

Victorian Testator Family Maintenance Cases update 2025 -2026

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OVERVIEW

- **Family provision claims/Part IV claims/Testator family maintenance ‘TFM’**
- Claims brought by ‘eligible persons’ for further provision under Pt IV of the *Administration and Probate Act 1958 (Vic)*
- **2025 – 2026 Cases update**
 - *Sternfein v Bloom* [2025] VSCA 275
 - *Lennan v Chao* [2025] VSC 220
 - *Lennan v Chao (No 2)* [2025] VSC 513
 - *McFarlane v McFarlane* [2025] VSCA 163
 - *Wielicki v Millar* [2026] VSC 12

Sternfein v Bloom [2025] VSCA 275

- Judgment delivered 14 November 2025 – Richard, Kenny JJA and J Forrest AJA
- Summary Dismissal – s 63 *Civil Procedure Act* 2010 (Vic) (**CPA**)
- Interpretation of definition of ‘Eligible Person’ - s 90(g) *Administration and Probate Act* (Vic) (**APA**)
- Appeal from
 - *Brumer; Sternfein v Bloom & Anor* (No 2) [2024] VSC 506 (27 August 2024)
 - *Re Brumer; Sternfein v Bloom* (2024) 72 VR 433 (Englefield JR); [2024] VSC 121 (20 March 2024)

Facts

- Former stepchild of deceased
- Lived with deceased (12–19 years of age)
- Deceased had parental role
- Relationship resumed in 2012 until deceased's passing
- No provision for plaintiff or his two biological sons, left for charitable purposes

Legal Framework – Summary Judgment

- Section 63 CPA permits the Court, subject to section 64, to give summary judgment in any civil proceeding if satisfied that a claim, or part of the claim, has no real prospect of success.
- Relevant principles: Court of Appeal in *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* [2013] VSCA
- Section 64 CPA allows the Court to order that a civil proceeding proceed to trial if the Court is satisfied that, ‘despite there being no real prospect of success’, the proceeding should not be disposed of summarily because ‘it is not in the interests of justice to do so’ or because the ‘dispute is of such a nature that only a full hearing on the merits is appropriate’.

Legal Framework – definition s 90(g)

- Section 90 APA – definition of eligible person paragraph (g):
a person who, for a substantial period during the life of the deceased, believed that the deceased was a parent of the person and was treated as a natural child of the deceased not referred to in paragraph (d);
- Section 3(1) definition of parent:
parent of a child includes a person who has day to day care and control of the child and with whom the child is ordinarily resident.
- Three elements to definition in s 90(g):
 - Substantial period
 - Belief person parent
 - Treated as natural child

Competing Interpretations

- Key issue: meaning of the phrase “**treated as a natural child**”
- Shorter Oxford English Dictionary (OED)
 - to deal with or behave or act towards in a specified way; to regard in a particular way and deal with accordingly.
- **Trial:** “treated” = ‘regarded as a natural child’
- No evidence → dismissed
- **Appeal:** conduct focus – considering both aspects of the meaning ‘treat’

Key Takeaways

- High bar for summary dismissal application – even if Court not satisfied under s 63, would have ordered to allow proceeding to go to trial as demanded a full hearing on merits
- s 90(g) – Court has clarified the interpretation of eligible person – it did not require the deceased to ‘regard’ plaintiff as his natural child. A practical inquiry is required on two parts of the OED definition
- Focus on parenting conduct

Lennan v Chao [2025] VSC 220

- Judgment delivered 30 April 2025 - Moore J
- Common scenario in practice
- Domestic partner claim
- Eligibility ≠ entitlement

Key Facts

- Plaintiff was 46 years of age
- Relationship with inconsistent cohabitation
- Estate $\approx$ \$2.8m
- Estate left to siblings
- Plaintiff financially comfortable and received deceased's Super $\approx$ \$378k
- Claim for $\approx$ \$850k provision to allow him to purchase a unit

Eligibility – Domestic Partner

- Conceded plaintiff was eligible – domestic partner at time of death
- Court considered nature of relationship and duration
- Cohabitation
 - not essential
 - absence a “strong indicator” against domestic basis [51]
 - such cases described as “exceptional”

Adequacy – Financial Position

- Income ≈ \$195k as infrastructure architect
- Significant savings & superannuation
- Capacity to acquire property (worth \$800–850k)
- No demonstrated need
- No competing need as siblings did not disclose financial position

Court's Reasoning

- Estate “substantial” but not a “large estate” (Hargrave J in *Borebor v Keane*)
- No obligation to provide a home – plaintiff had capacity to buy himself a home now, and he could have in the past but chose not to
- Testamentary freedom respected
- No failure of adequate provision
- Moore J at [27] ‘It is also well established that the ‘need’ of an applicant for provision is a ‘threshold’ or ‘essential’ issue for the establishment of a successful claim under Part IV of the Act’

Key Takeaways

- Eligibility ≠ success
- Financial security is critical
- \$2–3m not necessarily a “large estate”
- Cohabitation a significant factor when considering whether parties are in a domestic relationship

Lennan v Chao (No 2) [2025] VSC 513

- Judgment delivered 25 August 2025 - Moore J
- Costs application – r 26.01 of the *Supreme Court Rules*
- Offer of Compromise served – January 2024 - \$150,000 plus costs and not accepted

Costs in TFM proceedings

- Usual costs rules – including that ‘costs follow the event’ apply
- No particular leniency towards unsuccessful claimants in family provision proceedings
- Discretion not exercised in a mechanistic way without regards to justice of the case

Court's Order/Reasoning

- Claim was not 'borderline' or 'reasonable' – extravagant claim
- Plaintiff must have known he was not in a position of need, and the alleged 9-year relationship included 5 years of 'dating'
- claimed need was to be provided with a unit or funds to purchase a unit when he could afford to purchase by own means
- Plaintiff unreasonably failed to accept the offer
- Order that plaintiff pay defendants' costs of the proceeding, and on an indemnity basis after the offer of compromise
- There were no special characteristics which warrant a departure from usual rules as to costs

Key Takeaways

- Utility in serving an offer of compromise at the appropriate time in family provision litigation
- When considering risks of cost orders, consider whether any special characteristics or justice elements may warrant a departure from the usual rules as to costs
- Will plaintiff be impecunious?
- Exercise of discretion is not exercised on the premise that an unsuccessful plaintiff should not be left worse off than under the Will

McFarlane v McFarlane [2025] VSCA 163

- Judgment delivered 7 July 2025 – McLeish, Kaye and Kenny JJA
- Appeal from
 - *McFarlane v McFarlane* [2023] VSC 379 Barrett AsJ
 - See also related:
 - *McFarlane v McFarlane [No 2]* [2025] VSCA 187 (19 August 2025)

Key Facts

- Plaintiff was adult child of deceased of 52 years of age
- Estate ≈ \$488k – ‘reasonably modest’
- Estate left to deceased’s second wife of 32 years.
- Deceased received assets by survivorship - property in Mount Martha and cash and super
- Fallen on hard times after divorce in 2017
- Claim for \$265k to provide house deposit and discharge debts
- At trial, application refused on basis deceased did not fail to make adequate provision

Trial Judge

- Application dismissed
- Deceased had not failed to make adequate provision
- An order for \$265k would have a significant effect on the amount received by defendant
- Ordered to pay defendant's cost on an indemnity basis from the date the Calderbank offer expired and otherwise that parties bear their own costs

Successful ground of appeal

- Trial Judge fell into error in the way he emphasized the size of the estate
- Relied on size of estate without reference to defendant widow's other sources of finance
- Treated the size of the estate as a limiting factor
- Did not address fact that defendant widow has financial resources of over \$1.2m plus the two properties and would still have \$997k if estate were required to pay \$265k
- Thus, the adequacy of provision was assessed in a too confined way

Court's finding and reasoning

- Leave to appeal granted and appeal allowed
- Order made for provision for \$125k
- Debts not so burdensome
- Plaintiff and wife had means to save for house deposit
- Order as to costs set aside

Key Takeaways

- Look at the larger context of assets when considering competing interests not just the size of the estate
- What choices has a plaintiff made which may be relevant in making a claim for further provision? For example, making additional contributions to superannuation may weigh against argument that require provision
- Significance of duty to provide to a widow in claims brought by adult children

Wielicki v Millar [2026] VSC 12

- Judgment delivered 30 January 2026 – Irving AsJ
- Claim by wife of 18 years who cared for husband during illness
- Summary judgment application – s 63 CPA
- Only issue was whether the distribution of deceased's estate failed to make adequate provision for plaintiff's proper maintenance and support
- Whether maintenance and support can be established absent financial need

Key Facts

- Estate - \$1.9m 'modest'
- Plaintiff was 69 years of age
- Estate left to testamentary trust for deceased's daughter from prior relationship
- Wife completely excluded from Will - she sacrificed her career and her considerable earning capacity to care for the deceased when he was unwell
- Plaintiff had a home (\$2.65m), two investment properties (\$3.14m), term deposit (\$300k), superannuation income (\$25k per year) and income as medical practitioner and capacity (\$350k pa)
- Conceded by plaintiff's counsel that she did not have financial need

Court's Order/Reasoning

- Plaintiff unable to demonstrate need for maintenance and support
- Application for summary judgment granted
- Court at [67] considers various authorities dealing with the issue of 'need' – which support contention that a claimant is required to demonstrate financial need (cf. plaintiff's submission)
- At [70] In my view, the plaintiff has made a strong claim on the basis of the deceased's moral duty alone but has not demonstrated need. Put another way, notwithstanding the plaintiff's strong moral claim, she has not demonstrated that she is unable to adequately provide for her own proper maintenance and support. Unfortunately, the existence of a moral duty alone is not sufficient to found a claim under s 91 of the Act. It is beyond the power of the Court to rewrite the testator's Will to conform with general considerations of fairness or just compensation.

Key Takeaways

- a claimant is required to demonstrate financial need
- need is a relative concept – considered in light of the circumstances
- care, sacrifices or devotion are relevant circumstances but alone, do not suffice
- a claimant's financial circumstances are critical notwithstanding strong moral claim and emotional narrative



Questions/Discussion

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