

RECENT (NON-CAVEAT) TEP CASES

Svenson's Estates CPD Day, 26 March 2026

Nathan McOmish

His Holiness Moran Mor Ignatius v Attorney-General of Victoria [2025] VSC 756

1. Facts:

- a. In 2023 the Patriarch as registered proprietor of church land in Mickleham, entered a \$31 million contract of sale and in 2024 entered a \$2.5 million contract to purchase land in Bulla for church purposes;
- b. A parishioner, and alleged former co-trustee, filed a caveat over the Mickleham land and subsequently commenced a proceeding against the Patriarch regarding the land;
- c. Orders were made for the caveat to be removed with the Mickleham land sale proceeds to be held on trust;
- d. The Mickleham land settlement has been delayed for four years following a contractual variation;
- e. The Bulla land has been purchased;
- f. In very short compass, the parishioner alleged that a charitable trust settled in 1979 acquired land in Westmeadows in 1986, that property was sold with the proceeds used to assist with the purchase the Mickleham land, and legal title to the Mickleham land was eventually passed to the previous (1995) and now current Patriarch (2014);
- g. The parishioner seeks a declaration that the Mickleham land is held pursuant to the 1979 trust, that the Patriarch be removed as trustee;
- h. The Patriarch sought judicial advice that he was justified in defending the proceeding in respect of the Mickleham land and payment of costs from the 'deposit' (a purchaser loan) and income from the church community;
- i. The Patriarch's defence alleges that the 1995 transfer to the previous patriarch was to the office of the patriarch not to the individual person, and a counter-claim that the Mickleham land is held by him as registered proprietor of a different charitable trust whose objects (propagation of the faith etc) are implied from the usage of the land;
- j. The Attorney General was joined to the proceeding as the proper and competent party to protect a charitable trust – both parties contend the land is held on charitable trust; and
- k. The parishioner sought to be heard at the application for judicial advice by the Patriarch.

2. The parishioner's application for joinder in the judicial advice application as an interested party was dismissed:

- a. Proceedings for judicial advice have a 'summary character' and afford a facility for giving 'private advice' and are an exception to the Court's ordinary function of deciding disputes between competing litigants;
- b. An application for judicial advice under Order 54 is not required to join those with a beneficial interest under the trust;

- c. The question of whether it is proper for the trustee to defend proceedings is radically different from deciding the issues that are to be agitated in the principal proceeding; and
 - d. The A-G had been joined a protector of charities and filed submissions (distinguishing it from other cases where certain objectors were heard).
- 3. The Court then found that the Patriarch was justified in defending the proceeding and prosecuting a counter-claim:
 - a. Rule 54.02 of the Rules allows trustees to put before the Court relevant circumstances and to seek direction as to whether a trustee would be justified in pursuing a certain course;
 - b. The Court's sole purpose is to determine what ought to be done in the best interests of the trust;
 - c. Determining the best interests will depend on the type of trust and the circumstances of the case;
 - d. The A-G took a neutral position, other than acceptance that there are serious issues that need to be resolved;
 - e. In terms of defending the proceeding and the counter-claim, the Court's function is not to determine whether the Patriarch will likely succeed, but whether the position is justifiable and not fruitless;
 - f. The Court is usually reluctant to sanction a course of action unless the trustee has taken reasonable steps to form its own opinion – here an opinion had been obtained from senior counsel;
 - g. Counsel's opinion criticised the parishioner's pleas and asserted that the Patriarch's case was at least arguable;
 - h. The Patriarch argued that the Court did not need to consider the contents of counsel's advice as submissions made it clear the position was arguable based on counsel's advice (therefore only need to reference counsel's advice);
 - i. That submission, outside the usual practice, that the Court be provided with the advice, was rejected;
 - j. Counsel's advice is usually important:
 - i. For speed and efficiency;
 - ii. It provides comfort to the Court;
 - iii. The professional independence of counsel adds more value than a statement in submissions;
 - iv. It provides a firm foundation for persons interested in the due administration of the trust;
 - v. The summary jurisdiction exercised by the Court is aided by an opinion from competent counsel; and
 - k. It is in the interests of justice that differences in the asserted purposes of the trust be determined.
- 4. The judicial advice regarding indemnity costs:
 - a. The Patriarch sought to pay his costs from the property 'deposit' (purchaser loan) and church income, capped at \$506,000, subject to any further order;
 - b. Annual income for the church was around \$180,000 and the purchaser loan balance was \$500,000;

- c. The costs cap was based on an estimate of total costs for the proceeding (already \$117,000) including a 10 day trial;
- d. The Court's role is to broadly ascertain whether the quantum of costs appears appropriate, not to act as a costing assessor;
- e. The costs here were broadly appropriate given the nature, complexity and length of the proceeding;
- f. It may not usually be appropriate to make an indemnity order at this stage (that can be deferred until after trial), but here the A-G submitted that the deferral was unnecessary as the indemnity order proposed was variable or revocable by the trial judge;
- g. Although a trustee is entitled to indemnity costs if properly incurred in the performance of their duty, they will not be permitted recourse to trust assets for the purpose of defending litigation unless the expenditure will not be futile; and
- h. The costs cap is only a small proportion of the value of the property (\$31 million), readily satisfying the Court that the proposed expenditure will not be futile.

Re Donat [2026] VSC 56

- 1. An administrator *pendente lite* (pending the outcome of the probate dispute) obtained judicial advice, *inter alia*, that she was justified in paying estate debts and pursuing summary possession (Order 53) of an estate farming property that was occupied by an adult son (P) of the deceased, of which another son (R) had long complained. The administrator was then successful in the summary possession application. The overall outcome vindicated R's position.
- 2. This decision concerned costs, in particular between R and P.
- 3. Applicable principles per Grey J:
 - a. The discretion on costs must be exercised judicially by reference to factors in the case;
 - b. Where beneficiaries are joined by an LRP, they conduct themselves reasonably and the matter is non-adversarial, they may recover their costs from the estate, typically on an indemnity basis;
 - c. If the litigation is adversarial, the usual rules apply; and
 - d. Per McMillan J, the 'central principle' is 'to make an order that is fair and just between the parties in the circumstances of each case';
- 4. Held:
 - a. Attempts to vary previous costs orders in favour of the administrator were refused – no objection had been taken when those orders were made (by reference to the transcript). To do so would be contrary to the overarching purpose in the *Civil Procedure Act 2010*;
 - b. The proceeding was a vehicle for resolving longstanding disputes between the brothers over possession of the farm and estate debts. The hearings were no doubt adversarial;
 - c. R was the successful party – he is entitled to costs from the losing party, P;

- d. R's initial costs to be paid from the estate (he did not seek these costs from P), then by P largely on an indemnity basis – R had acted reasonably in relation to questions of estate administration;
- e. To the extent R cannot not recover his costs from P, they are recoverable out of the estate on an indemnity basis as it would be unjust for him to be out of pocket;
- f. No order made as to P's costs – he could not raise an arguable case in favour of his assertion of an equitable interest in the estate property and ultimately capitulated on the issue; and
- g. An argument by P about not being able to afford only sporadic legal representation failed – it did not absolve him of the consequences of his equitable claim that had no proper foundation.

Petalis v Petalis (Interlocutory Rulings) [2026] VSC 81

1. Background:

- a. In 2024 the mother died and son Mark obtained LOA on intestacy. He swore on affidavit that despite careful searches, no will could be found. The estate was worth around \$460,000;
- b. In fact Mark knew of a 2009 will – there were solicitors letters from that time addressed to him regarding storage of the will;
- c. Other son Andrew knew nothing of the grant until the solicitor holding the will contacted him. He then filed a summons for revocation and an accounting;
- d. Orders were made for an accounting (Form 3-6AA, **the form**). Mark failed to comply;
- e. Andrew applied to compel Mark to account, to be punished for contempt for wilfully not complying and indemnity cost orders;
- f. The summons was not endorsed with a penal notice under R 66.10 of the *Supreme Court (General Civil Procedure) Rules 2025*.
- g. Mark made various excuses, including that he couldn't download the form. The court had it sent to him by email;
- h. Mark then filed an affidavit that contained some estate dealings by him, including exhibiting bank statements that showed he was using the account for his personal use;
- i. At a directions hearing, Mark told the court that estate funds were held in a trust account. This was incorrect – he had transferred \$167,00 into his partner's name which he explained was his brother's half share of funds received from a deposit; and
- j. Mark then transferred \$230,000 to his brother, being half the value of the inventory value of the estate.

2. General principles for a contempt summons:

- a. The nature of this contempt summons was wilful non-compliance with the order to account;
- b. Five elements must be established beyond reasonable doubt to prove contempt:
 - i. An order was made by the court;
 - ii. The terms of the order are clear, unambiguous and capable of compliance;
 - iii. The order was served on the person;

- iv. The person had knowledge of the terms of the order; and
- v. The person breached the terms of the order by act or omission;
- c. As to state of mind, it is sufficient that the acts or omissions were intentional and likely to interfere with the administration of justice. It may be sufficient that the acts were deliberate without an intention to disobey being established. However, the disobedience must be more than casual, accidental or unintentional and must be regarded as wilful;
- d. Grey J, taking a prudent and conservative approach, noting that the word ‘wilful’ was used in the summons, held that he needed to be satisfied beyond reasonable doubt (**BRD**) that the failure to comply was wilful; and
- e. R 75.03 of the *Supreme Court (General Civil Procedure) Rules 2015* sets out the procedure on hearing the charge – it can be proved by summary procedure (provided the summons has sufficient particularity), the respondent has to be informed and the procedure is “as in the circumstances as the Court thinks fit”.

3. At the hearing:

- a. There was no difficulty in finding the first four elements of contempt;
- b. The real question was the non-compliance wilful BRD;
- c. Having emailed the form to Mark, he could not use his inability to download the form as an excuse;
- d. A properly completed form was needed to determine if the revocation should proceed (or was there no point as Andrew has received his entitlements?);
- e. Mark alleged that he had received legal advice that filing bank statements was sufficient for compliance and he did not need to complete the form;
- f. Mark’s evidence was found to unreliable and self-serving and was not to be accepted without corroboration;
- g. There was lingering concern that Mark may have misunderstood what his lawyers advised (given the BRD burden of proof), so he was directed to provide and verify the form on affidavit. He said it was difficult and expensive. It was explained to him that it was a simple estate and process. He was ordered to file the form and Mark’s solicitors were notified of his evidence and given the opportunity to respond;
- h. Mark filed the form the next day, albeit error riddled;
- i. Mark’s solicitors responded – they did advise him that he did not need to complete the form as they had not been provided with the orders that required it (only later orders), which was supported by email correspondence. No criticism was made of their conduct;
- j. Mark excluded the critical order from his brief to solicitors – his oral evidence that he provided the orders to them proved to be false;
- k. Did Mark deliberately engineer the wrong advice by failing to provide the order? It could not be proven BRD. The solicitors seemed to volunteer the advice that the form did not need to be completed;
- l. The form eventually filed by Mark was defective – the date the assets were received pre-dated the grant and the value remained unchanged since the probate inventory, which could not be true;
- m. In making and verify the form Mark had at least attempted to comply with the order, so his continuing disobedience was not wilful;
- n. On balance of probabilities, Mark’s error-riddled form was deliberate or done without caring, but this could not be proved BRD;

- o. By “the slimmest imaginable margin”, Mark’s disobedience may not have been wilful – he couldn’t download the form, he did file an affidavit (of bank statements), he received incorrect legal advice and the errors in his filed form may have been inadvertent;
- p. Mark was again ordered to file an accurate form. A fresh order included a penal notice, meaning future non-compliance may be met with fines and the possibility of imprisonment; and
- q. Mark was ordered to pay indemnity costs without reimbursement from the estate having wasted the court’s time and falsely obtained a grant.

Re Cassar Family Trust [2025] VSC 693

1. Background:

- a. The father died in 2011. In the first related proceeding, his son Michael was found to have obtained probate of a forged will (*Re Cassar [2022] VSC 126*) and probate was granted to a daughter Sandra;
- b. This proceeding concerned Michael’s involvement in a family trust. The trust deed appointed the father as appointor and his brother as trustee;
- c. The trust deed provided for a replacement appointor – as nominated by the appointor or alternatively their LRP. If there is no such person, then the trustee shall have the power of appointment;
- d. The appointor had power to remove and appoint trustees in writing;
- e. In 2012, the trustee purported to retire and appoint Michael, although there was no instrument in writing in evidence;
- f. In the first related proceeding, Michael was restrained from dealing with trust property, including a Fitzroy property held in his name as trustee;
- g. In 2022, Michael executed a deed of variation of the trust in his purported capacity as trustee pursuant to a variation that “If the appointor has died, the Trustee shall have the power to Appoint an appointor in substitution of the LRP of the Appointor ...”. He then executed a document purporting to appoint his wife as appointor;
- h. Sandra, as the father’s now LPR, then executed a deed of appointment and removal as appointor removing Michael as trustee and appointing a corporate trustee;
- i. The corporate trustee sought various relief; and
- j. Michael did not appear.

2. Held:

- a. In 2012, the father (the appointor) had not nominated a replacement appointor and there was no validly appointed LRP for Frank (the will being a forgery). The trustee could then exercise the power of appointment in writing;
- b. Michael did not become trustee in 2012 – there was no evidence in writing.
- c. However, Michael was trustee *de son tort* by his de facto control of trust property. He was subject to the liabilities of a trustee (eg to account);
- d. Michael’s 2022 deed of variation was invalid as he was never appointed trustee; The appointment of his wife as appointor pursuant to the variation was invalid;

- e. As Michael was not trustee, the 2012 transfer of the Fitzroy property to him as trustee was not validity transferred to him in that capacity. He was not validity entitled to retain the title. Vesting orders were made; and
- f. Sandra as LRP of the father's estate validly appointed the new trustee pursuant to her power of appointment.

Nicholson v Alcock [2026] VSC 67

1. Declaratory relief was sought in respect of a deed a severance:

- a. The parties were both daughters of the deceased and each entitled to 20% of her residuary estate;
- b. In 2002 the deceased was registered as a tenant in common of a property;
- c. In 2010 the deceased made a declaration of trust that she held her share of the property on trust as joint tenants in equity with the plaintiff;
- d. In 2024 the deceased executed a deed of severance of joint tenancy including that the property was now held with the plaintiff as tenants in common;
- e. The parties agreed that the deceased intended to sever the joint tenancy but diverged as to whether the severance was effective to sever the equitable joint tenancy;
- f. Was the deed of severance effective to sever the joint tenancy created by the declaration of trust?; and
- g. The Court determined the proceeding by consent and in the interests of justice (modest estate) by written submissions pursuant to s 62 of the *Supreme Court Act 1986*.

2. Legal principles:

- a. A severance converts an entitlement in an entire estate/interest into a proportionate share held as tenants in common;
- b. "The right to sever is inherent in a joint tenancy ... Severability is the 'escape hatch' available to each joint tenant. The other joint tenant cannot prevent a severance, unless they can invoke a contractual or equitable limitation";
- c. A joint tenancy can be severed in three ways: by unilateral act of one of the joint tenants, by mutual agreement or a course of conduct showing an intention to be held as TIC;
- d. A unilateral declaration of intention to sever will not suffice – there must be an effective alienation of property through destruction of one of the four unities – possession, interest, title and time;
- e. Alienation of legal interest is effected upon registration. An equitable interest may arise long before registration if the transferor can no longer resile from the transaction;
- f. Communication of any intent is not necessary for severance; and
- g. S 53(1)(c) of the *Property Law Act 1958* requires a disposition of an equitable interest to be in writing and signed.

- 3. The Court held that the severance of the equitable joint tenancy was effective as it was in writing and signed (and witnessed by a solicitor), thereby satisfying the requirements of s53(1)(c). It was noted that a severance to oneself does not impose any additional requirements.

Lin v Lin (Ruling No 1) [2025] VSC 691

1. This dispute, commenced in 2018, concerned control of two family trusts and the beneficial ownership of property. An independent trustee was appointed as part of final orders.
2. The first defendant gave undertakings not to exercise his power of appointment to remove the independent trustee but then filed a summons seeking to do so (ie seeking release from the undertakings) pursuant to liberty to apply.
3. This ruling concerned objections to evidence which were dealt with by consent on the papers. There were four categories of objection.
4. Category 1: hearsay evidence of what other witnesses said at previous hearings, where the witnesses were not being called. This evidence was inadmissible:
 - a. An argument that this evidence was admissible as part of interlocutory proceeding (s75 of the *Evidence Act 2008*, noting that the Act does not define interlocutory) failed – the nature of the relief sought was final;
 - b. The evidence was admissible for a non-hearsay purpose (s 60 of the Act);
 - c. In the absence of the relevant witnesses being called for cross-examination, there was the danger was that it would be unfairly prejudicial (s 136 of the Act) so a discretion was exercised to exclude it except as to the first defendant's notice, awareness or knowledge of the evidence (relevant to he was acting genuinely and for proper purposes), not as to the truth of its contents.
5. Category 2: objections to previous out of court representations:
 - a. excluded for the same reasons as category 1; and
 - b. a s 60 non-hearsay purpose argument failed as the arguments that the evidence 'provided context' did not elucidate their relevance.
6. Category 3: evidence about the independent trustee:
 - a. a statement of a belief that the trustee had to perform much work to get up to speed was excluded as being argumentative or in the nature of a submission based on opinion. Exceptions for lay opinion (s78 of the Act including the opinions based on what was seen, heard and perceived) did not apply; and
 - b. Evidence of four matters which were considered as giving rise to the trustee's fees were excluded.
7. Category 4: observations and findings by judicial officers in this proceeding were not relevant as they did not rationally affect the first defendant's state of mind (was he acting bona fide and for a proper purpose) in respect of this application. The judicial comments were made in other contexts.