV claim was a binding and enforceable agreement, notwithstanding her death by considering whether each of the conditions subsequent had been or should be satisfied. Held: The Attorney-General's initial decision not to oppose the settlement was a nullity because it was not an informed consent in the sense that he had not been provided with all relevant facts because he was not told that the person for whom provision was to be made under the settlement had died prior to him making his decision. The consent orders should be refused. The Court, in considering whether the amount of the provision to be made for the then plaintiff by the consent orders was appropriate, could not ignore the fact that she had died. This is particularly the case when s.91(4) of the Act requires the Court in determining that question to "have regard to" such matters as "the financial needs of the applicant ... at the time of the hearing and for the foreseeable future" and since her death the applicant no longer had any financial needs. Although the plaintiff's cause of action under Part IV of the Act could in certain limited circumstances survive her death, there was no basis for making any order in favour of her estate in this case. Application refused.

Enforcement of terms of settlement by summons in an existing proceeding or by new proceeding?

22. When enforcing terms of settlement, a decision has to be made as to whether the enforcement application should be made by summons in the proceeding or in a new proceeding to be commenced. The question is far from being a simple

one. In many instances it would be inappropriate for a Court to use the summary procedure in circumstances where contested questions of fact arise, when the allegations being made are in effect fraud, concealment of assets or misappropriation of assets, because the Court is entitled to expect evidence of some reasonable precision and not, allegations which are expressed in general terms.

- ***Barratt v. Foran*** [2013] VSC 420 (22 August 2013). Refusal by the plaintiff to comply with terms of settlement executed by the parties. Plaintiff alleged that the defendants misappropriated certain assets of the deceased's estate. Application by the defendants by summons in probate proceeding to enforce the terms. Terms should be enforced by the Court;

- ***Barratt v. Rees*** [2014] VSCA 327 (11 December 2014) (on appeal). (Neave and Kyrou JJA and Ginnane AJA). Probate dispute. Summary procedure to enforce Terms of Settlement. Appeal dismissed. Even if it be that trial judge did not apply the analysis that Court of Appeal described, decision may be upheld on additional or different grounds.

A dispute as to the interpretation of the terms of an agreement may be determined by the Court

23. The Court may determine the proper interpretation of the terms of settlement.

- ***Re Parsons*** [2014] VSC 244 (30 May 2014). Pursuant to Part IV of the *Administration and Probate Act 1958*, a daughter of the deceased made a claim seeking provision for her maintenance and support. The Part IV claim was mediated successfully by way of judicial mediation. Both parties were represented at the mediation by solicitors and counsel. One party was too ill to attend the mediation. It was agreed that she should sign the terms by 16 December 2013 and did so on 12 December 2013 at the Alfred Hospital. A dispute arose concerning the interpretation of paragraphs 3 and 10 of the terms of settlement in relation to the payment of the balance of the settlement sum of $47,500 to her. Held: There was no ambiguity in the relevant paragraphs of the terms of settlement.

Applying the principles set out in *Buxton Constructions Pty Ltd v. Golf Australia Holdings Ltd* [2007] VSC 10 (15 February 2007) (Hargrave J) reasonable persons in the position of the parties, by reference to the text of the agreement, the surrounding circumstances known to the parties and the purpose of the transaction, would understand the words in clauses 3 and 10 of the terms of settlement to mean that she must be alive to receive the sum of $47,500.

When a party does not have sufficient mental capacity to settle at mediation or the door of the Court?

24. If a person does not have capacity to enter into terms of settlement this must be appropriately identified and managed. A litigation guardian for a party in a proceeding may be appointed. Where a person affected by terms of settlement is not a party, enquiries must be made to find the person who may sign on their behalf according to law or in some case an application may be made for appointment of an administrator under the *Guardianship Act 1986* (Vic) may be required. The powers of an administrator are wide enough to enable the making of an offer of compromise.[8]

- ***Goddard Elliott (a firm) v Fritsch*** [2012] VSC 87 (14 March 2012). Bell J. This case is cited because it considers issues that arise from time to time in estate litigation even though it arose in the context of a family law case. There was a property proceeding in Family Court of Australia settled at the door of Court on terms that were overly generous to the wife. An action was commenced by the husband for damages for lost opportunity against his lawyers and counsel.

When do terms of settlement in a family provision claim prevent a further claim based on a different cause of action?

25. Wide releases from past, present and future claims are usually included in terms of settlement. In some cases where a party wants to retain rights under

[8] *Noble v Fraraccio (Ruling No. 2)* (2016) VCC 680.

a will or to retain the right to make a claim based on a different cause of action, that should be specifically dealt with in the terms of settlement.

- ***Morse v. Morse & Anor*** [2009] VSC 323 (see also at paragraph 3 above). The defendants sought orders which would give substantive effect to terms of settlement in a proceeding in which no final orders have as yet been made and in effect sought to dispose of the plaintiff's original proceeding on the terms agreed at the mediation. The question before the Court was whether the proceeding should be now resolved in accordance with the terms agreed by the parties or whether the plaintiff should be permitted to continue with it despite the outcome of the mediation. Held: The defendants do not face difficulties of the type which may arise, when a party seeks to revive a proceeding which has been formally disposed of by this Court, and does so by way of summary proceeding in reliance upon terms of settlement: see *Seachange Management Pty Ltd & Anor v. Pital Business Pty Ltd* [2009] VSCA 139 (18 June 2009); *Roberts v. Gippsland Agricultural & Earthmoving Contracting Company Pty Ltd* [1956] VLR 555. It is plain when the evidence is looked at as a whole that the plaintiff signed the terms understanding their effect and in particular understanding that they prevented a further claim by him to the Hawksburn property and required its sale. Subsequently he has sought to go back and revive that claim. He has failed to establish facts which would entitle him to avoid the effect of the document which he signed. Accordingly, the defendants are entitled to rely upon the terms of settlement and the proceeding should be disposed of in accordance with those terms. Orders accordingly.

Supreme Court of Victoria Practice Note SC CL7 and Approvals of Compromise Guide

26. The procedures in respect of approval of compromise applications are the subject of paragraph 12.1-12.4 inclusive of the Supreme Court of Victoria Practice Note SC CL7 "Testators Family Maintenance List". In addition published in October 2018 on the Supreme Court of Victoria Website is "Approvals of Compromise: A guide to practitioners" with an appendix of forms

of orders. When considering at mediation the form of the provision to be included in terms of settlement which will be the subject of an application for compromise, reference should be had to the form of orders that the Court may make and what steps will need to be taken when seeking approval.

The effect of a family provision order made under Part IV of the *Administration and Probate Act 1958* is critical in relation to the exemptions in Part 5 of the *Duties Act 2000* and specifically ss 42(1)(a) and 42(3)

51. Understanding the effect of a family provision agreement and the order made under Part IV of the *Administration and Probate Act 1958* is critical in relation to the exemptions in Part 5 of the *Duties Act 2000* and specifically ss 42(1)(a) and 42(3).

52. Section 97(4) of the *Administration and Probate Act 1958* provides:

> (4) Subject to this Part, a family provision order operates and takes effect—
>
> (a) if the deceased dies leaving a will disposing of the whole or any part of the deceased's estate, as if the provision made by the family provision order had been made by the deceased by executing a codicil to that will immediately before the deceased's death; or
>
> (b) if the deceased dies without leaving a will—
>
> (i) as a modification of Part IA in respect of so much of the deceased's estate as is affected by the family provision order; and
>
> (ii) as if the provision made by the family provision order had been made by the deceased in the deceased's will.

53. The effect of an order that the proceeding be dismissed without adjudication on the merits, where it has been agreed in terms of settlement that provision be made for a plaintiff in a TFM proceeding, but no family provision order has been made must be considered. The exemptions in Part 5 of the *Duties Act 2000* and specifically ss 42(1)(a) and 42(3) proceed on the basis that there is a

transfer of dutiable property not made for valuable consideration by the legal personal representative of a deceased person to a beneficiary, being (a) a transfer made under and in conformity with the trusts contained in the will of the deceased person or arising on an intestacy (s 45(1)(a) or a transfer of dutiable property not made for valuable consideration by a legal personal representative of a deceased person to a beneficiary to the extent that the transfer is made in satisfaction of the beneficiary's entitlement arising under the will of the deceased person or arising on an intestacy (s 45(3)).

54. In *Re Livingston; Hanby v D'Wynn*[9] the Court concluded that it would not make proposed orders as sought by the defendant and would make the orders provided for in the terms of settlement. The Court ordered that the application made by the defendant be refused. Otherwise, that orders should be made in accordance with the terms of settlement that the proceeding be struck out with no adjudication on the merits and no orders as to costs.

55. The defendant had sought the proposed orders as a means of not having to pay a duty assessment. She submitted that, as a matter of public policy, beneficiaries should be encouraged to settle Part IV claims and the Court can assist that process by providing orders that reflect the terms of settlement and that in doing all things necessary to settle a proceeding, a beneficiary should not be disadvantaged by having to pay stamp duty that would otherwise not be payable. The defendant referred the Court to Revenue Ruling 'Transfer of dutiable property from a deceased estate - Revenue Ruling DA.051' ('the Ruling'). The purpose of the Ruling is expressed to be an explanation of the operation of s 42 of the *Duties Act 2000* (Vic) following legislative amendments made to it by the *State Taxation Acts Amendments Act 2009.* The Ruling also explains the different approaches applied by the State Revenue Office in determining the dutiable value of property where the exemptions in s 42 of the Act are found not to apply. The Court observed that at the end of the Ruling, it is noted that rulings do not have the force of law and that each decision made by the State Revenue Office is made on the merits of each individual case, having regard to any relevant ruling and must be read subject to Revenue

[9] [2018] VSC 100.

Ruling GEN.001, which notes that Revenue Rulings 'cannot supplant the terms of the law' and 'may be overruled by legislative amendments to the law, or by decisions of appellate tribunals or Courts'.[10]

56. The orders sought in *Re Livingstone* were contrary to the terms of settlement. The Court made the orders that had been agreed between the parties, but these orders were not for provision out of the estate under Part IV of the *Administration and Probate Act 1958*. A duty assessment had already been issued. The Court explained as follows:

> 20 The relevant documents for the transfer must have been lodged and assessed by the State Revenue Office for the assessment to have been issued. The Court's role does not include making orders after an assessment of duty and where the State Revenue Office has not had the opportunity to consider any objections to the assessment. Nor is it the role of the Court to make orders contrary to the terms of settlement in the plaintiff's Part IV claim or as a means of not having to pay a duty assessment.
>
> 21 The appropriate procedure for seeking an exemption is prescribed by the *Duties Act 2000* as set out in the assessment. The defendant should have followed that procedure and lodged an objection to the assessment. In this way, the State Revenue Office is able to consider any entitlement to an exemption based on relevant facts and circumstances, including the transfer of land and any supporting documents submitted to the State Revenue Office in making the assessment.[11]

Will the Court approve 'your' TFM Compromise?

57. The decided cases make it clear that parties cannot assume that the Court will necessarily approve a compromise and make the orders that the parties submit to the Court. The concept of ownership of a compromise reached at mediation

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[10] State Revenue Office, *Explanation and status of revenue rulings,* Revenue Ruling GEN.001, 1 June 1993.
[11] [2018] VSC 100, [20], [21].

is one that does not have practical application once the compromise is subject to approval by the Court. Parties cannot by consent, confer power upon the Court to make orders which the Court lacks power to make. In the case of an approval application in respect of the compromise of a claim by a person under a disability a party seeking approval must understand the relevant principles. In *Re Simcocks*[12] McMillan J stated the applicable principle (citations omitted) that, "In determining whether to approve the compromise of a person under a disability, the Court must be satisfied that the compromise will benefit that person. The Court is concerned only with the best interests of the person under disability. It is not the Court's role to decide whether the outcome of the compromise is one that would have been made had the matter proceeded to trial. Rather, its role is to protect the person under a disability and to exercise its independent judgment on the question of whether or not to approve the compromise".[13]

The ordinary procedure of the Court facilitates the settlement of Part IV claims, without acting as a rubber stamp

58. In *Hodge v De Pasquale* [2014] VSC 413 (29 August 2014) McMillan J explained (citations omitted):

> 64 It is uncontroversial that family provision orders cannot be made by consent, as explained by Windeyer J in *Hore* v *Perpetual Trustee Company Ltd*:
>
> As the power to make orders is governed by s 9 (2) and s 7 the Court cannot by consent, assume a wider jurisdiction. Parties cannot by consent, confer power upon the Court to make orders which the Court lacks power to make.
>
> 65 As his Honour helpfully went on to explain, the ordinary procedure of the Court facilitates the settlement of Part IV claims, without acting as a rubber stamp:

[12] [2019] VSC 62 (14 February 2019).
[13] Ibid [17].

> Settlements of claims under the Family Provision Act are of course, very common. It is obviously in the interests of the parties and the Court, to encourage settlement and in any week the Masters in the Equity Division may be asked to make a number of orders agreed between the parties in such actions. It such matters in my experience, the Court looks quickly at the evidence, and is informed of the relevant facts by counsel or solicitor, and if the matter appears to be reasonable makes the orders. No detailed consideration of jurisdiction takes place as long as the plaintiff appears to have a proper basis for his or her claim. In cases where the interests of infants or unascertained classes of persons may be affected by the orders, then the proposed orders are considered in more detail, not usually on the jurisdictional question, but more often on relevant terms of the orders themselves, and the extent of the benefit provided by them. On occasions the Court refuses to make the orders proposed, but this is unusual. At one stage it used to be thought that the reason why the Court considered the proposed orders was to see whether or not they were being made purely for the purpose of the avoiding stamp duty on a conveyance pursuant to a deed of family arrangement, but really the question is one as to whether or not the Court has jurisdiction.
>
> In the three years during which I was a Master, I would have approved well over 100 such settlements, and I remember only two cases in which I refused to approve the proposed orders.

66 That practice is equally familiar to practitioners in Victoria.

59. At mediation where it is known that a compromise approval will have to be made, consideration should be given to advising a client about the role of the Court and that a compromise may be refused by it or granted on different terms. The learning from the various factual and legal combinations and permutations in the decided cases is that what the parties have agreed may not resemble or be reflected in the orders of the Court. In terms of settlement the parties may

consider inserting a clause that makes it clear that they are entered, "Subject to approval by the Court on such terms as the Court considers appropriate" or words to that effect. Otherwise the contractual position under the terms of settlement once there is an approval of the compromise but on different terms is a complex one and problems may arise. In cases where the Court indicates the terms upon which it would approve the compromise, consideration may be given to varying the terms of settlement to accord with the terms upon which the Court would grant the approval.

60. In cases where there are no persons under disability or affected by the proposed order, the agreement of the parties may be given greater weight but they cannot expect that the orders proposed will be made in the form submitted to the Court to facilitate the settlement of a Part IV claim, when the Court lacks power to make them. In an application for family provision orders pursuant to the *Succession Act 1981* (Qld) Dalton J in *Affoo v Public Trustee of Queensland* explained that the Court will have regard to the agreement as a factor, usually a significant factor, in deciding what order to make in the exercise of its discretion.[14] As Jones J observed in *Watts v Public Trustee of Queensland* [2010] QSC 410 at [15],[15] "Once the Court is of the view that the jurisdictional question has been satisfied then the issue arises as to the effect of the parties' agreement. Obviously considerable weight must be given to the agreement of the parties. The inquiry thereafter is limited. The circumstances would be unusual indeed for the Court to override the agreement of the parties who are of full age and where there is no evidence of undue influences at work in the reaching of the agreement."

Conclusion

62. As a result of mediation in family provision claims, one often finds many twists and turns in the paths towards final resolution. Parties and their advisers must be prepared before, during and after mediation to appropriately take steps to do what can be done to make decisions that lead them along the right paths to

[14] [2012] 1 Qd R 408 at [24] citations omitted; cited with approval in *Abrahams v Abrahams* [2015] QCA 286, [30].
[15] Cited with approval in *Abrahams v Abrahams* [2015] QCA 286 at [30].

resolution and not into a litigation maze. It is not in every case that the parties bargain will be approved by the Court and orders made. The propensity for approval to be granted and the best outcomes achieved is increased when there is commitment to an informed and dynamic approach to mediation, with a ready acceptance of flexibility.

R.D. SHEPHERD

22 November 2019

Isaacs Chambers